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THE
SOUTHWESTERN REPORTER.
VOLUME 113.

**INTERSTATE TRUST & BANKING CO.
et al. v. DIERKS LUMBER & COAL CO.**

(Kansas City Court of Appeals. Missouri. Oct. 19, 1908.)

1. RECEIVERS (§ 204*)—DISCHARGE—EFFECT.

On the final discharge of a receiver, he ceases to be a representative of the court, and can neither sue nor be sued as the representative of the estate.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 204.*]

2. RECEIVERS (§ 210*)—FOREIGN RECEIVERSHIP—ACTION BY FOREIGN RECEIVERS.

Though receivers were appointed by a foreign court, they may maintain an action in this state, either under rules of comity or those of law, to recover the purchase price of goods sold defendant after the property had come into their possession as receivers; and, in determining their rights to sue as receivers, the case will be treated as if they had been appointed by courts of this state.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 417; Dec. Dig. § 210.*]

3. ABATEMENT AND REVIVAL (§ 45*)—TRANSFER OF INTEREST—TERMINATION OF RECEIVERSHIP.

Under Rev. St. 1899, § 764 (Ann. St. 1906, p. 743), providing that, when an interest is transferred in a pending action other than by death, etc., the action shall be continued in the name of the original party, the transferee indemnifying the party in whose name the suit is continued, or the court may allow the transferee to be substituted, the discharge of the receivership of a corporation, pending an action by the receivers, would not abate the action, but the corporation could be substituted as plaintiff, or the receivers, and the corporation might elect to continue the action in the name of the receivers, they being regarded as trustees of the corporation.

[Ed. Note.—For other cases, see Abatement and Revival, Dec. Dig. § 45*; Receivers, Cent. Dig. § 256.]

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by the Interstate Trust & Banking Company and another, receivers, against the Dierks Lumber & Coal Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Kirkpatrick & Schwind, for appellant.
Haff & Michaels, for respondents.

JOHNSON, J. This is an action on an account for merchandise sold and delivered to defendant by plaintiffs as receivers of Powell Bros. & Sanders Company, Limited, a corporation created under the laws of Louisiana. Material facts appearing in the record, stated chronologically, are as follows: December 1, 1905, plaintiffs were appointed receivers of Powell Bros. & Sanders Company, Limited, by the district court of Vernon parish, La. They qualified as receivers, and became possessed of the assets of the corporation. In February or March, 1906, they sold and delivered to defendant, a lumber merchant doing business at Kansas City, lumber in car load lots of the total price of \$5,336.88. The account fell due the 1st day of May following, and all of it was paid by defendant, except \$642.15, to recover which amount plaintiff brought this suit in the circuit court of Jackson county, on the 10th day of September, 1906. Defendant answered, and filed a counterclaim for \$890 damages, alleged to have been sustained by it in consequence of a breach by plaintiffs of a contract to sell and deliver other cars of lumber to defendant. December 20, 1906, the district court of Vernon parish, La., made an order in chambers in the receivership proceeding, from which we quote: "First. That the Interstate Trust & Banking Company and Thomas C. Wingate, receivers of this court of the property of Powell Bros. & Sanders Company, Limited, are hereby discharged as such, and relieved of full responsibility in the premises, and are hereby authorized and empowered and directed to deliver and restore to Powell Bros. & Sanders Company, Limited, all of the property, assets, and effects of said company in their possession as such receivers, taking from said company receipts and releases in triplicate, one of which receipts shall be filed herein. Second. That the bond tendered by Powell Bros. & Sanders Company, Limited, in the sum of \$25,000, with the United States Fidelity & Guarantee Company, as surety, to guarantee the payment by Powell Bros. & Sanders Company, Limited, of all lawful debts of said company now unpaid (except

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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the debts purchased by D. G. Sanders in his individual name, or in his trade name of D. G. Sanders Lumber Company), is hereby accepted and approved and ordered filed herein. Third. That Powell Bros. & Sanders Company, Limited, shall assume and pay, as and when due, the accounts payable of the receivers herein, and shall pay within six months from the date of this order all the lawful debts of said Powell Bros. & Sanders Company, Limited; and, in the event of their failure to do so, the court reserves the right to retake the property and place the same in the hands of its receiver or receivers. * * * Fifth. That the receivers shall forthwith proceed to pay out of the funds placed in their hands by Powell Bros. & Sanders Company, Limited, the debts of the receivership that are now due and payable. Sixth. That as soon as said debts are paid, said receivers may apply for final discharge and the cancellation of their bonds." It does not appear that any order was made subsequently for the final discharge of the receivers. Before trial defendant filed an amended answer and counterclaim, in which, to the other defenses, it added one in the nature of a plea in abatement, as follows: "As a further defense, and without abandoning or waiving any other defense pleaded herein, defendant denies that plaintiffs are receivers of Powell Bros. & Sanders Company, Limited, and alleges the fact to be that, since the commencement of this action, and since the filing of defendant's first amended answer herein, the plaintiffs have been, by the order and judgment of the district court of the state of Louisiana, under which they claimed appointment, discharged and dismissed, and are no longer qualified or acting receivers of Powell Bros. & Sanders Company, Limited; that plaintiffs are not in possession of any of the property or assets of Powell Bros. & Sanders Company, Limited, and have no right, title, or interest in the subject-matter of the cause of action set up in the petition, and are not entitled to maintain this action." A jury was waived by the parties, and after hearing the evidence, the court found all the issues in favor of plaintiffs, and entered judgment in their favor for the full amount demanded. Defendant appealed, and presents for our determination but one contention, viz., that plaintiffs were disabled from prosecuting the action by their discharge in the court which appointed them.

On the final discharge of a receiver, he ceases to be a representative of the court, and becomes *functus officio*. High on Receivers (3d Ed.) 767. He can neither sue nor be sued as the representative of the estate. But should we concede (and we do so only *arguendo*) that the order before us was the legal equivalent of an order for the final discharge of the receivers, we do not perceive any good reason for holding that such discharge compels the abatement of this suit.

Plaintiffs brought the suit to enforce a contract of sale they made, as receivers, with defendant. Though appointed by a foreign court, they were entitled to enforce a demand of such character in the courts of this state, either under rules of comity or those of law. The subject of the contract they made with defendant being the sale of property of an estate already reduced to their possession as receivers, there can be no question of their right to sue in a jurisdiction foreign to that of their appointment. *Robertson v. Staed*, 135 Mo. 135, 36 S. W. 610, 33 L. R. A. 203, 58 Am. St. Rep. 569. And we shall regard the question before us as though it had been raised in an action brought by receivers appointed by a court in this state.

The effect of an order discharging the receiver, and restoring the estate to the corporation during the pendency of a suit properly brought by the receiver in his representative capacity, is not to compel the abatement of the suit. In such cases the provisions of section 764, Rev. St. 1899 (Ann. St. 1906, p. 743), should be applied, and the corporation, treated as the transferee of the cause of action, should be substituted on its motion, or the motion of the receiver, as the party plaintiff. Should the parties to the transfer elect to proceed with the cause in the name of the receiver, they should be permitted to do so, and thereafter the plaintiff should be regarded as the trustee of the transferee, and not as the representative of the court. This would be in accord with the plain purport of the statute, and would do no injury to any right of the defendant. It follows that no error was committed by the court in the refusal to dismiss the action on the ground under consideration.

The request of plaintiffs that 10 per cent. damages be awarded for vexatious appeal is denied, and the judgment is affirmed. All concur.

TEXAS & P. RY. CO. v. STOKER.

(Supreme Court of Texas. Nov. 4, 1908.)

1. STATUTES (§ 124*)—SUBJECTS AND TITLE OF ACTS—ACTS RELATING TO MORE THAN ONE SUBJECT.

Acts 30th Leg. c. 24 (Gen. Laws 1907, p. 509), approved May 25, 1907, is entitled "An act providing for the appointment of official stenographers for district courts by the judges thereof to report cases, and providing for the method of making up and filing the statement of facts of all evidence introduced on the trial of causes, providing for the time within which such statement of facts must be filed, and providing for the appointment of special stenographers in county courts, for their compensation, and for making and filing statements of fact in civil causes tried in the county courts," etc. *Held*, that the title does not contain more than one subject, in contravention of Const. art. 3, § 35, since the different provisions of the statute relate to the preservation by the proper persons of the evidence taken in trials and of questions arising out of it.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 124.*]

2. APPEAL AND ERROR (§ 644*)—STATEMENT OF FACTS—STATUTORY PROVISIONS—ORIGINAL STATEMENT—DEFECTS—WAIVER.

Acts 30th Leg. c. 24 (Gen. Laws 1907, p. 509), approved May 25, 1907, after providing several methods in which statements of fact may be preserved, provides that the original statement of facts shall be sent up on appeal. There is no conflict between the act and Acts 30th Leg. c. 7 (Gen. Laws 1907, p. 446), approved May 14, 1907, except as to the time in which the statement must be filed, so as to allow the filing of the conclusions of the trial judge after the adjournment of court. *Held*, that while the original statement of facts, and not a copy, should accompany the record, the appellate court may consider the copy, since appellee's objections to such course, because of the additional cost of the transcript and the lack of authenticity of the copy, might be waived by appellee, and the first objection, if urged, would be satisfied by adjudging the additional expense against appellant.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 644.*]

Certified questions from Court of Civil Appeals of Second Supreme Judicial District.

Action by I. A. Stoker against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Questions certified by Court of Civil Appeals to the Supreme Court. Questions answered.

H. C. Shropshire, for appellant. Stubblefield & Patterson and J. S. Sheppard, for appellee.

WILLIAMS, J. Certified questions from the Court of Civil Appeals of the Second District as follows:

"The above entitled and numbered cause is pending before us on appeal from a judgment against appellant and in appellee's favor for \$1,230 as damages for personal injuries alleged to have been caused by the negligence of the operatives of one of appellant's passenger trains in failing to give warning of its approach toward a public road crossing near the town of Eastland,

over which appellee was driving, as more particularly shown in our opinion on a former appeal. See *Tex. & Pac. Ry. Co. v. Stoker*, 103 S. W. 1183. On the present appeal no original statement of facts has been filed in this court, as provided in the act of the Thirtieth Legislature approved May 25, 1907 (Gen. Laws 1907, p. 509, c. 24), relating to the subject, and the assignments of error are such as cannot be considered in the absence of a statement of facts. We have, however, a copy of what purports to be a statement of facts incorporated in the transcript. The judgment from which this appeal is prosecuted was rendered on August 7, 1907, the term of the court adjourned August 24, 1907, and the statement of facts, as shown by the incorporated copy, was thereafter filed within the time allowed by the 20-day order therefor. We have a number of cases before us in like condition as to statements of fact, and in view of the decision of the Court of Civil Appeals of the Sixth Supreme Judicial District in the case of *Garrison v. Richards*, 107 S. W. 861, holding that under the act of the Legislature referred to statements of fact so incorporated in the transcript cannot be considered, we deem it advisable to certify to your honorable court for decision:

"First. Whether or not the title of the act of the Thirtieth Legislature of Texas approved May 25, 1907, providing for the appointment of stenographers, etc. (Gen. Laws 1907, p. 509, c. 24), contains more than one subject, in contravention of section 35, art. 3, of the Constitution?

"Second. If not, then are we authorized under said act to consider the statement of facts incorporated in the transcript in this case?"

1. The first question is answered in the negative. The different provisions of the statute, as stated in the title, may all be considered properly as the regulation of one subject, which is the subject of the bill, *viz.*, the preservation by the proper persons of the evidence taken in trials and of questions arising out of it, and the statement thereof in authentic form for the information of the appellate courts upon appeal. The provisions for the appointment and compensation of stenographers are incidental to and in aid of this general purpose, and we see no good reason why all of the provisions could not properly be included in one bill.

2. Two questions are involved in the second one stated in the certificate: (a) Do the provisions of the act referred to, which forbid the copying of statements of facts into records and require the sending up of the originals, apply to all statements of facts? (b) If so, may the Court of Civil Appeals, nevertheless, consider that before it? Act May 25, 1907 (Laws 30th Leg. p. 512, c. 24) § 15, after providing several methods in

which statements of facts may be preserved, adds that "no statement of facts shall be incorporated in the transcript on appeal, but the original shall be sent up therewith." Considering comprehensive treatment of the subject throughout the law, this language could leave no doubt upon the first question, but for the passage of another act, not only at the same session, but upon the same day, which, however, was approved on the 14th day of May. Gen. Laws 1907 (30th Leg.) p. 446, c. 7. The law last referred to would appear, when considered by itself, to be intended to continue in force the rules under which statements of facts had always been prepared by the parties in cases where no stenographer's report had been prepared (*Middlehurst v. Collins-Gunther Co.*, 100 Tex. 349, 99 S. W. 1025), and, being passed at the same time with the other, suggests that the other may have been intended to regulate only those cases in which stenographers were employed, leaving others subject to be regulated by different procedure. If the two acts could be made to operate together by such a construction consistent with the terms of both, it would be our duty to adopt that construction; but it is impossible to so restrict the act approved May 25th without doing violence to its language. In unmistakable terms it provides for the making up of statements of facts in both of the methods previously recognized, and as to both provides that the original statement, and not a copy, shall accompany the transcript. There is no conflict between the two acts, except as to the time in which the statement is to be filed, and no question depending on that conflict is presented by the certificate. The purpose of the act of May 14th was to amend the previously existing statutes, so as to allow the filing of the conclusions of the trial judge after the adjournment of court; and this probably explains its passage, notwithstanding the adoption of the other statute containing full provisions for the making and filing of statement of facts. We must hold, therefore, that the original statement of facts, and not a copy, should have accompanied the record.

It does not follow necessarily that the Court of Civil Appeals may not consider the copy. The appellee would have the right to object to the course pursued for but two reasons that we can see, which are (1) the additional cost of the transcript and (2) the lack of authenticity of the copy; the statement of facts being authenticated by the certificates required to be upon the original, and the clerk being no longer authorized to certify to a copy. These objections could certainly be waived by the appellee, and the first, if urged, would be satisfied by adjudging the additional expense against the appellant.

The certificate does not give sufficient in-

formation to enable us to determine definitely whether or not the Court of Civil Appeals should consider the statement in the record.

INTERNATIONAL & G. N. R. CO. v. VALLEJO.

(Supreme Court of Texas. Nov. 4, 1908.)

1. APPEAL AND ERROR (§ 842*)—REVIEW—QUESTIONS OF FACT—VERDICT.

Where there is any evidence tending to prove a fact essential to a recovery, the issue is for the jury; but whether there is such evidence in the record is a question of law for the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3323-3325; Dec. Dig. § 842.*]

2. RAILROADS (§ 359*)—INJURY TO PERSON ON TRACK—NEGLIGENCE.

Where, in an action against a railroad company for injuries to a child run over by its cars, the facts disclosed created no duty on the part of the company to the child, there could be no negligence, and therefore no liability.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 359.*]

3. RAILROADS (§ 378*)—INJURY TO PERSON ON TRACK—NEGLIGENCE.

While a train, after dark, was moving backward on a side track, the fireman saw a child on the main track, 14 feet distant, going in the opposite direction. The only danger that could exist to the child would arise from his leaving the main track and crossing over to the side track. The child crossed over to the side track and was run over by cars coupled to the front of the engine. *Held*, that the trainmen as a matter of law owed no duty to the child, and the company was not liable for the injuries sustained.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1281; Dec. Dig. § 378.*]

4. EVIDENCE (§ 595*)—WEIGHT AND SUFFICIENCY—INFERENCES.

An inference can only be drawn from facts.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 595.*]

5. RAILROADS (§ 378*)—INJURIES TO PERSON ON TRACK—CARE REQUIRED.

To impose on the crew of a train the duty to watch all children about railroad yards and tracks during the operation of the train is beyond the proper limitation of all correct principles of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1281; Dec. Dig. § 378.*]

Error from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Evaristo Vallejo, by his next friend, against the International & Great Northern Railroad Company. There was a judgment of the Court of Civil Appeals (108 S. W. 1187) affirming a judgment for plaintiff, and defendant brings error. Reversed and rendered.

Jno. M. King and Hicks & Hicks, for plaintiff in error. Bertrand & Arnold, for defendant in error.

BROWN, J. The appellee was a child three years old. His mother lived in a section

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

house of appellant at Bermuda, a station between the city of San Antonio and Laredo. At the station there was a side track of considerable length, which was situated on the west side of the main track. The section house was on the east side of the main track. A freight train was on its way to Laredo, and, arriving at Bermuda, took the side track in order to let another freight train pass on the main track. It was after dark, about 8 o'clock. There were some flat cars loaded with gravel standing on the side track, and when the train that took the side track passed in it pushed the flat cars to the south far enough so that the freight train would clear the switch and leave room for the train going to San Antonio to pass. The engine was coupled to the train of flat cars. After the train which was going north passed on the main track, the freight train, which it is charged inflicted the injury upon appellee, moved backwards toward the main track and pulled the flat cars with it down to the point where they stood before the freight train had entered upon the side track. The side track was about 14 feet west of the main track, and as the freight train was passing down on the side track to the north the fireman, who was on the east side of the engine, observed the appellee, a small child dressed in white, walking along the main track. The fireman said, "Halloo, kid!" when the child looked, and then "struck a trot" going toward the section house. The fireman went over to the engineer and told him that he had seen some child, "a little bit of a fellow," on the main track, and when they came back on that track to be careful, as it might be on that track playing, or something to that effect.

The fireman testified that he saw the child as it went down the track until it went out of his sight, and then he said he "could have seen it further." There was an electric light on the engine, which was burning and gave a bright light upon the main track for a considerable distance, and on all the space between the track and the flat cars, to within a few feet of the cars. The fireman spoke to a brakeman, who got on the train at the switch, and asked him if he had seen the child on the track, and the brakeman said that he had not. Fletcher, the fireman, manifested a good deal of concern and anxiety for the child. He said he was not afraid that the child would go close to the cars of the train he was on, but he feared that the child might stop on the way somewhere and get hurt. No one on the train knew the child was hurt until they got to Laredo. After the train left, one of the men at the section house heard a woman crying and the child crying. He went out and found that the mother of the child had it in her arms with one of its feet injured. They took the child to Laredo for treatment. There was no direct evidence as to what place the child was when injured; but the testimony showed that there was

blood upon the track at the rear trucks of the second car from the engine where the cars were stopped. The mother seems not to have testified, although she took the child from the track. The engineer testified that it was unusual for the fireman, if he saw a person within 12 or 14 feet of the track, to come over and tell him of it. He said that he heard the fireman say, "Hallo, kid!" and the fireman told him about seeing the child. Fletcher, the fireman, testified that it was his duty to keep a lookout in the direction the train was moving, and he did so. There was some conflict in the statements of Fletcher as to the distance the train had moved after he saw the child and before it stopped. The evidence seems to indicate that the train had moved but a short distance, perhaps two cars' length, after he saw the child, before it stopped and cut loose from the flat cars.

If there is any evidence in this case which tends to prove negligence on the part of the employees of the railroad company that caused the injury, then an issue of fact was made, to be decided by a jury, and of which this court has no jurisdiction. Whether there is such evidence in the record is a question of law, which it is the duty of this court to decide. The important question in this case is, what duty did the railroad company owe to the defendant in error, under the facts as they appear in the record? If it be true that the facts disclosed before the jury and presented to us created no duty on the part of the railroad company to the child, then there can be no negligence; and, being no negligence, there can be no liability on the part of the railroad company. When Fletcher, the fireman, saw the child, it was on the main track and 14 feet distant from the moving train, on which Fletcher was. The train was then moving northward and backward, and the child was on the main track going in the opposite direction. While upon the main track the child was in no present danger from the moving train. The only danger that could be said to exist was that he might change his course and, leaving the main track, cross over to the side track and come in contact with the train. But this danger depended upon the action of the child, and could not be guarded against by the employees by any means consistent with the performance of their duties in the operation of the train. They could exert no control over the child's action, and, situated as he and the train were in relation to each other, there was no danger that the child would be injured by the train's movements so long as he continued in the direction he was going.

The question then arises, what should the employees of the railroad company have done under the circumstances to guard that little child against injury? It is manifest that there was nothing for them to do, but what they did do—leave the child in its then secure condition and attend to their duties, or stop the train and send some one to carry the

boy to his mother. Would any one contend that it was the duty of the railroad company to cease the operation of its train in order to perform the duties of nurse? If there had been probability that by the continued movement of the train injury would be inflicted on the boy, the duty to stop the train would have arisen; but no such result was indicated by the facts. We conclude that negligence cannot be predicated upon the fact that the fireman saw the child upon the main track after night, although he knew it was liable to get into danger, because such condition of things imposed no obligation upon the railroad company, and therefore there was no act to be performed by its employes, the failure to do which renders the company liable for the results.

There is testimony which tends to show that the fireman was mistaken as to the distance the child had traveled when it went out of his sight, and the evidence shows that he did in fact leave the main track, and cross over to the side track, and come in contact with the moving train, and thereby received the injury; but these facts are not sufficient in themselves to create a liability on the part of the railroad company. The fireman testified that it was his duty to keep a lookout in the direction the train was moving, and this is manifestly true, because he would be called upon to inform the engineer of signals which might be given by the train crew in the movements of the freight train. Therefore it was not his duty to keep the lookout to the rear of the moving train. *Green v. Railroad (Ky.)* 78 S. W. 439; *Pedigo's Adm'r v. Railroad (Ky.)* 68 S. W. 463. Since it was not the duty of the fireman to watch in the rear, the fact that the child did pass over at a place where he could have been seen does not justify an inference that the fireman saw him as he passed from one track to the other. This is the ground upon which the Court of Civil Appeals concludes that the jury rested their verdict. It is perhaps the most plausible theory that can be advanced in support of their finding; but in our opinion it is absolutely without probative force upon the question whether the fireman saw the child or not. An inference can only be drawn from facts; and, there being no facts upon which to base it, such an inference or conjecture is wholly unsupported.

The cases cited by the appellee are not in point on this question. In the case of *M., K. & T. Ry. Co. v. Nesbit* (Tex. Civ. App.) 97 S. W. 825, the child was going in the same direction as the train, and was on a road which crossed the railroad track. He was in plain view of the engineer. It was evident to all bystanders that the child intended to cross the track. It was the duty of the engineer to keep a lookout, and if he had done so he could have seen the boy. The facts distinguish that case from this. It is unneces-

sary for us to comment upon the other cases cited. Their facts are so dissimilar to this case that their want of applicability here is manifest. There is a marked difference between the duty of the crew in starting a standing train, about which children have been loitering, and the continued operation of a train already in motion, when no child has been observed to be near to it. To impose upon the crew of a train the duty to watch all children that may be about the railroad yards and tracks during the operation of the trains would be going beyond any adjudicated case which has been brought to our notice, and beyond the proper limitation of all correct and just principles of law.

We are of opinion that there is no evidence upon which to base the verdict in this case, and that the trial court should have instructed the jury to return a verdict for the defendant. The Court of Civil Appeals erred in affirming the judgment of the district court, for which error judgments of the district court and Court of Civil Appeals are reversed, and judgment is here rendered for the plaintiff in error.

ST. LOUIS, I. M. & S. RY. CO. v. BOSHEAR.
(Supreme Court of Texas. Nov. 4, 1908.)

1. CARRIERS (§ 230*)—CONTRACT FOR CARS—ACTIONS—EVIDENCE—AGENT'S AUTHORITY—QUESTIONS FOR JURY.

Whether a carrier's traveling freight agent was authorized to contract to furnish cars to plaintiff to transport his cattle *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.*]

2. CARRIERS (§ 230*)—CONTRACT FOR CARS—ACTIONS—EVIDENCE—RATIFICATION—AGENT'S CONTRACT FOR CARS.

Whether a carrier ratified the contract of its traveling freight agent to furnish cars for a through transportation over its own and a connecting line, if he acted without authority, *held*, under the evidence, to be for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 230.*]

3. CARRIERS (§ 228*)—CONTRACT FOR CARS—ACTIONS—RATIFICATION OF AGENT'S ACT—EVIDENCE.

Evidence that similar agreements of a traveling freight agent to furnish cars at points on other lines for through shipments to points on his line were acted upon by the carrier tends to show that the making of such agreements was within the agent's actual authority.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

4. CARRIERS (§ 207*)—CONTRACT FOR CARS—ACTIONS—RATIFICATION.

Where defendant's agent contracted to furnish cars at a point on another line for a through shipment to a destination on his own line, and the rule of the initial carrier was that responsibility for through transportation must be assumed, if at all, by its connecting carrier, the transaction must be assumed to have been conducted in accordance with that custom, the duty to furnish the cars under the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contract resting upon defendant, and hence it could ratify the agent's act.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 207.*]

5. CARRIERS (§ 228*)—CONTRACT FOR CARS—AGREEMENT OF AGENT—EVIDENCE.

Defendant not being legally bound to furnish cars on another line, unless it had agreed to do so, and the rule of the other line requiring defendant to do so to insure the passing of the shipment to destination over defendant's line, the fact that it furnished cars to be so used at the instance of its agent would justify an inference that it acted upon the agent's agreement.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

6. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the time required by stock trains to make a trip was fully shown by witnesses testifying from their own knowledge, the admission of opinion by witnesses based upon trips made by them, two of whom spoke of also knowing the time from conversations with others and from general reputation, if erroneous, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

7. TRIAL (§ 190*)—INSTRUCTIONS.

In an action for breach of contract by a carrier's agent to furnish cars, where the evidence was conflicting as to what the agent told plaintiff, a requested charge that the agent's statement that he would try to have the cars furnished would not be an agreement to do so, and the verdict should be for defendant, was properly refused, as assuming that the statement was as stated.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-435; Dec. Dig. § 190;* Carriers, Cent. Dig. § 1337.]

8. TRIAL (§ 253*)—INSTRUCTIONS.

There being another ground for recovery set up by plaintiff, the charge was erroneous as excluding a right of recovery thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by T. B. Boshear against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment of the Court of Civil Appeals (108 S. W. 1032) affirming a judgment for plaintiff, defendant brings error. Affirmed.

Leake & Henry, for plaintiff in error. W. B. Wynne, J. A. Germany, and H. M. Cate, for defendant in error.

WILLIAMS, J. This action was brought by the defendant in error against the Texas & Pacific Railway Company and the plaintiff in error to recover for damage to a shipment of cattle from Wills Point, Tex., to St. Louis. The judgment of the district court was in favor of the former company and against the latter; and the questions now in the case are wholly between the latter and the plaintiff.

A part of the cause of action asserted by plaintiff consisted of a claim that this defendant had broken a contract by which it

agreed to furnish cars at Wills Point for the shipment at a specified time, in consequence of which the cattle sustained damage while being held in pens at that place, awaiting the coming of the cars. The defendant denied the making of the contract by its agent, as well as his authority to make it. The trial court submitted to the jury the questions whether or not the agent made the agreement, whether or not he had authority to make it, and whether or not, if he had not such authority, the defendant had ratified his action. Most of the assignments of error depend upon the proposition that there was no evidence of authority of the agent nor of ratification. The evidence in brief tends to show that plaintiff had ordered cars for the shipment of his cattle from Wills Point to Terrell, and thence, over the Midland road, to St. Louis. W. D. Young, the traveling freight agent of the defendant, requested Mantius, the station agent of the Texas & Pacific Company at Wills Point, to induce plaintiff to ship by the defendant's route. An interview followed between these two and Allen, plaintiff's agent, in which, according to the testimony of Mantius and Allen, Young agreed to have the cars at Wills Point on Saturday, November 11th, and that the cattle should go through to their destination over the Texas & Pacific and the St. Louis, Iron Mountain & Southern roads. Young denies the making of any agreement, and testifies that he only promised to do the best he could to furnish the cars. He further testifies that his authority was merely to solicit freight shipments for the company represented by him, and that he had no authority from it to agree to furnish cars at points off its road. At the time of the alleged agreement, a rule of the Texas & Pacific Companies forbade its local agents to receive cattle and obligate it to ship them beyond its line, unless other companies over whose lines they were to go would furnish cars for the purpose, but it allowed the use of its cars to be furnished by the other companies. Mantius testifies that, when the agreement was made, at the request and in the presence of Young, he at once wired his superintendent "to request the Iron Mountain to have the cars at Wills Point to receive the cattle on the morning of the eleventh," and that the superintendent at once wired back that the request had been made. Young also states that he wired to the "head man" in Texas of his road a "notice" that the cars had been ordered, and the request that he have them furnished. The cars did not arrive on the 11th, but Young was at Wills Point on that morning to see to the billing and loading of the cattle, and stated to plaintiff that he did not know why the cars had not come, but assured him they would be there in a little while. They did arrive on Sunday morning. None of the telegrams mentioned were pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

duced, and the defendant offered no evidence as to Young's authority, or as to ratification, except his statement already quoted. The plaintiff adduced evidence of several other transactions in which Young had made agreements for his company to furnish cars at stipulated times on other roads, which agreements were complied with. We think the evidence justified the submission of the questions both as to authority and as to ratification.

The reliance of the plaintiff in error is upon the decision of this court in *Gulf, Colorado & Santa Fé Railway Company v. Jackson & Edwards*, 99 Tex. 343, 89 S. W. 968, to the effect that a soliciting agent, like Young, has no implied authority to bind his principal, a railroad company, to undertake the carriage of freight over other roads than its own. In that case there was no evidence either of authority or of ratification. The fact that the cars were furnished was not evidence of ratification, for the reason that the cattle were tendered to the company on its own line, and it was bound without any contract to furnish cars and to receive the freight upon proper demand. Its action in doing this, therefore, had no tendency to show that it was acting upon the unauthorized agreement of its agent; and, when the property was received, the company demanded the execution of contracts limiting its obligation to a carriage over its own road. In the present case, the evidence that other agreements of the agent like that in question were recognized and acted upon by the company unquestionably tends to show that the making of such agreements was within his actual authority.

The most plausible contention is that it was error for the trial court to submit the issue of ratification in addition to that of precedent authority. While the cars were eventually furnished, it is urged that this does not show action by the defendant in error, because they may have been furnished by the Texas & Pacific Company. But the answer to this is that the whole transaction was evidently conducted in accordance with the rule or custom of the latter company that responsibility for through transportation must be assumed, if at all, by its connecting carriers. It was the Iron Mountain Company that was called upon, in accordance with that understanding, to furnish cars for a through transportation. The inference is justified that the cars sent were sent by or for that company. But it is said that this still furnishes no evidence of ratification of Young's agreement because it does not appear that the principal acted upon and with knowledge of it. If the case were one in which freight was tendered upon the line of the company furnishing the cars, the objection might be unanswerable; for, as already remarked, it could not be inferred that the

cars were sent upon the agreement rather than in the discharge of a legal duty existing without agreement. But this company was not bound to furnish cars on another line, unless it agreed to do so. To insure the passing of the freight over this defendant's road, the rule of the other company exacted the furnishing of the cars by it, and from the fact that it furnished cars to be used off its line in response to such notice as was given the jury might well infer that it acted upon an agreement by which alone it could have been required to do so.

Objection was made during the trial to the admission of the evidence of certain witnesses as to the time required for stock trains to make the trip from Wills Point to St. Louis. The witnesses showed that they had made other trips, and were qualified to testify to the fact. Two of them also spoke of knowing the time from conversations with others, and from general reputation, but this was not their only qualification. Whether this would have been an admissible way of showing the time we need not decide, since that was fully shown by a number of witnesses testifying from their own knowledge.

The defendant would have been entitled upon proper request to have had the jury correctly instructed as to the legal effect of a mere promise such as Young testified to, but the instruction requested "that the statement of W. D. Young that he would try or would use his best endeavors to have the cars furnished at Wills Point by Saturday would not be a contract or agreement to do so, and your verdict will be for defendant," was objectionable in that it assumed that Young's statement was as he testified when there was a conflict of evidence about it, and in that it excluded any right of recovery on the other ground set up by plaintiff, that the cattle were negligently handled on plaintiff in error's own road.

Affirmed.

FLANARY et al. v. WADE.

(Supreme Court of Texas. Nov. 4, 1908.)

1. EXECUTION (§ 276*)—RIGHTS OF PURCHASER—REVERSAL OF JUDGMENT.

An execution issued on a judgment which had been reversed on appeal, and a levy thereunder and sale were void, and no title passed to the purchaser.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 797; Dec. Dig. § 276.*]

2. EXECUTION (§ 276*)—SALES—VALIDITY.

Where a judgment was reversed on appeal unless plaintiff filed a remittitur, and thereafter the remittitur was filed, and the judgment affirmed and entered in the district court, such subsequent entry did not validate a sale made under execution issued on the original judgment.

[Ed. Note.—For other cases, see *Execution*, Dec. Dig. § 276.*]

Error from Court of Civil Appeals of Second Supreme Judicial District.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by N. J. Wade against W. J. Flanary and others. The judgment of the district court was reversed on appeal to the Court of Civil Appeals, and defendants bring error. Judgment of Court of Civil Appeals reversed, and judgment of district court affirmed.

For prior report, see 108 S. W. 506.

Dillard & Word, Cureton & Cureton, and Dewey Langford, for plaintiffs in error. W. M. Knight, for defendant in error.

BROWN, J. By written contract Tom Wood employed N. J. Wade, an attorney, to file a suit in the district court of Bosque county against W. J. Flanary for damages. By the contract Wood agreed to give to Wade one-third of the land recovered in the suit. The contract was duly filed among the papers of the suit of Wood against Flanary. On the 13th day of September, 1902, Wood recovered a judgment in that case against Flanary for the sum of \$2,400, from which judgment Flanary appealed to the Court of Civil Appeals, and perfected his appeal in that court, but did not give a supersedeas bond.

Flanary owned two tracts of land, each lying partly in Bosque and partly in Erath counties. On the 11th day of December, 1902, Wood caused an execution to be issued and delivered to the sheriff of Bosque county, who levied it upon the portion of each tract of land which was situated in Bosque county, and on January 6, 1903, the land was sold under the execution, and was bid in by Wood for the sum of \$200. The facts do not show how much of the land was in Bosque county. The \$200 was credited on the judgment of Wood against Flanary. The case of Flanary against Wood having been filed in the Court of Civil Appeals of the Second district, that court entered these orders:

"April 18, 1903. This cause came on to be heard on the transcript of the record, and, the same being inspected because it is the opinion of this court that there was error in the judgment, it is therefore considered, adjudged, and ordered that the judgment of the court below be reversed and the cause remanded for further proceedings in accordance with the opinion of this court; unless appellee files a remittitur of all exemplary damages in excess of \$500.00 within twenty days from this date. Upon the filing of such remittitur the judgment will be affirmed. It is further ordered that the appellee Tom Wood pay all costs in this behalf expended, and this decision be certified below for observance."

"May 9th, 1903. In this cause a remittitur having been filed, it is ordered by the court that the judgment be affirmed for \$56.00 actual damages and \$500.00 exemplary damages, and that the appellee, Tom Wood, do have and recover of and from the appellants W. J. Flanary, Will Flanary, Jr., Lee Flanary, and Arch Adkins, and from each of them, the sum of \$556.00, with interest there-

on from this date at the rate of 6 per cent. per annum. It is further ordered that the said appellee pay all costs incurred by reason of this appeal, and that this decision be certified below for observance."

On April 28, 1903, Wood sued out an alias execution in the district court of Bosque county upon the judgment in his favor against Flanary, and caused the same to be levied by the sheriff of Erath county on the land in that county on May 8, 1903. The remittitur required by the Court of Civil Appeals was entered, and that court on the 12th day of May, 1903, gave judgment affirming the judgment of the district court for the sum of \$556. Under an order of sale issued from the district court of Bosque county in said case, the sheriff sold the land lying in that county on July 7, 1903, and Tom Wood bid it in at the sum of \$600, which amount was credited upon the judgment. The sheriffs of Bosque and Erath counties each made a deed to Tom Wood for the land purchased by him. On August 2, 1903, a suit was pending in the district court of Bosque county in favor of Tom Wood and his wife, Mattie, in which W. J. Flanary, F. V. Flanary, and a number of others not necessary to name were defendants. In that suit Tom and Mattie Wood sought to recover from the defendants Mattie Wood's interest in the community estate of her deceased mother and W. J. Flanary; F. V. Flanary being a second wife and the other defendants being children of the deceased wife. Tom Wood employed N. J. Wade to sue for the land purchased by him under his judgment as hereinbefore stated, and entered into a written contract binding himself to convey to Wade one-half of the land that he might recover in that action. Wade filed in the pending suit an amended petition, in which he set up, in addition to the claim of Mrs. Wood as the heir of her mother, his own title as purchaser from the sheriff as before stated herein. Wood and wife and all of the defendants compromised their suit, and Wood and wife signed a motion to dismiss the suit from the docket, whereupon Wade filed a plea of intervention setting up his title to one-half of the land under the contract with Tom Wood. All parties except Mrs. F. V. Flanary disclaimed title to the land. She claimed title under deed of gift made to her by her husband on the day that Wood recovered his judgment against Flanary. At the trial judgment was given in favor of Wade for \$290, but against his claim for the land, which judgment was upon appeal to the Court of Civil Appeals for the Second District reversed and rendered for Wade for one-half of the land.

The order which the Court of Civil Appeals entered in the case of Flanary against Wood on the 18th day of April, 1903, reversed and set aside the judgment which the district court had entered in that case and this condition continued until May 9, 1903, when the judgment of the district court was affirmed;

a remittitur having been entered. On the 28th day of April, 1903, there was no judgment in the district court of Bosque county between the parties hereto which would authorize the issuance of the execution that the clerk of that court issued directed to the sheriff of Erath county. Therefore the execution issued upon the judgment which had been annulled by the Court of Civil Appeals being without authority was void, and the levy made by virtue of that execution upon the land in controversy on the 8th day of May was likewise invalid. It follows that, the execution and the levy upon which the subsequent proceeding and sale depended being invalid, the sale itself was void, and conferred no title upon Wood who purchased at the sale made on July 17, 1903. The title of Wade being derived from Wood, necessarily falls with it, and the conclusion must be reached that Wade had no cause of action in this case for the recovery of this land.

The subsequent affirmance of the judgment of the district court of Bosque county by the Court of Civil Appeals was in fact the entering of a new and different judgment, but in no phase of the case could the subsequent entry of the judgment have the effect to make valid that which was void before.

The Court of Civil Appeals erred in reversing the judgment of the district court and in rendering judgment for Wade for the land. It is therefore ordered that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the district court be affirmed.

LANDRY v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Texas. Nov. 4, 1908.)

1. TELEGRAPHS AND TELEPHONES (§ 53*)—DELAY OF MESSAGE—PROXIMATE CAUSE.

In an action for failure to promptly transmit a telegram to plaintiff's brother announcing the serious illness of her husband, and requesting her brother to send some one to her, the brother having been 15 miles away from the destination of the message, so that he could not have taken a certain train had the message been sent promptly, it was error to permit plaintiff to recover for the failure of her brother to arrive by that particular train in time for the funeral; his nonarrival not being caused by the failure to transmit the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 53.*]

2. TRIAL (§ 251*)—SUBMISSION OF ISSUES—ISSUES NOT WITHIN PLEADINGS.

In an action for failure to transmit a telegram to plaintiff's brother in S. in time to enable him to attend her husband's funeral, there being no allegations that another brother would have gone had the message been delivered, or of any damage arising from the failure of any one to attend except her brother S., it was error to submit the issue of damages for the failure of her other brother to attend the funeral.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

Error from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Ida Landry against the Western Union Telegraph Company. Judgment in the Court of Civil Appeals (108 S. W. 461) reversing a judgment for plaintiff, and she brings error. Reversed and remanded.

Cocke & Cocke, for plaintiff in error. Webb & Goeth, for defendant in error.

BROWN, J. Ida Landry sued the Western Union Telegraph Company to recover damages for the negligent failure to promptly transmit and deliver the following message, which was sent from Ganahl, Tex., dated on the 1st day of March, 1905, and was delivered at the office of the telegraph company at 7 o'clock a. m.: "Sam Roundtree, Schreiver, La. Gus Landry very low. Send some one to me. Answer. [Signed] Ida Landry." Proper and sufficient allegations of the negligence in failing to transmit and deliver the message were made. It was alleged that, at the time the message was delivered, the agent of the telegraph company who received it knew of Landry's condition. The petition, in connection with other necessary and proper allegations to properly set forth the cause of action, contained these allegations: "Plaintiff further alleges that there was a west-bound passenger train scheduled to pass through Schreiver, La., at or about 10:20 a. m. of the morning of March 1, 1905, and said train did pass said point on said date at or near the schedule time, and on which train the party to whom said telegram was sent, Sam Roundtree, or some one under his direction, could have reached San Antonio, Tex., about 5 or 6 o'clock a. m. of March 2d, had said telegram been promptly transmitted and delivered, as it was defendant's duty to do, but that, due to the delay in transmission and delivery of said telegram the said Roundtree was not advised of the needs and conditions of plaintiff until after said train had passed said point, for which reason said Roundtree could not come or send aid to this plaintiff until the following day, causing a delay of 24 hours." The petition also contained this allegation: "That the husband of plaintiff died on March 1, 1905, at Center Point, Tex., and it was her wish and desire to carry his remains for burial to the family burying ground in Louisiana, and which she would have done had her brother Sam Roundtree, Jr., who was sent by her father, Sam Roundtree, in response to said telegram, reached her on the morning of March 2d, as he could have done had said telegram been properly transmitted and delivered."

Again, plaintiff alleged as follows: "Plaintiff further alleges that, due to the failure of defendant to transmit and deliver said telegram promptly, her brother, who finally came in response thereto, did not reach Cen-

ter Point, Tex., at or about 11 o'clock on the morning of March 2d, as otherwise he could and would have done, much to the sorrow, disappointment, grief, and humiliation of this plaintiff; that due to the failure of her brother to so reach and assist this plaintiff in shipping said deceased back to Louisiana, as aforesaid, it became necessary and indispensable for plaintiff to make preparation to have her said husband buried at Center Point, Tex., decomposition having set in, and she having no funds with which to have his body embalmed or transported to Louisiana, all of which were known to defendant at the time of sending said telegram; that, being wholly powerless to accomplish her said desire to have the body of her husband buried in the family burying grounds in Louisiana, as aforesaid, due to the negligence and failure of defendant to properly transmit and deliver said telegram, and the consequent inability of plaintiff's brother to reach her on the morning of March 2d, it devolved on this plaintiff to personally direct, supervise, and attend to all the necessary details and arrangements in preparing said body for burial, the digging of the grave, the conveyance of the body thereto, and all other things and duties ordinarily incident to such an occasion; that plaintiff was in a comparatively strange country, was among strangers, and without any relatives to aid, comfort, console, or assist her; that she was, by reason of the delay in transmitting and delivering said telegram, compelled to attend the public burial of her deceased husband among strangers, and alone—that is, without the comfort, consolation, assistance, and support of her brother—which caused her much mental pain and anguish, much sorrow and grief, and which would have been tempered and more easily borne had her said brother been present to cheer, comfort, and assist her; that plaintiff was humiliated over the thought that the people who attended said burial would conclude that she had not the esteem, regard, and sympathy of her people because of the failure of any of them to be present; that because of the increased mental anguish, humiliation, pain, and suffering experienced by plaintiff as aforesaid she had sustained actual damages in the sum of \$500, in addition to the actual damages sustained by her in the sending of the said telegram."

The trial court charged the jury, in substance, if they believed from the evidence that the telegraph company negligently failed to transmit and deliver the message within a reasonable time to Sam Roundtree, Sr., at Schreiver, La., then to find for the plaintiff such sum as would compensate her for the damages actually sustained by her, "and in estimating such actual damages, if any, the jury should include the amount received by the defendant for sending the message, and, in addition, the mental anguish, pain, sorrow,

or grief, if any, which she sustained because of the failure of her brother to arrive at Ganahl on the noon train of March 2, 1905, and be present and cheer and comfort her, and to assist in the burial of her husband, and which she would not have sustained had the telegram been promptly transmitted and had her brother arrived on the noon train of March 2, 1905."

The undisputed evidence showed that at the time the message should have been delivered at Schreiver, and at the time the train passed on which the brother must have taken passage to reach Ganahl on the 2d of March, Sam Roundtree, Jr., was 15 miles distant from Schreiver, and that he did leave that station the next day on the first train that he could have taken had the message been promptly delivered to Sam Roundtree, Sr. It was therefore error for the court to submit to the jury the issue of the damages which the plaintiff sustained by reason of the failure of her brother Sam to arrive on the train on the 2d of March, because his failure to so arrive did not result from the failure to deliver the telegram in a reasonable time.

The honorable Court of Civil Appeals says that there was another brother, Joe, who was within the purview of the telegram. There is no allegation in the petition that, if the telegram had been delivered in time, the brother Joe would have gone to his sister in Ganahl, nor is there any allegation of any damage arising from the failure of any one to go to plaintiff's aid and relief, except the brother Sam, Jr. There was no evidence which justified the submission of the issue to the jury.

We therefore reverse the judgments of the district court and Court of Civil Appeals, and remand the case to the district court.

MAHS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1908.)

CRIMINAL LAW (§ 649*)—TRIAL—POSTPONEMENT—EXCLUSION OF EVIDENCE.

In a prosecution for burglary with intent to rape, prosecutrix did not identify the intruder in her house on the night in question, nor did she attempt to do so, in her testimony. The state attempted to identify him first by comparison of handwriting between a letter the authorship of which defendant admitted, with another letter received by prosecutrix, and by evidence of the postmaster that he saw defendant write and mail a letter the day before prosecutrix received the letter in question. *Held*, that the court erred in refusing to delay the trial for a few minutes, necessary to obtain the presence of the postmaster a second time, in order that he might testify that he only meant that he saw defendant writing, and did not notice whether he wrote a letter or postal cards, as defendant testified, on the ground that the court had given notice that he would not wait for witnesses to be brought in, and because no

affidavit had been filed affirming the truth of the expected testimony.

Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1512-1515; Dec. Dig. § 642.*]

Appeal from District Court, Hemphill County; H. G. Hendricks, Judge.

Herbert Bernard Mahs was convicted of burglary with intent to rape Amie Dustin, and appeals. Reversed and remanded.

Hoover & Taylor, for appellant. F. J. McCord, Asst. Atty. Gen., W. D. Fisher, Dist. Atty., and Baker, Willis & Willis, for the State.

DAVIDSON, P. J. Appellant was convicted of burglary with intent to commit the crime of rape upon Amie Dustin.

The prosecutrix was on the 28th day of May, 1906, and had been since December 24, 1907, a waitress in a café owned by one Kellas, and occupied a room in his residence as her sleeping apartment. Appellant was cook in the same café, but did not sleep at the residence of the proprietor. The alleged burglary occurred on the 26th of May, 1908. Prior to the burglary, prosecutrix became somewhat uneasy on account of the conduct of two men who had followed her along the street. Upon her invitation, appellant subsequently became her protector and companion between the café and the Kellas residence. This brought about a friendly relation between the parties. On one occasion prosecutrix, looking through appellant's clothing, found a letter he had written to a girl in another state. This letter indicated the existence of more than a friendly feeling between appellant and that girl, and alluded to the prosecutrix. The letter evidenced a decidedly more intimate relation between the girl addressed than with the prosecutrix. Prosecutrix kept this letter, and it was produced upon the trial. A day or two before the alleged offense, appellant informed prosecutrix of his intended departure from Canadian for Kansas City. She replied that she did not care. He asked what was the matter. She replied: "Oh, enough." They immediately separated. On the following night, the 26th of May, prosecutrix attended a dance, escorted by a Mr. Belden. She returned in company with Belden about 12 or 12:30 o'clock that night. Belden and prosecutrix separated at the entrance; prosecutrix going into the house. She did not know what became of Belden. After entering the house she lighted a lamp, went to the different rooms of the house, and finally to her own sleeping apartments. The window was up and blinds partially open in Mrs. Kellas' room. Prosecutrix found the same condition of affairs in her own room. She was not at first disturbed about this, because the wind frequently blew the shutters open. She, however, later looked under her

bed and discovered nothing, disrobed, and went back to Mrs. Kellas' room; in fact, was preparing to take a bath. After reaching Mrs. Kellas' room the second time, she testified she discovered somebody had been sitting upon the bed. Upon making this discovery she noticed the bed moved slightly, and under it discovered a man. She immediately fled to a neighbor's house and gave information of the condition of things. As she went out of the house and off the premises she said she looked back and saw the intruder standing in the doorway of the kitchen; that at no time did he speak to her, or in any manner attempt to catch hold of her, and her testimony does not make it appear that he came from under the bed while she was in the room. The Kellas family was away from home, and had been for some days. Prosecutrix had been in the habit of inviting Miss Jackson to sleep with her. On this particular night, or day preceding the night, she had informed Miss Jackson she need not come that night, as she had invited another young lady. She did not, however, invite the other young lady, and she was to occupy the house that night alone. She says appellant had always treated her courteously, and had in no way misbehaved towards her or in her presence. Belden left town on the train that night, or early the next morning. Appellant had, a day or two prior to this, severed his relation as employé at the café, and had informed the prosecutrix of his intended departure from Canadian, and of his intended return to Denver, in the state of Colorado.

On the 28th of May prosecutrix received a letter in which the writer stated that he had intended having intercourse with her on the night in question, and if she had resisted he would have killed her. This letter became a serious issue in the case on the trial. The state introduced in evidence the letter prosecutrix had taken from the pocket of appellant as a standard of comparison to show that the one received on the 28th of May was written by appellant. Some bank officials were called as experts, and testified in their judgment the same party wrote both letters, but denied being experts. Appellant denied under oath writing the second letter. He admitted writing the one prosecutrix had taken from his pocket. In this attitude of the case the postmaster testified for the state that appellant had written a letter on the evening of the 27th of May in the post office and mailed it. It was the state's theory that this was the letter received by prosecutrix on the 28th of May. Appellant took the stand and denied under oath that he wrote the letter in question, and further denied that he wrote any letter in the post office at all, but testified, in regard to the matter of the writing in the post office stated by the postmaster, that he wrote two postal cards

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and mailed them—one to his sister in Wyoming, and the other to his former landlady at Denver to secure apartments in her house he had occupied when he formerly lived at Denver. The testimony closed, and appellant then offered to recall the postmaster for the purpose of proving by him that when he stated to the jury that he saw appellant write a letter that it was through inadvertence; that he had paid but little attention to what appellant was doing—simply saw him writing and did not notice whether he wrote a letter or postal cards, and that he did not intend to swear that appellant had in fact written a letter; that his attention was not directed to the fact that whatever was written by appellant might have been postal cards instead of a letter. It was stated to the court, in this connection, that the postmaster was at the post office a short distance away in the town where court was being held, and an officer had gone for him and he would be produced in a few moments. The court refused to permit the introduction of this witness. In qualifying the bill he states, in effect, that he had notified counsel upon either side that he would not wait for witnesses to be brought in, but that they must be kept present all the time; and he further states that no affidavit had been filed affirming the truth of the expected statements from this witness until on motion for new trial.

The record does not disclose affirmatively at what time appellant discovered that the postmaster would thus qualify his evidence; but it was offered to prove these facts before the argument was begun. This testimony was very material under the circumstances. The prosecutrix had not identified the intruder in her house on the night of the 26th, nor did she undertake in her testimony to do so. In fact, not only her testimony, but the whole record, tends to prove the fact that she did not identify him. The state sought to do this by two circumstances: First, comparison of handwriting; and, second, postmaster saw appellant write and mail a letter. It will therefore be observed at once that the evidence of the postmaster was of a most material character, and tended with some degree of cogency to corroborate the testimony of the experts. This letter had been denied under oath. Therefore the testimony of the experts could not of itself furnish a basis of conviction under the terms of the statute. If in fact appellant wrote this letter, or the jury believed he wrote it, and such was the effect of the postmaster's testimony, it became a strong circumstance against the accused. It therefore became of first importance to appellant that this evidence be met, if possible, and to this end he offered the witness. It was

rejected, first, because the court stated he would not permit witnesses to be brought in, but that they must be present; second, that the postmaster's affidavit was only filed on motion for a new trial. Neither reason is valid under this condition of the record. The delay would only be for a few moments at least, and the affidavit is not necessary to inform the court of the materiality of the rebutting or explanatory evidence, when the evidence is tendered during the trial.

The affidavit in regard to such testimony, if newly discovered, would find proper place in the motion for a new trial; but here the facts were known, had been ascertained, and were tendered before the argument was commenced. Under our statute which authorizes the introduction of evidence at any time before the conclusion of argument, for the due administration of justice, appellant was in ample time, and should have been accorded the right to have the postmaster explain away the circumstances sought by the state as evidence of guilt. It certainly would not have caused any longer delay in the trial to have introduced it then than it would at any stage of the subsequent portion of the trial to the conclusion of the argument. It will be seen this evidence was not only material, but it would have explained away one of the most cogent facts against appellant. The evidence of the postmaster, in connection with the letter, tended somewhat to identify the letter. If appellant in fact wrote the letter, it tended to prove two facts for the state: First, identification of appellant as an intruder; second, it served also to throw light upon the reason or purpose of his being in the house. It would take no argument to disclose that these were crucial points in the case. If the postmaster had been permitted to explain his former evidence, and testify to facts tendered as stated by counsel to the court, these two questions would have been presented to the jury in a much more favorable light for appellant; because, if he did not write that letter, then there is but slight, if any, evidence to show the purpose of being in the house, and there was nothing to identify him as the party being in the house. We are of opinion, therefore, that this action of the court was clearly erroneous, and in direct violation of that statute which permits the introduction of testimony in aid of the due administration of justice at any time before the argument has been concluded.

There are other questions in the case; but they may not arise upon another trial, and are not discussed.

The judgment is reversed, and the cause is remanded.

McCONNICO v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1908.)

CRIMINAL LAW (§ 1090*)—APPEAL—RECORD—STATEMENT OF FACTS—BILL OF EXCEPTIONS—REVIEW.

In the absence of a statement of facts or a bill of exceptions matters presented in a motion for a new trial cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2822; Dec. Dig. § 1090.*]

Appeal from District Court, Limestone County; L. B. Cobb, Judge.

Jethro McConnico was convicted of murder in the second degree, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was awarded a term of 10 years in the penitentiary for murder in the second degree.

The record is before us, without a statement of facts or any bill of exceptions. The matters presented in the motion for a new trial, with the record in its present condition, cannot be reviewed.

There being no errors, therefore, shown or sufficiently presented for discussion, the judgment is affirmed.

DAUGHTRY v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1908.)

DUELING (§ 4*)—CHALLENGE TO FIGHT—EVIDENCE.

Evidence held insufficient to sustain a conviction of sending a challenge to prosecutor to fight a duel with deadly weapons, with intent to kill prosecutor.

[Ed. Note.—For other cases, see Dueling, Dec. Dig. § 4*]

Appeal from District Court, Lubbock County; L. S. Kinder, Judge.

C. Daughtry was convicted of sending a challenge to prosecutor to fight a duel with deadly weapons, and he appeals. Reversed and remanded.

H. C. Ferguson and McGee & Puckett, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with and convicted of sending a challenge to one J. W. Campbell to fight a duel with deadly weapons, with intent to kill and murder said Campbell.

It is contended that the evidence fails to show that appellant sent a challenge as charged. Campbell was the only witness. He testified that in the evening, after he had left his office, he was called to the phone at his residence; that he asked who it was, and was informed that it was C. Daughtry; that the speaker stated that he had re-

ceived a letter from Campbell to Campbell's sister, wife of appellant, in which some charges were made against Daughtry. An explanation was demanded. Campbell informed the speaker that he did not wish to talk with him about private matters over the phone, and requested him to come there and talk with him, and that he would talk with him anywhere as a gentleman about anything necessary. The party who called Campbell over the phone stated: "I will be there tomorrow evening at 4 o'clock, and I demand that you meet me." Campbell informed him that he would meet him at any time, finally saying to him, "I don't want to talk to you over the phone about family matters." Campbell then rang off, hung up the receiver, and walked away. Campbell's wife and sister being sick at the time, he did not care to talk, as they might hear and become excited. The phone rang again. The speaker informed Campbell that he wanted him to stay at the phone and hear what he had to say, and demanded that he meet him. Campbell again declined to talk with him over the phone. The party said he would meet him at his hall in front of the door. Campbell declined this, but said he would meet the speaker anywhere. Again he rang off and hung up the receiver. This ended the matter, except two letters, one of which was dated at Lubbock, July 15, 1907, and directed to J. W. Campbell, Plainview. The letter is rather rambling, at least is not very coherent, and the writer seems to have had some grievance about a letter he charges Campbell with having written. This letter referred to a letter the writer had received. Without going into the details of this letter, getting down to that portion of it that would suggest, if anything does suggest, a challenge, we find this: "Now, waiving all ceremonies, will you meet me at any time you may suggest, in combat? Now my blindness is no excuse, since, if you like, you may blindfold yourself, though that is altogether as you like, for I am not afraid of you, and much less afraid to die. Address me at Hereford, advising me if you will meet me in combat, select your weapons, and say whether or not you wish to enter the combat blindfolded." Then follows another letter, dated the 16th of July, 1907. This, also, was purported to have been written at Lubbock, in which the writer retracted some things he had said the previous day about the mother of Campbell. This expression occurs in the latter letter: "I regard you as a man not afraid to meet me." Both letters are signed, "C. Daughtry." Omitting quite a lot of matter in the letters, which seems to have little or no bearing on the case, outside of showing incoherent anger, this is about the substance of the case.

We are of opinion this evidence does not sustain the conviction. If the language quot-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed be construed into an offer to fight Campbell with deadly weapons, so as to bring it within the purview of the statute on dueling or sending challenges, which we think is somewhat doubtful, we are then met with this trouble: Campbell does not undertake to swear that it was appellant talking with him over the phone, nor that appellant was the man who sent the letters or wrote them. There was no evidence introduced, except as above stated; no witness introduced, except Campbell, and he does not swear that it was the handwriting of appellant; nor is his testimony, in our judgment, sufficiently cogent, even if the letters contained a challenge, to connect appellant with writing and sending the letters. There may be some suspicious circumstances, as shown in the statement; but they are not sufficient to authorize the incarceration of a man in the penitentiary under article 715 of the Penal Code, under which this indictment was found.

The judgment is reversed, and the cause is remanded.

GREEN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1908.)

APPEAL AND ERROR (§ 701*)—RECORD—QUESTIONS REVIEWABLE—ABSENCE OF STATEMENT OF FACTS.

In the absence of a statement of facts, the appellate court will not ordinarily review assignments questioning the sufficiency and correctness of the charge of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2933; Dec. Dig. § 701.*]

Appeal from District Court, Bastrop County; Ed. R. Sinks, Judge.

Johnnie Green was convicted of murder, and appeals. Affirmed.

Robert A. Brooks, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. The appellant was charged by indictment in the district court of Bastrop county with the offense of murder. He was put upon his trial in July, 1908, in said court, and was by the jury convicted, and his punishment assessed at death.

The record discloses that, preliminary to the main trial, there was some suggestion made that appellant was insane, which issue was tried in said court in advance of the main trial, resulting in the return of a verdict by the jury that the appellant was then sane. There is no statement of facts in the record, notwithstanding 80 days after adjournment was allowed within which to file a statement of facts.

We have carefully examined the charge of the court, and so far as we can tell, in the absence of a statement of facts, it is unobjectionable. The only instruction requested by appellant's counsel was given by the court.

There are some complaints of the charge of the court made; but it is well settled that in the absence of a statement of facts we cannot, ordinarily, at least, review assignments questioning the sufficiency and correctness of the charge of the court. *Holloway v. State* (Tex. Cr. App.) 110 S. W. 745, and authorities there cited. It is a matter of regret that, in a case with the assessment of the death penalty, we are not aided by a statement of facts. None, however, was filed, nor was any excuse or reason given why it was not done.

As presented to us, notwithstanding the awful penalty imposed upon appellant, we are without discretion in the matter, and the judgment of the court below must be affirmed; and it is so ordered.

MOLAND v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1908.)

CRIMINAL LAW (§ 1097*)—APPEAL—RECORD—STATEMENT OF FACTS—EFFECT OF FAILURE TO MAKE.

Error in overruling a motion for new trial on the ground that the verdict was not sustained by the evidence cannot be considered, in the absence of a statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2947, 2948; Dec. Dig. § 1097.*]

Appeal from District Court, Ellis County; F. L. Hawkins, Judge.

Aaron Moland was convicted of burglary, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the district court of Ellis county of the offense of burglary, and his punishment assessed at five years' confinement in the penitentiary.

The case comes to us without either statement of facts or bills of exception. The only ground of the motion for new trial filed in the court below was to the effect, in substance, that the verdict of the jury was wholly unsupported by the evidence introduced on the trial of the cause. In the absence of a statement of facts, it is evident that we cannot consider this question.

Finding no error in the record, the judgment of the court below is affirmed.

STEEL v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1908.)

1. CRIMINAL LAW (§ 778*)—DEFENSES—INSTRUCTIONS.

An instruction, on a trial for carrying a weapon, which places the burden on accused to

prove beyond a reasonable doubt the defense that he was a traveler, is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1849; Dec. Dig. § 778.*]

2. WEAPONS (§ 17*)—CARRYING WEAPONS—INSTRUCTIONS—DEFENSES.

Where, on a trial for carrying a weapon, accused admitted having a pistol about his person, and testified that on the day of his arrest he had started out to make a collection tour which would carry him through several counties, an instruction that if the jury believed beyond a reasonable doubt that accused had a pistol about his person, and that he was a traveler pursuing his journey and engaged in business connected with the same, they should acquit him, was erroneous as requiring the jury to find, in order to acquit accused, that he was in the pursuit of his journey and also engaged in business connected therewith.

[Ed. Note.—For other cases, see Weapons, Cent. Dig. § 31; Dec. Dig. § 17.*]

Appeal from Wood County Court; J. O. Rouse, Judge.

H. F. Steel was convicted of carrying a pistol on his person, and he appeals. Reversed, and cause remanded.

H. C. Geddie, H. F. Boyett, and Jones & Jones, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. The appellant was charged by complaint and information with the offense of carrying a pistol on and about his person on the 18th day of September, 1907. On trial in the county court of Wood county he was found guilty by the jury, and his punishment assessed at a fine of \$100. From this judgment he appeals to this court, and asks a reversal thereof.

We think the judgment of the court below must be reversed. There was evidence introduced in the case that appellant on the 17th day of September, 1907, had a pistol in the house of Henry Douglass, in the town of Mineola, under circumstances which probably would have left him, if the testimony had been credited by the jury, substantially without defense. It was also shown by the state that appellant had on and about his person a pistol in the town of Mineola on the morning of September 18, 1907. There was no election by the state, and under the charge of the court the jury were authorized, if they credited the testimony of the state, to find appellant guilty as to either of the occasions on which it was claimed he had a pistol. Appellant denied that he had the pistol on the night of the 17th of September at the home of Henry Douglass. He admitted having the pistol in his hack on the next day at the time of his arrest by the witness Woods. His claim was that he was protected in having the pistol as a traveler. He testified, in substance, that he left home on that day and had started out to make a collection tour, which would carry him through Hopkins, Rains, Van Zandt, and Smith counties, during which time he expected, and it was his

purpose, to collect a considerable sum of money for the company for which he was working. His testimony fully supported this contention.

In this state of the proof, appellant's counsel requested the court to give the following charge: "If you believe from the evidence that, at the time the defendant was arrested by J. B. Woods and John S. Daniel, the defendant was started on a trip to Hopkins, Rains, Van Zandt, and other counties, then I charge you as a matter of fact that he was a traveler, and would not be guilty of violating the law by reason of having the pistol in his possession at the time." This charge was by the court refused. The court, however, did give to the jury the following charge: "If you believe from the evidence beyond a reasonable doubt that the defendant had on and about his person a pistol, as charged, if any, and that he was a traveler pursuing his journey and engaged in business connected with the same, then you will acquit the defendant." The vice of this charge, apparent by the reading of same is, that it places the burden upon appellant to prove beyond a reasonable doubt his defense; that is, that he was a traveler. It is also objectionable in that it requires that he must be both in the pursuit of his journey and engaged in business connected with the same. This is so manifestly erroneous as not to require elaboration.

For the errors pointed out, the judgment of the court below is reversed, and the cause remanded.

YOUNG v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21, 1908.)

CRIMINAL LAW (§ 1156*)—APPEAL—MOTION FOR NEW TRIAL—TIME.

Under Code Cr. Proc. art. 819, requiring a new trial to be applied for within two days after conviction, but permitting the court in felony cases, for good cause shown, to allow the application to be made at any time before adjournment of the term, where a motion for a new trial was made five days after trial and sentence, the denial of the motion will not be reviewed in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3067; Dec. Dig. § 1156.*]

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Jasper Young, alias Brooks, was convicted of forgery, and he appeals. Affirmed.

Jno. L. George, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Nueces county on a charge of forgery; the allegation being, in substance, that he had forged a check for the sum of \$5 on the Corpus Christi National

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Bank. On trial the appellant was found guilty, and his punishment assessed at confinement in the penitentiary for two years.

We gather from the record that appellant was not defended by counsel on the original hearing. No motion for a new trial was filed until five days after the verdict of guilty was returned against him. The judgment of guilty bears date December 12, 1907. The motion for new trial was filed on December 17th of the same year. A motion was made by the district attorney to strike out appellant's motion, for the reason that same was not filed within two days after the rendition of the verdict, and because not filed at all until after the court had pronounced sentence on appellant on said verdict of conviction, reciting and averring that appellant was so duly and properly sentenced by the court at 9:30 o'clock a. m. on the 17th day of December, 1907, and said motion for a new trial was filed at 3:30 o'clock p. m. on the same day. Article 819 of our Code of Criminal Procedure is as follows: "A new trial must be applied for within two days after the conviction, but for good cause shown, the court, in cases of felony, may allow the application to be made at any time before the adjournment of the term at which the conviction was had. When the court adjourns before the expiration of two days from the conviction, the motion shall be made before the adjournment." Under this provision of our Code of Criminal Procedure it has been held that motions for new trial filed more than two days after the verdict, where no sufficient excuse is shown for the delay, will not be entertained. *Valentine v. State*, 6 Tex. App. 439. Again, it has been held that the article, in effect, confides to the judicial discretion of the trial court the determination of applications for new trial made after the expiration of two days, and the exercise of that discretion will not be revised, unless it has been abused to the defendant's prejudice. *White v. State*, 10 Tex. App. 167; *Bullock v. State*, 12 Tex. App. 42; *Smith v. State*, 15 Tex. App. 139; *Hernandez v. State*, 18 Tex. App. 134, 51 Am. Rep. 295.

In this case the motion for new trial was not filed until five days after the conviction. No reason or excuse is given why it was not filed earlier; nor, indeed, was it filed until after the appellant was sentenced. There is no bill of exceptions, preserved in the record, showing any reason why the discretion justly confided to the court should or can be revised by us. Necessarily, in matters of this sort, much discretion must be confided to the district judge. We know in practice that motions and amended motions are frequently filed after the expiration of two days, and we cannot assume that the trial court would decline to entertain a motion for new trial without any reasonable and just ground for so doing. Under the condition of the

record as here presented, we must assume, as we do, that there was no abuse of the discretion of the trial court, so that it results that we must treat the case as if no motion had been presented. If this is correct, it follows of necessity that article 723, Code of Criminal Procedure, which provides: "Whenever it appears by the record in any criminal action, upon appeal of the defendant, that any of the requirements of the eight preceding articles have been disregarded, the judgment shall not be reversed unless the error appearing from the record was calculated to injure the rights of the defendant, which error shall be excepted to at the time of the trial, or on motion for a new trial"—should control in the disposition of the case. In the light of this article a careful inspection of the record does not disclose the denial of any substantial right to appellant of which he can in fairness complain; nor, indeed, do we believe that, if the motion might be considered, there is any error justifying or requiring a reversal of the case.

It is therefore ordered that the judgment of conviction of the court below be, and the same is hereby, affirmed.

JONES v. STATE

(Court of Criminal Appeals of Texas. Oct. 21, 1908.)

CRIMINAL LAW (§ 1090*)—APPEAL—RECORD—NEW TRIAL.

In the absence of a statement of facts or bill of exceptions in the record, matters presented in a motion for a new trial cannot be reviewed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2822; Dec. Dig. § 1090.*]

Appeal from District Court, El Paso County; James R. Harper, Judge.

Sam Jones was convicted of theft, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft, and his punishment assessed at two years' confinement in the penitentiary.

The record is before us without a statement of facts or bill of exceptions. The matters presented in the motion for a new trial, with the record in its present condition, cannot be reviewed.

There being no error, therefore, shown, the judgment is affirmed.

Ex parte COLEMAN.

(Court of Criminal Appeals of Texas. Feb. 12, 1908. Rehearing Denied June 24, 1908.)

1. EXTRADITION (§ 24*)—DUTY OF STATES.

The provision of the United States Constitution requiring the surrender of fugitives from

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 113 S.W.—2

justice is in the nature of a treaty stipulation between the states, equally binding on each state and its officers, so that, where the proceedings are regular, the executive of the state on which the demand is made has no discretion to refuse to honor it.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 28; Dec. Dig. § 24.*]

2. EXTRADITION (§ 36*)—WARRANT—CLERICAL ERRORS.

Where extradition papers showed that the alleged fugitive from justice was charged by affidavit, a recital in the warrant of the Governor of the state on which the demand was made that the fugitive was charged by indictment was a mere immaterial clerical error.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 40-43; Dec. Dig. § 36.*]

3. EXTRADITION (§ 30*)—"FUGITIVE FROM JUSTICE."

That petitioner remained in Alabama for some time after an alleged homicide, then moved to Georgia, remaining in constant communication with the Alabama authorities, and where his location was known to them when he moved to Texas, where he lived for a number of years before extradition proceedings were instituted, did not prevent him from being a "fugitive from justice" within the extradition law, which term includes any person who commits a crime in one state for which he is indicted, and departs therefrom and is found in another state.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 32; Dec. Dig. § 30.*]

For other definitions, see Words and Phrases, vol. 4, pp. 2995, 2996.]

4. EXTRADITION (§ 32*)—INDICTMENT.

Where extradition proceedings were based on a sufficient affidavit, it was not material that, after arrest of accused in the state to which he fled, the sheriff having him in charge was furnished with an objectionable indictment by the authorities of the demanding state.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 38; Dec. Dig. § 32.*]

5. EXTRADITION (§ 32*)—ELEMENTS OF OFFENSE—TIME AND PLACE.

Where extradition proceedings were instituted by Alabama to prosecute petitioner for an alleged homicide committed in that state, under the laws of which it was not essential that the indictment should charge either the time or venue of the offense, an indictment omitting such elements was not objectionable for that reason in the extradition proceedings.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 38; Dec. Dig. § 32.*]

6. HABEAS CORPUS (§ 30*)—GROUNDS FOR RELIEF—ERRORS AND IRREGULARITIES.

An alleged fugitive from justice in extradition proceedings will not be discharged on habeas corpus because of substantial defects in the indictment under the laws of the demanding state; it being sufficient that he is charged by indictment with the offense and that all other prerequisites to extradition are complied with.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

Application for a writ of habeas corpus by William H. Coleman. Writ denied. Petitioner remanded.

Crawford & Lamar and M. L. Dye, for appellant. Walter F. Seay, Lee Richardson, and F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. This is an original application for a writ of habeas corpus, which was granted by this court, and relator insists that he is illegally restrained of his liberty by A. L. Ledbetter, sheriff of Dallas county, Tex., for various reasons, and asks this court to release him. After the original application was granted by this court, the sheriff came in and made return showing that he held relator in custody under a writ of arrest issued by John G. Bradley, clerk of the criminal court of Jefferson county, Ala.; second, a warrant of arrest issued by J. F. Williams, justice of the peace, precinct No. 1, Dallas county, Tex.; third, an authorization for the person of Henry Coleman, issued to Robert L. Collier on January 7, 1908, by B. B. Comer, Governor of the state of Alabama, a copy of which is attached; fourth, an executive warrant for the custody of Henry Coleman, issued on the 13th day of January, 1908, by his excellency, T. M. Campbell, Governor of the state of Texas. A copy of all of said papers is attached to the sheriff's return.

After the above return was made, the sheriff amended his return, which was entirely proper. The same shows that, in addition to the above, he holds relator by virtue of (a) an affidavit filed by Ellisha A. Reeves in the criminal court of Jefferson county, Ala., on the 6th day of January, 1908, charging the relator with murder; (b) a petition, filed and sworn to by H. P. Heflin, solicitor of Jefferson county, Ala., signed and sworn to on the 6th day of January, A. D. 1908, which petition prays for the extradition of relator, to the end that he may be returned to the state of Alabama to be prosecuted for the crime of murder; (c) a warrant of arrest, issued by S. L. Weaver, judge of the criminal court of Jefferson county, Ala., for the arrest of the relator on a charge of murder, the said warrant being issued on January 6, 1908; (d) a requisition issued by the Governor of the state of Alabama, directed to the Governor of the state of Texas, requesting that the relator be apprehended and delivered to Robert L. Collier, to be conveyed to the state of Alabama, to be prosecuted for the crime of murder of which he stands charged in the state of Alabama; (e) a written authorization, issued by the Governor of the state of Alabama, which confers authority on Robert L. Collier to receive for the authorities of the state of Alabama, to answer to a charge of murder alleged to have been committed in said state, the said authorization having been issued on January 7, 1908, a copy of which is attached to the relator's petition, and the original of which is on file in this court; (f) an executive warrant issued by the Governor of the state of Texas, on January 13, 1908, which warrant authorizes the relator's delivery to Robert L. Collier, to be conveyed to the state of Alabama, to be tried on a charge

of murder in said state, a copy of which executive warrant is attached to relator's petition filed herein, and the original of which is on file in this court.

The requisition of the Governor of the state of Alabama reads as follows:

"Executive Department, State of Alabama. The Governor of the State of Alabama, to his Excellency, the Governor of Texas: Whereas, it appears by the annexed copy of an affidavit, which is hereby duly certified to be authentic in accordance with the laws of this state, that Henry Coleman stands charged with the crime of murder, committed in the county of Jefferson, in this state, and it has been represented to me that Henry Coleman has fled from justice of this state and has taken refuge in the state: Now, therefore, pursuant to the provisions of the Constitution and laws of the United States in such case made and provided, I request that you cause the said Henry Coleman to be apprehended and delivered to Robt. L. Collier, who is hereby authorized to receive and convey him to the state of Alabama, there to be dealt with according to law. In witness whereof, I have hereunto set my hand and caused the great seal of the state to be affixed at the capitol, in the city of Montgomery, this 7th day of Jan'y, in the year of our Lord one thousand nine hundred and eight, and in the one hundred and thirty-second year of American Independence. B. B. Comer, Governor of Alabama. [Seal.] By the Governor: Frank N. Julian, Secretary of State."

The affidavit upon which said requisition of the Governor of Alabama is issued is as follows:

"State of Alabama, Jefferson County. Criminal Court. Before me, John G. Bradley, clerk of the criminal court, personally appeared H. P. Heflin, who prosecutes for the state in said county, who upon oath says that Henry Coleman stands charged in said county with the offense of murder; that said Henry Coleman is now a fugitive from justice in this state, and has taken refuge in the state of Texas; that this application for his extradition is made in good faith, for the sole purpose of prosecuting him for the offense with which he is charged, and not to procure his presence here to serve him with any civil process, nor to collect a debt, nor to enforce any claim, nor for any other improper purpose; that he has investigated the facts in this case, and is of the opinion that a conviction will be had. And the petition recommends Robert L. Collier as commissioner on the part of the state of Alabama to receive this prisoner. H. P. Heflin, Solicitor of Jefferson County, Alabama.

"Sworn to and subscribed before me this 6th day of January, 1908. John G. Bradley, Clerk of the Criminal Court of Jefferson County, Ala."

The accompanying affidavit of Elisha A. Reeves reads as follows:

"The State of Alabama, Jefferson County. The Criminal Court of Jefferson County, ——— Term, 190—. Personally appeared before me, S. L. Weaver, associate judge of the criminal court of Jefferson county, in and for said county, Elisha A. Reeves, who, being duly sworn, says that Henry Coleman, whose other and further name is unknown to affiant, within twelve months before making this affidavit in said county, did unlawfully and with malice aforethought kill James Cordray by shooting him with a pistol, against the peace and dignity of the state of Alabama. Elisha A. Reeves.

"Subscribed and sworn to before me this 6th day of January, 1908. S. L. Weaver, Associate Judge of the Criminal Court of Jefferson County."

The warrant of arrest is as follows:

"The State of Alabama, Jefferson County. To any Lawful Officer of Said County—Greeting: You are hereby commanded to arrest Henry Coleman, whose other and further name is unknown to affiant, and bring him before the judge of the court of Jefferson county at the present term of said court, to answer the state of Alabama on a charge of murder preferred by Elisha A. Reeves. Witness my hand this 6th day of January, 1908. S. L. Weaver, Judge of the Criminal Court of Jefferson county.

"Witnesses for State: ———, residence ———; Geo. W. Courson, Deputy Sheriff; W. J. McGrail, City; W. D. Paris, City."

The certificate of the clerk to said warrant is indorsed thereon as follows:

"The State of Alabama, Jefferson County. I, John G. Bradley, clerk of the criminal court of Jefferson county, in and for said county and state, do hereby certify that the within and foregoing is a true, complete, and correct copy of the affidavit and warrant now on file in my office, in a cause wherein the state of Alabama is plaintiff and Henry Coleman is defendant, which cause is now pending for trial. Witness my hand this 6th day of January, 1908. John G. Bradley, Clerk."

The requisition issued by the Governor of the state of Texas is as follows:

"The State of Texas, to All and Singular the Sheriffs, Constables, and Other Civil Officers of said State: Whereas, it has been made known to me by the Governor of the state of Alabama that Henry Coleman stands charged by indictment before the proper authorities with the crime of murder, committed in said state, and that the said defendant has taken refuge in the state of Texas; and whereas, the said Governor, in pursuance of the Constitution and laws of the United States, has demanded of me that I cause the said fugitive to be arrested and delivered to Robt. L. Collier, who is, as is satisfactorily shown, duly authorized to receive him into custody and convey him back to said state; and whereas, said demand is accompanied by copy of said indictment, du-

ly certified as authentic by the Governor of said state: Now, therefore, I, T. M. Campbell, Governor of Texas, by virtue of the authority vested in me by the Constitution and laws of this state and of the United States, do issue this my warrant, commanding all sheriffs, constables, and other civil officers of this state to arrest and aid and assist in arresting said fugitive, and to deliver him, when arrested, to the said agent, in order that he may be taken back to said state, to be dealt with for said crime. In testimony whereof, I have hereunto signed my name and have caused the seal to be hereon impressed, at Austin, Texas, this 13th day of January, A. D. 1908. T. M. Campbell, Governor.

"By the Governor: L. T. Dashiell, Secretary of State."

The original authorization is as follows:

"Executive Department, State of Alabama. The Governor of the State of Alabama, to All to Whom These Presents shall Come—Greeting: Know ye that Robt. L. Collier is hereby authorized and empowered, as agent on the part of this state, to receive from the proper authorities of the state of Texas Henry Coleman, charged with the crime of murder, and who is a fugitive from justice, and convey him to this state, to be dealt with according to law. All persons are therefore requested to permit the said agent at his own proper cost to remove the said Henry Coleman unmolested into this state; the said agent peaceably and lawfully behaving. In witness whereof, I have hereunto set my hand and caused the great seal of the state to be affixed at the capitol in the city of Montgomery, this 7th day of Jan'y, in the year of our Lord one thousand nine hundred and eight, and in the one hundred and thirty-second year of American Independence. B. B. Comer, Governor of Alabama.

"By the Governor: Frank N. Julian, Secretary of State."

On the trial of the case before this court evidence was introduced showing conclusively that W. H. Coleman is the relator. Henry Coleman, the man called for in the executive warrant. Relator filed what he terms a contravention of the last statement; but, after a careful perusal of same, we find that there is no dispute thereof offered of the statement that he is the person wanted under the Governor's warrant. But he insists that after he committed the homicide he remained in Alabama for some time, then went to Georgia, and had been living in Texas a number of years; but in no respect does he dispute the fact that he is the same person for whom the Governor of this state issued his requisition, or executive warrant. We do not deem it necessary to comment in detail on the evidence on this question; but this, as we understand it, is the legal effect and proof upon the question as to relator's identity. Then we are relegated back to the question

of the sufficiency of the papers upon which the executive warrant is issued.

In approaching the question in this case, we deem it appropriate and quite apt to quote the language used by that great jurist, Judge Roberts, in the case of *Hibler v. State*, 43 Tex. 203, in discussing the duty of one Governor to honor a requisition, when properly made: "This provision of the Constitution of the United States, requiring the surrender of fugitives from justice, is in the nature of a treaty stipulation between the states of the Union, and it is equally binding upon each state and all of the officers thereof, for its faithful execution, as though it was a part of the Constitution of each state, whether Congress had passed laws relating thereto or not. Those laws have been passed to establish uniformity in the mode of performing this constitutional duty resting upon each state. When its execution is put into active operation by the proper authority of this state, the Governor, based upon the authentic information and demand as required by law, it is equally obligatory upon all of the officers of this state as is the enforcement of any criminal proceeding under the Constitution and laws of this state; and any undue means resorted to for the purpose of thwarting or preventing the due execution of this duty of the states are equally to be reprehended. This may be done by abusing and perverting the privileges of the writ of habeas corpus, as well as by any other means. This is a great writ of liberty, by being left unshackled with forms and conditions in the mode of obtaining it. Therefore it can easily be obtained where there is no foundation for it in fact or in law." We recognize, as suggested by the learned judge, that the beneficent writ of habeas corpus unshackled, as it is and ought to be, can be used as a means of frustrating the orderly proceedings and due administration of the laws of this state, and we hold that in this case the relator has abused the principle of the writ, in that there is no merit in his insistence that he is illegally restrained of his liberty. But under relator's insistence we will now proceed to pass upon many, if not all, of his insistences why he should be released.

We will first consider the supposed defects in the papers issued by the Governor of this state. It will be seen, from the warrant above copied, that the Governor says Henry Coleman stands charged by indictment before the proper authorities with the crime of murder; whereas, in truth and in fact, he is charged by an affidavit, as indicated by the affidavit of Elisha A. Reeves, above copied. This is a mere clerical error, since we can look, and must look, to both papers—that is, the executive warrant and the affidavit—and, when construed together, it clearly appears to have been a clerical error, in using the word "indictment" in the executive warrant. The Supreme Court of New Hamp-

shire, in the case of *State ex rel. Munsey v. Clough*, 72 N. H. 178, 53 Atl. 1086, 67 L. R. A. 946, says that a Governor's warrant for the arrest of a fugitive from justice is not void because it describes the offense as uttering forged wills, where the indictment in each count charged the uttering and publication as true of a "certain forged instrument purporting to be a will," where, by reference to the indictment, the meaning of the warrant is rendered plain and definite. So in this case, by reference to the warrant of the executive, it will be seen that it was the sheerest inadvertence that the word "indictment," instead of "affidavit," was used. Furthermore, said last-cited case holds that a finding that an accused is a fugitive from justice is not precluded by the fact that the indictment shows that the offenses were committed more than six years before the indictment was found. The application of the last-cited principle is pertinent, in this: Appellant insisted by his affidavit and testimony that by reason of the fact that he remained in Alabama for some time after the homicide, moved to Georgia, remaining in constant communication with the authorities in Alabama, or at least his whereabouts being well known by them, and moved from the last-named state to Texas, where he has lived a number of years, precludes the conclusion that he is a fugitive from justice. This proposition is furthermore answered by Judge Roberts in the case of *Hibler v. State*, 43 Tex. 203. It is there held that "a person who commits a crime in one state, for which he is indicted, and departs therefrom, and is found in another state, may well be regarded as a fugitive from justice in the sense in which it is here used."

It seems that after the arrest of relator the sheriff of Dallas county, who now has him in charge, was furnished an indictment, which indictment does not state the county or the state in which the crime was committed, nor the date thereof. The statement is made in the evidence that this indictment was furnished the sheriff by the officers of the state of Alabama. It will be noted, however, that the Governor of this state granted the requisition upon an affidavit, and not upon an indictment. The affidavit was made and the requisition granted prior to the time the indictment was found, and is in no sense a predicate for assailing the validity of the executive warrant of this state. However, even if appellant's insistence be correct, in the case of *Ex parte Pearce*, 32 Tex. Cr. R. 306, 23 S. W. 15, this court decided this question against appellant in the following language: "In the case at bar there is no question as to the nature of the crimes charged, and that they are offenses against the laws of Alabama. Embezzlement and theft are crimes in every state of the Union. Neither time nor place are essential elements in said crimes. We do not think an indictment failing to charge time and venue must neces-

sarily be fatally defective in every state in the Union, whatever be its statutes or forms of proceeding. In the case of *Noles v. State*, 24 Ala. 693, this question was passed on by the Supreme Court, which held that the then Code, dispensing with the necessity of allegation of time and venue, but requiring proof thereof, was not against the Bill of Rights; that the accusation of the commission of crime is the gravamen of the indictment that could not be dispensed with, but the particulars as to time, place, and circumstance, not constituting essential elements in the crime, may be dispensed with by statute, and be left as a matter of proof in establishing jurisdiction." So, if relator was held, as he insists, under an indictment that states no venue, that states no time, under the above excerpt from the decision last cited, it will be seen that, under the laws of the state of Alabama, these are not requisites of an indictment in said state. The indictment is preferred by a grand jury of Jefferson county, Ala. So, even conceding, as stated, relator's insistence that the requisition was granted upon the indictment above described, still this would not vitiate the proceedings or entitle relator to be discharged. In the *Pearce Case*, last cited, the lamented Judge Hurt very aptly put the duty of this court on the question of requisition, as follows: "Our position upon this question is that if it reasonably appears upon the trial of the habeas corpus that the relator is charged by indictment in the demanding state, whether the indictment be sufficient or not under the law of that state, the court trying the habeas corpus will not discharge the relator because of substantial defects in the indictment under the laws of the demanding state. To require this would entail upon the court an investigation of the sufficiency of the indictment in the demanding state, when the true rule is that, if it appears to the court that he is charged by indictment with an offense, all other prerequisites being complied with, the applicant should be extradited." The last expression of this court upon this question was in the case of *Ex parte Denning*, 100 S. W. 401, 18 Tex. Ct. Rep. 740. The requisition in that case presented to the Governor contained the following requisites: "(1) That the affidavit had been lodged in the demanding state. (2) The demand was made by the Governor of that state, stating that the affidavit was authentic. This left no discretion to the executive of this state. The law is mandatory when these two requirements are made, and there is but one thing for the executive of this state to do, and that is to issue the warrant, after ascertaining that the party was in fact a fugitive within the borders of this state, the manner of which ascertainment is left entirely to the discretion of the Governor of the fugitive state."

The papers before us are in all things formal, and, as stated at the outset of this opinion, there can be no serious cavil over the

fact that the sheriff of this county legally holds said relator under said executive warrant, and he is hereby remanded to the custody of said A. L. Ledbetter, sheriff of Dallas county, to be turned over by him to Robert L. Collier, who has heretofore been authorized by the Governor of Alabama to receive him and carry him from this state to the state of Alabama.

DE ROACH et al. v. CLARDY et al.

(Court of Civil Appeals of Texas. Oct. 14, 1908. On Rehearing, Nov. 4, 1908.)

1. DEEDS (§ 38*)—EXCEPTIONS—VALIDITY—UNCERTAINTY OF EXCEPTED PART—EFFECT.

A grant of a certain entire tract, excepting a part thereof, is not executory, and, if the land excepted is not described with certainty, the exception will fail, and not the grant, as the uncertainty affects the exception only.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 72; Dec. Dig. § 33.*]

2. DEEDS (§ 137*)—EXCEPTIONS—CONSTRUCTION.

A grant of all "that portion of a tract of 150 acres," described, except certain parcels previously conveyed, and excepting further "three acres upon which our residence now is, and adjoining the same," was a grant of the entire 150 acres excepting therefrom what had been conveyed and the three acres, and not of that portion of the 150 acres remaining after taking away the excepted parts.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 457; Dec. Dig. § 137.*]

3. DEEDS (§ 140*)—EXCEPTIONS—CONSTRUCTION—SELECTION OF LAND EXCEPTED.

A deed granted all "that portion" of a certain tract of 150 acres, excepting "three acres upon which our residence now is, and adjoining the same, and which said tract is to be hereafter surveyed for us," and thereafter the grantor conveyed a lot adjacent to the residence, bounding it by the land so conveyed. *Held*, that the deed, construed in the light of the grantor's subsequent conveyance, showed that the grantor had the right of selecting the three acres excepted, so that the grantee was not bound to make a survey to give validity to the deed.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 140.*]

4. DEEDS (§ 140*)—EXCEPTIONS—CONSTRUCTION—SELECTION OF LAND EXCEPTED.

Where a tract was granted, excepting three acres, which the grantor had the right to select, he could not defeat the grant by failing to make the selection.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 140.*]

5. JUDGMENT (§ 252*)—RELIEF GRANTED—CONFORMITY TO PLEADINGS.

In trespass to try title to land conveyed by plaintiff's predecessors, the deed excepting three acres which were to be thereafter surveyed, but had never been determined with certainty, plaintiff seeking to have the deed declared void and the land it purported to convey adjudged in him, upon judgment for defendant, plaintiff may not complain that the judgment did not adjudicate the boundaries of the three acres, as he was not entitled to that relief under the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.*]

On Motion for Rehearing.

6. TRESPASS TO TRY TITLE (§ 35*)—PLEADING—VARIANCE.

Where, in trespass to try title, defendant pleads title specially, he cannot rely on any other title.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 50-52; Dec. Dig. § 35.*]

7. TRESPASS TO TRY TITLE (§ 6*)—RIGHT OF ACTION—TITLE TO SUPPORT ACTION.

Plaintiff in trespass to try title cannot recover if he fails to make out his title, even though defendant pleads specially a title which he fails to prove.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 16; Dec. Dig. § 6.*]

Appeal from District Court, El Paso County; J. M. Goggins, Judge.

Action by L. Aguirre De Roach and others against Allie D. Clardy and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

F. G. Morris, for appellants. A. G. Foster and Turney & Burges, for appellees.

JAMES, C. J. Appellants were the plaintiffs in an action of trespass to try title against Mrs. Allie D. Clardy and F. Desloge. Plaintiffs alleged possession in themselves of a certain tract of 53¼ acres of land, which remained of a larger tract of 150 acres described in a deed from Pedro Aguirre and wife to Zeno B. Clardy and F. Desloge, less parts thereof previously conveyed by Aguirre and wife, and 3 acres in a certain locality. The amended petition set forth said deed; that plaintiffs were the heirs of Pedro Aguirre and wife; that defendant Allie B. Clardy was the sole devisee and independent executrix of Zeno B. Clardy, and alleged that said deed never took effect as a conveyance of any land, for that there was never surveyed for the said Pedro Aguirre and wife three acres of land upon which their residence was at the time the deed was signed, and adjoining said residence, and, without such survey being made for them of said land, said deed did not identify any land so as to operate as a conveyance thereof; that no survey of said three acres having ever been made, said deed, if it had any effect, remained executory, and did not take effect as to any land and has so remained for 4 years, more than 10 years, and 19 years, after its execution, wherefore the right of the vendees, if any such right existed to have said survey made of said three acres for Pedro Aguirre or his heirs, so as to give effect to said deed, has long since become a stale demand, and said right is also barred by the statute of four years. The prayer was for decree setting aside said deed, that plaintiffs have their title to said land established, and defendants' claim thereto, constituting a cloud on plaintiffs' title, removed, and for general relief. The above indicates the nature of the case. The result of the trial will be shown by a brief statement

from the judge's conclusions; there being otherwise no statement of facts.

The court found that the deed, as above described, was executed by Pedro Aguirre and wife on July 14, 1887; "that neither plaintiffs nor defendants at any time have surveyed or otherwise segregated the three acres for Pedro Aguirre or his heirs adjoining his residence, except that sufficient land remains unsold around the residence of Pedro Aguirre to make the quantity of three acres, and that possession of the land around the residence of said Pedro Aguirre has at all times remained in Pedro Aguirre and wife, and since their deaths in their heirs, and that such possession of said land has always been respected by said defendants, and that said defendants have treated the land so held by plaintiffs as the property of Pedro Aguirre, his wife, and their heirs, and it was generally understood by the parties that the three acres meant were three acres immediately surrounding the house; that the plaintiffs executed a deed to a portion of the land lying east of the Aguirre home, describing said land as being bounded on the east 119 feet with the lands of Mr. Clardy and bounded on the north 56 feet with land of Mr. Clardy, which deed was a confirmation deed of one given by Ysabel Aguirre in her lifetime on February 7, 1891"; that Pedro Aguirre and his wife remained in possession of said homestead and resided there until their death, the latter dying in 1892, and that thereafter and up to this time their daughter has remained there, but not by such assertion of claim as makes title to land by limitation, and that neither plaintiffs nor defendants had any title by that character of possession. The court also found that Z. B. Clardy and F. Desloge paid taxes on 170 acres out of the Elijah Bennett survey No. 11 in the year 1887 and in 1888 and all subsequent years on 250 acres out of said survey, and that Victoriano Martinez (husband of one of the plaintiffs) rendered for taxes in 1888 in the name of Pedro Aguirre 30 acres of said survey, and in 1890 there was rendered and paid on 3 acres of said survey in the name of Pedro Aguirre, and that for the years 1904, 1905, 1906, and 1907 Chona Lucero, who remained in possession of the Aguirre house, rendered and paid taxes on 3 acres of said survey, and stated that her claim was for 3 acres of land. The court's conclusion of law was that the deed by Pedro Aguirre and wife operated to vest title in Clardy and Desloge to all the land described as unsold, except three acres adjoining the house in which Aguirre and wife resided at the time the deed was executed. The judgment rendered was that plaintiffs take nothing and that defendants have and recover of plaintiffs the land involved, describing the 53¼ acres by metes and bounds, "except three acres" of land upon which was situated on the 14th day of July, 1887, the residence of Pedro Aguirre and wife, and ad-

joining said residence. Plaintiffs have appealed.

The two propositions upon which appellants rely in this court under their assignments are:

First proposition:

"The granting clause of the deed from Aguirre and wife to Clardy and Desloge being operative only on 'that portion of a tract of 150 acres * * * except [certain tracts before sold], and excepting, further, three acres upon which our residence now is, and adjoining the same, and which said tract is to be hereafter surveyed for us,' the grant could not take effect without identifying that on which the grant was to operate by eliminating that on which the grant did not operate. The grantors did not convey the 150-acre tract by the granting clause and then provide for exceptions out of it of certain parts, but the granting clause only operated on that portion which remained after withholding from the operative words of conveyance all except that part remaining after eliminating certain parts, and, the three acres to be surveyed adjoining and to include the house not being described so that they could be identified at the time the deed was executed, the deed attempted to convey a particular part of a larger survey, and not an undivided interest, and, the part on which the granting clause was intended to operate not being susceptible to identification otherwise than by describing the parts on which the granting clause did not operate, the deed constituted an attempt to convey and describe a particular part of a larger tract of land, and was void for uncertainty as to the particular part on which the conveyance was intended to operate, and did not convey an undivided interest, this not being intended by the parties, and, the right given the grantees to select and survey for the grantors three acres adjoining and to include the grantors' house never having been exercised, the deed never took effect as a conveyance of any land, but remained executory. Without such selection and survey or pleading the right and offering to specifically perform the same, said deed was no obstacle to a recovery by plaintiffs, the successors in title of the grantors, in an action of trespass to try title."

Second proposition:

"The deed under which defendants claim not having vested any title when executed, but having remained executory, the right of defendants to tender performance by selecting and surveying for plaintiffs, especially as to J. A. Lowe, who holds by purchase from the heirs of the grantor, after 20 years from the accrual of a cause of action for specific performance accrued, is barred by the four-year statute of limitation, and has become a stale demand, and could not now be exercised, nor was any offer or tender of performance made in this suit. Therefore judgment should have been for plaintiffs." The exceptions in the granting clause are in the follow-

ing language: "Have granted, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said F. Desloge and Zeno B. Clardy * * * all that certain piece or parcel of land situated in the county of El Paso and state of Texas, and being all that portion of a tract of 150 acres part of survey No. 11 conveyed to said Pedro Aguirre by Joseph Magaffin * * * except certain pieces or parcels of land out of said tract which we have heretofore conveyed by deed to * * * all of said deeds to said grantees being recorded in the deed records of said county * * * and excepting further three acres upon which our residence now is and adjoining the same and which said tract is to be hereafter surveyed for us." The parts referred to as previously sold off were identified. The primary contention of appellants is that the granting clause did not purport to grant the entire tract of 150 acres less the exceptions; but in express language operated only upon what land was left after taking from the 150-acre tract the parcels excepted. The rule is that a grant of a certain entire tract, excepting a portion, is not executory in any sense, and, if the land sought to be excepted is so described as to be unascertainable, it is the exception that will fail, and not the grant, as the uncertainty affects the exception only. *Loyd v. Oates*, 143 Ala. 231, 38 South. 1022, 111 Am. St. Rep. 39; *McAllister v. Honea*, 71 Miss. 256, 14 South. 264. The converse of this proposition is what appellants invoke as applicable to the granting clause in question. The position is made clear by a quotation from *Frank v. Myers*, 97 Ala. 444, 11 South. 835, in discussing certain cited cases: "In neither of these cases did the vendor sell a certain whole excepting an uncertain part, but attempted to sell an uncertain part of a certain whole. The uncertainty and infirmity which render inoperative a sale like these lie in the grant itself, and not in any uncertain exception from the grant." There is therefore some ground for appellant's construction of the clause, because it uses the words "that portion" of the tract of 150 acres, from which it would appear that this granting clause operated upon, and was in terms addressed, only to that portion of the 150 acres which remained after taking off the excepted parts, using the excepted parts of the 150 acres merely as a matter of description of "that portion" which was granted; that making uncertainty exist in the grant itself.

The contention just referred to is, however, dealing with the clause upon the abstract theory that the three-acre exception as described in the deed is incapable of identification. As we think the said three-acre tract was left, and is, susceptible of identification, there is really no need of our holding that this granting clause is or is not entitled to the effect contended for. We will state, nevertheless, that the clause, when read in its

entirety, shows that the intention of the grantors was to pass title to all of the 150 acres, excepting therefrom what had previously been conveyed and the 3 acres. The very use of the word "except" indicates this. The exception reads: "And excepting, further, three acres upon which our residence now is and adjoining the same and which said tract is to be hereafter surveyed for us." The facts are that the deed was made in July, 1887; that the grantors were living in a house upon the three acres at the time, and up to their death, the husband dying first and the wife dying in 1892, and their heirs have since been living there, using the surrounding land, it being treated as theirs by defendants; that it was generally understood that the three acres meant the three acres immediately surrounding the house, and that in November, 1906, the plaintiff Carolina Aguirre Martinez and her husband executed a deed to a portion of land lying east of the Aguirre house, describing the same as being bounded on the east 119 feet with the lands of Mr. Clardy and bounded on the north 56 feet with land of Mr. Clardy, which deed was a confirmation deed of one given by Ysabel Aguirre in her lifetime in 1891. In the first place, we believe that appellant's counsel is in error in saying that the deed imposed upon the grantees the duty to survey the three-acre tract for the grantors. The deed does not say so. It says that it was to be surveyed for the grantors. We take this to mean that it was to be surveyed in their behalf, or in their interest. It meant that the grantors were to have the three acres about the house as they wished it. It would be wholly unreasonable to say (unless the deed had expressed otherwise) that the grantees were authorized to survey off any three acres, including the house, in any shape they saw fit, for the grantors, when both the exception and the mode of its ascertainment were manifestly to be in the interest of the grantors, they alone knowing their desires in that respect. But we are not left to the bare language of the deed. In questions of this kind light is thrown upon what was intended by the practical construction placed upon the clause by the parties. Neither party called upon the other to make any designation. The surrounding land remained open except as used by the occupants of the Aguirre house. But in 1891 Mrs. Aguirre, who had survived her husband, deeded a lot east of the house and bounded it on the east and north by the land of Mr. Clardy, which deed was long afterward confirmed by another deed. This would appear to have been in respect to the excepted three acres, and a selection, or designation in respect to it, at least so far as fixing one corner was concerned, and the north and east lines to some extent. We thus have the grantors acting upon the theory that the deed gave them the right of selection, and it

does not appear that this exercise of the right was ever questioned.

Accordingly we conclude that it was not necessary for the grantees to designate the three acres, in order to give the deed validity. The matter involved here is essentially different for a grant such as of a certain number of acres to be selected by the grantee out of a tract, which is held to be executory, and as not confirming any title until the selection is made, and that such right of selection in the grantee may not be enforced after the lapse of too long a time. The present is the case of a grant, depending upon the selection or description by the grantor of a certain excepted number of acres at a certain locality, and he and his heirs cannot defeat the grant by their own failure to make the selection. Enough has been said to dispose of both the propositions. The judgment rendered does not adjudicate the boundaries of the three acres. The plaintiff did not seek such adjudication, but sought to have the deed declared void, and to have the entire land attempted to be conveyed by it adjudged to them. This they were not entitled to, and under the pleadings and evidence they have no just reason to complain of the judgment as rendered.

Affirmed.

On Rehearing.

The amended petition on which the case was tried set forth the conveyance from plaintiffs' ancestors to defendants, and alleged that it was not signed by the ancestors, and, if signed, was void for indefinite description. We might presume that plaintiffs introduced the deed in evidence. The fact is it was introduced and was the basis of the controversy; and, by whomsoever introduced, it precluded plaintiffs from recovering upon their pleadings in so far as it had validity as a conveyance. It is true that defendants pleaded and sought to establish that the three acres had been agreed upon, or had been selected, and that the proof failed to show this. Nevertheless defendants were entitled to the benefits the deed conferred on them, and plaintiffs were not entitled to relief contrary to its effect. The judgment entered was in accordance with a correct construction of the deed, and the court, evidently from lack of proof, was unable to correctly go further than to make the adjudication it did. It is undoubtedly true that when, in trespass to try title, defendant pleads title specially, he can rely on no other. But, viewing the amended pleading as embodying the statutory action of trespass to try title (which we think it was not), it is equally true that plaintiff in such an action, even when defendant pleads specially a title which he fails to prove, cannot recover if the evidence develops he has no right to the relief he asks. *Hayes v. Galla-*

her, 21 Tex. Civ. App. 90, 51 S. W. 280; *Hutcheson v. Chandler* (Tex. Civ. App.) 104 S. W. 436.

The motion is overruled.

BLACKBURN v. CHERRY.

(Supreme Court of Arkansas. Oct. 12, 1908.)

1. DEEDS (§ 193*)—VALIDITY—BURDEN OF PROOF.

One asserting that a deed was a forgery had the burden of proving it.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 564; Dec. Dig. § 193.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—EVIDENCE—CHANCERY DECREES.

The Supreme Court will not reverse a chancery decree, unless the finding is against the preponderance of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Pulaski Chancery Court; Jesse C. Hart, Chancellor.

Action by Cinderella E. Blackburn against L. W. Cherry, trustee. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

Carmichael, Brooks & Powers, for appellant. Whipple & Whipple, for appellee.

HILL, C. J. Cinderella E. Blackburn and Gideon E. Blackburn were husband and wife, and the wife owned the tract of land in controversy, containing 160 acres, situated in Pulaski county. Mrs. Blackburn obtained a decree of divorce from her husband on the 9th of October, 1890. A certain deed, purporting to be executed by her and her then husband, Gideon E. Blackburn, on the 5th of June, 1890, conveyed the land to James P. Webb. Mrs. Blackburn brought suit in chancery, alleging that said deed was a forgery, and asked that the defendants be restrained and enjoined from selling and conveying the property and from transferring, negotiating, or handling any of the purchase-money notes which they may have given to Gideon E. Blackburn for it, and that the deed be set aside and held for naught, and her title quieted. The suit was brought against Blackburn, who was subsequently dismissed from it, and against Cherry and Cox, who held under conveyances the validity of which was dependent upon the deed from Mrs. Blackburn to Webb. The chancellor held that said deed was not a forgery, but was a good and valid deed, and dismissed plaintiff's complaint for want of equity, and quieted the title of defendants. From this decree she has appealed.

Several questions are discussed; but, as the court views the facts, these questions are unnecessary to the determination of the case. The evidence of the forgery of the deed is the testimony of Mrs. Blackburn, which is positive and direct, and that of her daughter,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

who says that the signature to the deed is not the signature of her mother. On the other side, the clerk of the court before whom the deed was purported to be acknowledged testifies positively that he knew Mrs. Blackburn, and remembers her execution of the deed. He says that she signed it in his presence and acknowledged it. The deed bears his certificate and the seal of the court. It also bears the name of a third party as witness, and this party testifies that he witnessed the execution of the deed. There is some corroborating evidence tending to support each side; but this is all of the direct evidence in the record. The burden was upon Mrs. Blackburn to establish by a preponderance of the testimony that the deed was a forgery, and in this she has failed; and the chancellor properly so held. This court does not reverse chancery decrees unless the finding is against the preponderance of the evidence; and it cannot be said to be that in this case.

Even if Mrs. Blackburn had sustained her case by a preponderance of the evidence, still she would have been barred of recovery by reason of her own laches. But it is not necessary to review the facts upon that subject, as the proposition already mentioned settles the appeal.

The judgment is affirmed.

HART, J., who presided in the chancery court, was disqualified and did not participate. McCULLOCH, J., being related to one of the parties, did not participate.

THOMPSON et al. v. BOWEN.

(Supreme Court of Arkansas. Oct. 12, 1908.)

1. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASERS—NOTICE—RECORDS—CHAIN OF TITLE.

A purchaser of land must take notice of all prior recorded instruments in the line of his purchased title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513, 515; Dec. Dig. § 231.*]

2. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASERS—NOTICE—RECORDS—CERTIFICATE OF ENTRY ISSUED BY STATE PRIOR TO PATENT.

A certificate of entry, issued by the state prior to issuance of patent to another person, is not in the line of title of persons holding under the patent, so as to charge them with notice of outstanding equities under the certificate; and, in the absence of actual notice, they may presume that the state officers had done their duty and issued the patent to the person entitled to it.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 513-515; Dec. Dig. § 231.*]

3. VENDOR AND PURCHASER (§ 230*)—TITLE—NOTICE OF OUTSTANDING CLAIMS—RECITALS IN CONVEYANCE.

A recital in a patent that it was issued upon a certificate issued from the land department "in favor of A., widow of J.," did not charge one

in whose chain of title the patent was a link with notice that the conveyance was to A. as widow or by virtue of her rights as widow; the words "widow of J.," being only a description of the person, and not limiting the estate taken by the patent.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 504; Dec. Dig. § 230.*]

Appeal from Mississippi Chancery Court; Edward D. Robertson, Chancellor.

Suit by G. W. Thompson and others against W. J. Bowen. Decree for defendant, and plaintiffs appeal. Affirmed.

Edwards & Ledbetter and D. F. Taylor, for appellants. W. J. Driver, for appellee.

MCCULLOCH, J. Appellants, as heirs at law of James H. Thompson, deceased, sue to recover a quarter section of land in Mississippi county. In 1885 James H. Thompson purchased said tract of land, which was swamp and overflowed land, from the state of Arkansas, paid the purchase price, and received a certificate of entry. He died in 1861, leaving surviving his widow, Ann Thompson, and two children, who continued in possession of the land. In 1870 the State Land Commissioner, upon proof being made by affidavit filed in his office of the loss of said certificate, issued a duplicate certificate to the widow, Ann Thompson; and on February 23, 1870, the Governor of the state executed to Ann Thompson his deed on behalf of the state, purporting to convey said land to her in fee simple. The deed contained a recital that "the Land Commissioner of the state of Arkansas did grant his certificate, dated the 12th day of February, 1870, and numbered 56, to and in favor of Ann Thompson, widow of James H. Thompson," for said land. It also recited that "Ann Thompson is entitled to a deed from the state of Arkansas for said lands," and purports to convey the same to "Ann Thompson and her heirs and assigns." The same language is employed in the habendum clause, and in no part of the deed is any reference made to the prior issuance of the certificate to James H. Thompson. This deed was duly recorded, and on January 2, 1900, said Ann Thompson, who had continued in possession of the land up to that time, sold and conveyed it to appellee, who paid a valuable consideration and claims to be innocent of any actual knowledge or information concerning the issuance of a certificate to James H. Thompson. Appellants pray that the appellee be declared to be a trustee for them as equitable owners of the land and that the same be decreed to them.

The preponderance of the testimony supports the finding of the chancellor that appellee had no actual knowledge of any infirmity in the title, and the only question of law presented for our consideration is whether or not he is chargeable with constructive notice of the purchase of the land by James H.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Thompson and the issuance to the latter of the certificate of entry.

It is a well-established principle of law that a purchaser of real estate must take notice of all prior recorded instruments in the line of his purchased title. Is a certificate of entry, issued by the state prior to the issuance of a patent to another person, to be considered in the line of title of persons holding under the patent, so as to charge them with notice of outstanding equities under the certificate? This court seems to have already answered this question in the negative. *Osceola Land Co. v. Chicago M. & L. Co.*, 84 Ark. 1, 103 S. W. 609. In that case, which involved this question, Mr. Justice Riddick, speaking for the court, said: "Chatfield held under a patent from the state, and those who purchased from him could, in the absence of actual notice, rest upon the presumption that the officers of the state had done their duty and issued the patent to the person entitled to receive it." The same view is expressed by the Supreme Court of the United States in *United States v. C. & O. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354.

My attention is now directed to the fact that Mr. Justice BATTLE and myself are noted as dissenting in the case of *Osceola Land Co. v. Chicago M. & L. Co.*, supra. This is an error. We both concurred in the result reached by the court in that case, but differed with the other judges, who held that the tax confirmation decree in favor of Boynton had the effect of transferring any equitable right or title which Rozell may have had. We thought that the decree did not have such effect, and that for this additional reason the decree of the chancellor was erroneous, and should be reversed. We should have been noted as concurring in the result, but not in the opinion, instead of dissenting.

But it is contended by counsel for appellants that, conceding that appellee was not chargeable with constructive notice of the prior certificate of entry issued to James H. Thompson and the equitable title which passed thereunder, the recitals of the patent to Ann Thompson were sufficient to put him upon actual notice of the prior certificate. The patent recites that it was issued upon a certificate issued from the land department "in favor of Ann Thompson, widow of James H. Thompson." It is argued that this recital was sufficient to indicate that Ann Thompson took the title as widow of James H. Thompson, and by virtue of her right as widow, and that it was notice to appellee that Ann Thompson held the title in trust for the heirs of James H. Thompson. Appellee was, of course, chargeable with notice of all recitals in the conveyance in the chain of his title; but we do not think this recital was sufficient to indicate that the conveyance was to Ann Thompson as widow, or by virtue of her rights as widow. The employment of

the words "widow of James H. Thompson" can only be regarded as descriptive of the person, and not as limiting the estate taken under the patent. 13 Cyc. 625; *Jackson v. Roberts*, 95 Ky. 410, 25 S. W. 879; *Richardson v. McLemore*, 60 Miss. 315; *Barrett v. Cochran*, 11 S. C. 29; *Combs v. Brown*, 29 N. J. Law, 36; *Hart v. Seymore*, 147 Ill. 598, 35 N. E. 246; *Kenenbley v. Volkenberg*, 70 App. Div. 97, 75 N. Y. Supp. 8.

Decree affirmed.

JEFFERY et al. v. JEFFERY et al.

(Supreme Court of Arkansas. Oct. 12, 1908.)

1. ADVERSE POSSESSION (§ 113*)—ADMISSIBILITY OF EVIDENCE.

In ejectment, where plaintiffs claimed under adverse possession of themselves and ancestors, evidence that plaintiffs' father had told them that the land belonged to their mother was not admissible to establish adverse possession, but only to show the character and extent of his possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 670; Dec. Dig. § 113.*]

2. ADVERSE POSSESSION (§ 13*)—REQUISITES—OPEN AND NOTORIOUS POSSESSION.

To acquire title by adverse possession, there must be open, notorious, peaceable, continuous, and adverse possession of the land for more than seven years.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 65; Dec. Dig. § 13.*]

3. ADVERSE POSSESSION (§ 114*)—SUFFICIENCY OF EVIDENCE.

Admissions by defendant, holding the paper title to land, held not sufficient to establish title in others by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

Appeal from Circuit Court, Izard County; J. W. Meeks, Judge.

Ejectment by M. E. Jeffery and others against P. H. Jeffery and another. Judgment for plaintiffs, and defendants appeal. Reversed, and remanded for a new trial.

J. B. Baker, for appellants. McCaleb & Reeder, for appellees.

HART, J. This is an action of ejectment brought in the Izard circuit court by the plaintiffs, M. E. Jeffery, W. W. Jeffery, and R. M. Jeffery against the defendants, P. H. Jeffery and the Mt. Olive Stove Company, for the possession of the lands described in the complaint. Plaintiffs allege that their mother, Mary A. Jeffery, departed this life intestate on the 19th day of August, 1892, leaving them as her children and only heirs at law, and that at the date of her death she was seised and possessed of the lands described in the complaint; that the plaintiffs became tenants in common of said lands, subject to the curtesy of their father, Asa Jeffery, who held possession of the lands until his death, which occurred in June, 1906; that the plaintiffs

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and their said ancestors have held the open, notorious, peaceable, continuous, and adverse possession of said lands for more than seven years continuously prior to the year 1904, claiming it as their own; and that they became the owners thereof by virtue of the statute of limitations. Defendants answered, denying the allegations of the complaint, and affirmatively set up title in themselves by virtue of a commissioner's deed, executed pursuant to the judgment and order of the probate court of Izard county. The evidence is sufficiently stated in the opinion in discussing the effect of it. There was a jury trial, and a verdict for the plaintiffs, and defendants have appealed.

Defendants contend that the verdict is not sustained by the evidence. In this they are correct. It is not disputed that the paper title is in the defendant P. H. Jeffery. In 1873, Asa Jeffery, the father of the plaintiffs, and Ambrose Jeffery, while they were partners in business, bought the land in controversy at a guardian's sale in the probate court, and executed their note for the purchase money. They were indebted to the defendant P. H. Jeffery for service rendered the firm, and assigned to him their certificate of purchase in payment therefor, and for the further consideration that he pay the balance due by them on the purchase money. This he did, and by order of the probate court the deed was executed to him, reciting the above facts. Plaintiffs claim title by the adverse possession of themselves and of their ancestors. In support of their claim they testified that their father, Asa Jeffery, had told them that the land in controversy belonged to their mother. These declarations were not admissible for the purpose of establishing adverse possession, but were only admissible to show the character and extent of his possession. *Seawell v. Young*, 77 Ark. 309, 91 S. W. 544.

The only other evidence is that of witnesses who testify that P. H. Jeffery had admitted to them that the land in controversy belonged to Asa Jeffery, and that he had paid a mare at one time and some cotton at another to Asa Jeffery, which witness M. E. Jeffery understood was for rent of the land. P. H. Jeffery explains that he had sold to Asa Jeffery a mare and took his notes for same, and that he sent M. E. Jeffery after them. He stated that block 6, which belonged to Asa Jeffery, and block 7, the land in controversy, were under a common inclosure by agreement, and that he rented both pieces to the same tenant in 1888; that he collected the rent, and sent half of it to Asa Jeffery by M. E. Jeffery.

Plaintiffs and their ancestors must have held the open, notorious, peaceable, continuous, and adverse possession of the lands for more than seven years, to amount to an investiture of title. *Jacks v. Chaffin*, 34 Ark.

534; *Logan et al. v. Jelks*, 34 Ark. 547; *Crease v. Lawrence*, 48 Ark. 312, 3 S. W. 196; *Nicklace v. Dickerson*, 65 Ark. 422, 46 S. W. 945. We do not think that the admissions testified to as having been made by P. H. Jeffery are sufficient to establish title by adverse possession.

The judgment is reversed, and the cause remanded for a new trial.

KNAUFF v. NATIONAL COOPERAGE & WOODENWARE CO.

(Supreme Court of Arkansas. Oct. 12, 1908.)

1. QUIETING TITLE (§ 14*)—CONDITIONS PRECEDENT—PAYMENT OF TAXES.

Kirby's Dig. §§ 661-675, authorizing confirmation of tax titles and other titles under involuntary sales, provided petitioner shall have "paid taxes on the lands for at least two years after the expiration of the right of redemption," does not apply to an adversary suit to litigate conflicting titles and quiet the superior one, so as to require plaintiff to allege payment of such taxes, as the jurisdiction of chancery over such subjects is exercised independently of statute.

[Ed. Note.—For other cases, see *Quieting Title*, Dec. Dig. § 14.*]

2. TAXATION (§ 809*)—CONFIRMATION OF TAX TITLE—COMPLAINT—SUFFICIENCY.

A complaint alleging that plaintiff was the owner of lands, claiming under a tax deed, that the lands were not occupied by an adverse claimant, and that defendant was asserting title thereto and paying taxes, states a cause of action to quiet title under the general equity jurisdiction of the court, irrespective of whether plaintiff was entitled to a general decree for confirmation of the tax sale, under Kirby's Dig. §§ 661-675.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1601; Dec. Dig. § 809.*]

Appeal from Prairie Chancery Court; Jno. M. Elliott, Chancellor.

Suit by O. O. Knauff against the National Cooperage & Woodenware Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

W. A. Leach, for appellant. Thomas & Lee, for appellee.

McCULLOCH, J. Appellant filed his complaint or petition in chancery, alleging that he is the owner of certain lands in Prairie county, claiming title thereto under a clerk's deed executed July 21, 1905, pursuant to sale by the collector for delinquent taxes, and praying that his title to said lands be quieted. He also alleged that appellee is setting up a claim to said lands and has been paying taxes thereon from year to year, and he asked that appellee be made a party defendant in the suit. Appellee was brought in by service of summons, and filed its demurrer to the complaint, which the court sustained.

Appellee defends this ruling of the court on the ground that appellant fails to allege in his complaint that he had "paid taxes on

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the lands for at least two years after the expiration of the right of redemption," in compliance with the requirements of the statute authorizing confirmation of tax titles and other titles under involuntary sales. Kirby's Dig. §§ 661-675. It is contended that a title under a tax sale or other involuntary sale mentioned in the statute cannot be quieted unless the terms of the statute be fully complied with. The vice of this contention is that it seeks to apply the requirements of the statute to adversary suits, such as this one, between parties for the purpose of litigating conflicting titles and quieting the superior one. The statute does not control in such suits, as the jurisdiction of chancery courts over such subjects is exercised independently of statute. The statute, in so far as it confers jurisdiction in such cases over which courts of equity formerly exercised jurisdiction, is to that extent merely declaratory of existing powers, and not a grant of additional powers. *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696; *Boyce v. Grundy*, 3 Pet. 210, 7 L. Ed. 655.

The complaint alleges that the land is unoccupied by an adverse claimant and that appellee is asserting title thereto and paying taxes on the land. This states a cause of action in an adversary suit, and, if sustained by proof, is sufficient to entitle appellant to relief. The court should, under that state of the case, grant the relief prayed for by removing the alleged cloud and quieting appellant's title. Even if appellant is not entitled under the statute to a general decree for confirmation of the tax sale, the complaint states a case for relief in this adversary suit against appellee, and it was error to sustain a demurrer to the complaint, which is at least good to the extent that it states grounds for equitable relief against appellee.

Reversed and remanded, with directions to overrule the demurrer to the complaint.

KITCHENS, Public Adm'r, v. JONES et al. (Supreme Court of Arkansas. Oct. 12, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 181*)—WIDOW'S ALLOWANCE—STATUTES—CONSTRUCTION.

A widow's allowance authorized by Kirby's Dig. § 3, to the extent of \$300, can only be granted out of the decedent's personal estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 681; Dec. Dig. § 181.*]

2. CONVERSION (§ 6*)—EQUITABLE CONVERSION—SURPLUS ON FORECLOSURE.

An equity of redemption in mortgage property being an estate subject to all the incidents of ownership, a surplus arising on a foreclosure sale of land belonging to a decedent's estate is not thereby converted into personalty, but partakes of all the incidents of real estate.

[Ed. Note.—For other cases, see *Conversion*, Cent. Dig. § 10; Dec. Dig. § 6.*]

3. EXECUTORS AND ADMINISTRATORS (§ 181*)—MORTGAGE FORECLOSURE—SURPLUS—WIDOW'S ALLOWANCE.

The status of a decedent's estate being fixed as of the date of his death, a surplus arising on a subsequent sale of his land on mortgage foreclosure was not available for the payment of an allowance to the widow, but was distributable to the widow and children as realty, according to the statute of descent and distribution.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 681; Dec. Dig. § 181.*]

Appeal from Circuit Court, Phillips County; Hance N. Hutton, Judge.

Petition by Charity Jones and others against F. F. Kitchens, public administrator. Judgment for petitioners, and defendant appeals. Reversed and remanded.

Campbell & Stevenson and J. M. Vineyard, for appellant. M. L. Stephenson, for appellees.

HILL, C. J. John Jones died in April, 1906, leaving a widow and children, some of whom were minors. At the time of his death he was the owner of certain real estate in the city of Helena, which was incumbered by a deed of trust. Default had occurred in the performance of the conditions of the deed of trust before his death, and, after his death, the deed was foreclosed in the chancery court, and the property sold by a commissioner of the court to satisfy the mortgage debt. The proceeds of the sale paid off the mortgage and left a surplus of \$554.57, which was turned over by the commissioner in chancery to Kitchens, public administrator, who was administering the estate of Jones. The land was not the homestead of the deceased. The dower rights of the widow had been released in the trust deed. This surplus was the only asset of the estate, which was insolvent. Charity Jones filed a petition in the probate court of Phillips county, representing that she was the widow, and that there were minor children, of the said John Jones, deceased; that the estate of her husband exceeded \$300 in value; and she prayed that the sum of \$300 be paid to her out of said fund for the use of herself and minor children. Trial was had in the probate court, and, on appeal, in the circuit court, upon an agreed statement of facts. The circuit judge granted the petition, and the administrator has appealed.

This appeal involves a construction of section 3 of Kirby's Digest, which reads as follows: "When any person shall die leaving a widow and minor children, or widow or minor children, and it shall be made to appear to the court that the personal estate of such deceased person does not exceed in value the sum of three hundred dollars, the court shall make an order vesting such personal property absolutely in the widow and minor children, or widow or minor children, as the case may be, when the court is satisfied that rea-

sonable funeral expenses of such persons not to exceed twenty-five dollars have been paid or secured; and in all cases where the personal estate exceeds in value the sum of three hundred dollars, the widow and minor children, or widow or minor children, as the case may be, may retain the amount of three hundred dollars out of such personal property at its appraised valuation." In *Wilson v. Massie*, 70 Ark. 25, 65 S. W. 942, it was held that this statute repealed the pre-existing statutes upon this subject, and effected a change in the law from an estimate of the whole mass of the decedent's property to an estimate of the personal property alone in making this allowance to the widow and minor children. This case, therefore, turns upon the character of the estate of Jones in the mortgaged property. In *State for the Use of Ashley & Watkins v. Lawson et al.*, 6 Ark. 269, the court said: "The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law, and is accordingly held to be descendible by inheritance, devisable by will and alienable by deed, precisely as if it were an estate of inheritance at law." The nature of the equity of redemption is thus stated in the encyclopedia: "An equity of redemption is an estate in the mortgaged property, and is subject to all the incidents of ownership. It may be conveyed or devised. It descends to the owner's heirs or personal representatives according to the nature of the mortgaged property, and is subject to curtesy and homestead." 11 Am. & Eng. Enc. 209, 210. The text is well supported by authority, including several Arkansas cases cited in the note. It is clear, therefore, that the equity of redemption left by Jones at his death was real property, and descended as real property descends.

The question remains whether its conversion into cash through the foreclosure of the mortgage changed its character within the meaning of this statute. The argument is made that the power of conversion is well established, and that the chancery court had the right to convert the realty into personalty; and, having that right, that it changed the character of the property. A consideration of the cases cited may be useful. *Coolidge v. Burke*, 69 Ark. 237, 62 S. W. 583, and *Lenow v. Fones*, 48 Ark. 557, 4 S. W. 56, were cases where the surviving partner converted partnership assets from one class of property to another, and it was held that the property passed in its converted state. The same principle was recently recognized in *French v. Vanatta*, 83 Ark. 306, 104 S. W. 141. There is a radical difference between those cases and this. The estate of a partner does not take a share of the partnership assets until the partnership is wound up; and a surviving partner, or a court, in order to wind it up, may convert it, and naturally the asset coming from the partner-

ship should descend in the form in which it falls into the estate. But in the case at bar the right of the widow and minor heirs accrued, under the plain terms of the statute, at the time of the death of the husband and father, and not at a later time when, in the course of the administration of his estate, his property has been changed from realty to personalty. In *Loffis v. Glass*, 15 Ark. 680, and *Turner v. Davis*, 41 Ark. 270, the interest under consideration was the proceeds of a sale of real estate, and not the real estate itself; and it was held that the interest was personalty. That is not true here, for the inheritance was not of the proceeds, but of the land itself, subject to the mortgage, which could have been discharged at any time by the payment of the mortgage debt. In *Re Simmons*, 55 Ark. 485, 18 S. W. 933, after stating the rule that where a conversion is rightfully made, whether by court or trustee, all the consequences of conversion must follow, the court, through Chief Justice Cockrill, said: "It may be that this statement of the rule is subject to the explanation or qualification that the conversion takes effect only to the extent of the purpose for which conversion was required, where, for example, a surplus remains from the proceeds of land sold to satisfy a decree of foreclosure. In such a case the conversion to raise a surplus over the decree and costs was not required, and was probably not intended by the court; and the rights of the parties in interest, it is held, remain the same as if no conversion had taken place, although the sale was rightful." This statement of the principle is absolutely conclusive here, and is in accord with the authorities, as will be seen by those cited in the opinion.

Mr. Woerner thus states the same principle: "By the sale the real estate is converted into money. But the conversion is complete and effectual only to the extent and for the purposes for which the sale was authorized, whether by the will or by the order of the court. So far as these purposes do not extend, and in so far as any of them do not take effect in fact or in law, the property retains its former character in respect of the rights of its owner, and passes accordingly. The surplus of the proceeds of a sale ordered for the payment of debts remaining after the debts and expenses of administration have been discharged retains the character of real estate for the purpose of determining who is entitled to receive it, and goes to the persons to whom the real estate would have gone but for the conversion." 2 Woerner on Am. Law of Administration, § 481. The status of the decedent's estate is fixed under this statute when he dies, and the allowance contemplated by it must be made out of the personal property as it then existed, and not from the proceeds of realty which may thereafter assume personal form. In this case his equity of redemption de-

scended at his death to his widow and children, according to the statute of descents and distribution, as realty. Its subsequent conversion to pay the debt against it does not let them in to share in it as personal property, for the only purpose of the conversion was to pay the mortgage debt, and not to change the status of the property.

The judgment is reversed and the cause remanded, with directions to enter a judgment in conformity to this opinion.

ST. LOUIS, I. M. & S. RY. CO. v. HARDIE.
(Supreme Court of Arkansas. Oct. 5, 1908.)

1. RAILROADS (§ 72*)—ROADBEDS—DRAINS—COMPANY'S DUTY—DEED CONSTRUED.

A railway right of way deed providing that all drains should be so bridged or protected by culverts that the flow of water should not be impeded requires the company to maintain its bridges or culverts so that the natural flow of the water is not obstructed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 72.*]

2. WATERS AND WATER COURSES (§ 118*)—RAILROADS—DRAINS—COMPANY'S DUTY.

Irrespective of any contract, a railway company must maintain culverts so as to allow free passage of surface water from adjoining lands.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 128; Dec. Dig. § 118.*]

3. WATERS AND WATER COURSES (§ 126*)—OBSTRUCTION OF DRAINS—RAILROADS—PLEADING—SUFFICIENCY.

Allegations that defendant built a railway across plaintiff's land; that he conveyed a right of way on condition that all drains be so protected by culverts that the flow of water should not be impeded; that the natural drainage for surface water on lands held by him on one side of the road was across the road; that, before the road was built, plaintiff constructed ditches to assist the drainage; that defendant threw a dump or levee across drains and negligently failed to provide sufficient openings to admit the flow of surface water; that the surface water was dammed up over certain lands, retarding the growth of the crops and increasing the cost of cultivating and gathering them, etc.—sustain an action for damages aside from the liability imposed by the deed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 139; Dec. Dig. § 126.*]

4. WATERS AND WATER COURSES (§ 125*)—CONSTRUCTION OF DRAINS—RAILROADS—MEASURE OF DAMAGES.

The measure of damages against a railway company for obstructing drains is the same, whether founded upon an express contract requiring it to keep the drains unobstructed or upon the company's liability independent of the contract.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 140; Dec. Dig. § 125.*]

5. WATERS AND WATER COURSES (§ 126*)—OBSTRUCTION OF DRAINS—MEASURE OF DAMAGES—INSTRUCTIONS.

In an action for obstructing drains, an instruction that in fixing plaintiff's damages the jury could consider the loss of the rental value of the cleared land that he was unable to cul-

tivate, the extra cost of planting and working his crop, less the cost of gathering so much of the yield as was lost, and the cost of reclearing land, was not erroneous as authorizing recovery of the rental value of the cleared land and also the extra cost of planting and working it, especially in the absence of a request for a more specific instruction, where the case was tried on the theory that the measure of the damages to the crop was its actual value when destroyed, and that, on the cleared land which could not be cultivated, the damages were limited to its rental value.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 141; Dec. Dig. § 126.*]

6. EVIDENCE (§ 471*)—OPINION EVIDENCE.

In an action for obstructing drains resulting in injury to crops and to land, it was not error to allow a question asked a witness "Did you have a similar piece of land, similarly situated, similarly cultivated, similar area, that you cultivated?" on the theory that it called for witness' opinion as to what the damaged land would have produced, and as to what tracts were similar, where he had testified what crops the damaged land produced, and he merely testified what an equal area of adjoining land, similar quality, produced the same year when cultivated by him in the same manner as the overflowed land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2149; Dec. Dig. § 471.*]

7. WATERS AND WATER COURSES (§ 126*)—OBSTRUCTION OF DRAINS—INSTRUCTIONS.

In an action for damages caused by the obstruction of drains, it was not error to instruct that if the persons working the land claimed to have been damaged were share hands, working for a proportion of the crop, and no part of it belonged to them but to plaintiff, he could recover the entire damage where the evidence showed that plaintiff did not intend to rent the land, that he had control of it, and that such persons were merely hired to make the crop.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 126.*]

Appeal from Circuit Court, Chicot County;
H. W. Wells, Judge.

Action by William T. Hardie against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit by Wm. T. Hardie against the St. Louis, Iron Mountain & Southern Railway Company. The substance of the complaint is as follows: That the defendant company constructed an additional line of railway in Chicot county in 1903 over certain lands of plaintiff (giving course and direction of said line) for a distance of 3¼ miles, more or less. That plaintiff, by deed, conveyed the right of way to defendant over said lands on consideration that said railway should be constructed in such manner that all drains, natural or artificial, should be so bridged or protected by culverts that the flow of water from said lands and the lands adjacent thereto should in no way be impeded or restricted. (A copy of said land is filed as "Exhibit A" to the complaint.) That during the years 1904, 1905, and 1906 he was in possession of certain lands

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in Chicot county (described in detail), known as the "Macon Lake Plantation," consisting of 6,000 acres, and four other plantations, containing, respectively, 400, 400, 200, and 480 acres. That by the topography of said lands the natural drainage for surface water on all of said land east of the defendant's railroad is westward from the bank of Bayou Macon on the north and Macon Lake on the east, across the line of said railway, into the natural bayous on the west, thence into Bayou Macon on the south. That the natural drainage from certain other described lands is east across said railroad, with other waters from the east of same. That prior to the building of said railroad defendant (plaintiff) had constructed artificial drainage to assist said natural drainage by a complete system of ditches connecting with a "mother ditch" (describing same). That in building said additional line of railroad defendant caused to be thrown up a dump or levee the entire distance over the land of plaintiff, before described, and down the channel and across the "mother ditch" and five other ditches, and across the natural drainings of said lands, and had negligently failed to provide sufficient openings through said dump or levee to admit the flow of surface water through same from 16 acres of the lands (describing same) of plaintiff's lying east of said railroad and 200 acres lying west of said railroad, which are dependent for drainage on said "mother ditch." That during the years 1904, 1905, and 1906 the defendant, over the protest of plaintiff, carelessly, negligently, and willfully maintained its roadbed, so carelessly and negligently constructed as aforesaid, so as to cut off the drainage of said lands, though often promising plaintiff to make such openings as were necessary. That same would have been easily made, and at small expense. That by reason of said failure the defendant caused the surface water during the years 1904, 1905, and 1906 to back and dam up for a great portion of the year over said lands (describing them), and over 300 acres thereof, and thereby retarded the growth and increased the cost of cultivation and gathering and lowered the yield of a large cotton crop, to wit, 500 acres (describing same), 100 acres (describing same), and 200 acres (describing same), to the damage of plaintiff in the sum of \$12,000. Prayer for judgment in said amount. The defendant filed its answer, denying all the material allegations of the complaint. Testimony was adduced by the plaintiff to sustain the allegations of his complaint, and by the defendant to sustain its defense. The questions involved render it unnecessary to further state the evidence except such comments as may be made in the opinion. There was a jury trial and a verdict for plaintiff in the sum of \$22,000, and defendant has appealed.

T. M. Mehaffy, J. E. Williams, and Campbell & Stevenson, for appellant. Baldy Vinson, for appellee.

HART, J. (after stating the facts as above). The following special propositions are urged to reverse the judgment:

First. That the damage to plaintiff's crops was caused by the obstructed condition of the drains and culverts; that, by the terms of its right of way deed from the plaintiff, defendant was not bound to maintain the drains and culverts across its right of way free from obstruction, but that it was plaintiff's duty to keep them open. The clause of the deed referred to is as follows: "It is further expressly understood and agreed * * * that all drains, both natural and artificial, shall be so bridged or protected by culverts that the flow of water from said lands and lands adjacent shall be in no wise impeded or restricted." Clearly the language of the deed contemplates that the railroad company should maintain its bridges or culverts so that the natural flow of the water should not be obstructed or impeded. Obviously the railroad company never intended to give up any part of its control over its roadbed, for such a course would not only tend to hinder it in the operation of its trains, but would endanger the lives of its employes and passengers. Moreover, independent of any contract, the duty of maintaining its culverts so as not to impede the free passage of the surface water was cast upon the defendant. The drains and culverts were allowed to fill up and become obstructed by the falling of dirt when the defendant was raising its roadbed, and they could have been cleaned out at a reasonable expense. This rule was announced in the case of *Little Rock & Ft. Smith Ry. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280, and has been followed by the court ever since. A citation of only a few of the later cases is necessary. *Baker v. Allen*, 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 104; *Chicago, Rock Island & Pacific Ry. Co. v. McCutchen*, 80 Ark. 235, 96 S. W. 1054; *L. R. & Ft. Smith Ry. Co. v. Wallis*, 82 Ark. 447, 102 S. W. 390. The allegations of the complaint are sufficient to sustain an action for damages aside from the liability imposed by the contract, and the measure of damages would be the same whether the action is founded on the contract or on the liability of the railroad independent as announced in the *Chapman* and other cases supra.

Second. That the court did not correctly instruct the jury as to the measure of damages. The instruction given by the court on that point at the request of the plaintiff is as follows: "You are further instructed that if you find from a preponderance of the evidence that defendant was guilty of negligence in maintaining its roadbed, and thereby obstructed the natural drainage of the surface water from plaintiff's lands, and caused them to dam up against said roadbed and flow back over plaintiff's lands, and damages or prevents making crops thereon, your verdict will be for plaintiff for such actual damages as

the evidence shows he sustained during the years 1904, 1905, and 1906 as was the result and solely due to the negligence of the defendant, with interest thereon from the time such damage occurred; and, in arriving at the amount of damages from the evidence, you will take into consideration the loss of rental value of the cleared land that he was unable to cultivate, the extra cost of planting and working his crop, less the extra cost he would have been to in gathering and working so much of the yield as was lost, the cost of reclearing land caused to have grown up by being forced to lie out as the result of such negligence, and, after finding the sum of such losses for the years 1904, 1905, and 1906 as the evidence convinces you that plaintiff has sustained, and the interest on the same from the time such losses occurred at six per cent. per annum, you will return into court written on the complaint a verdict for plaintiff, and assess his damages at that sum." At the request of the defendant, the court gave the following instruction on the measure of damages: "(15) If you should find for the plaintiff, you should assess such amount of damages as you find he has actually sustained as the necessary result of defendant's negligence, and the measure of his damages would be the cash value of the crops at the time they were destroyed, provided you find such destruction as alleged. And, in arriving at the measure of the value of his crop alleged to have been destroyed, you may take into consideration the fertility of the soil upon which they were growing, the state of their cultivation, their condition at the time of destruction, the favorable or unfavorable season following for the maturity of the crop with their probable yield. You will also take into consideration further expense of cultivation, if any further cultivation was needed, the additional expense of gathering and marketing them, and also the impending hazard or peril of weather and storms between the times they were destroyed or injured and the close of the season for maturing and gathering the same." Appellant railway company urges that the instruction given by the court at the instance of the plaintiff allows double damages. In other words that it directs the jury to find for the damages of the cleared land that appellee was unable to cultivate, its rental value, and also the extra cost of planting and working it. The different elements of damages were correctly stated in the instruction of which complaint is made. It is true that the naming of all of the elements of damage in one instruction may have caused confusion in the minds of the jury, and thus have influenced it to apply an element of damage to a class of lands to which it was not applicable, but we do not think such was the result. The testimony introduced, the instruction given on the measure of damages at the instance of the defendant, now appellant, and the whole conduct of the trial as disclosed by the record, show that the case was tried on

the theory that the damages to the crop were its actual value, where it had matured sufficiently to have a market value at the time of its destruction, and that on the cleared land which could not be cultivated the damages were limited to its rental value. There was an evident intention to follow the rule laid down in the case of *Railway Company v. Yarbrough*, 56 Ark. 612, 20 S. W. 515, and the later case of *St. Louis Southwestern Ry. Co. v. Morris*, 76 Ark. 542, 89 S. W. 846, *Little Rock & Ft. Smith Ry. Co. v. Wallis*, 82 Ark. 447, 102 S. W. 390, and *St. Louis, I. M. & S. Ry. Co. v. Saunders*, 85 Ark. 111, 107 S. W. 194. Appellant's counsel must have known the meaning the court intended to convey by the instruction, and, instead of making a general objection, should have requested a specific instruction which would have eliminated the fault instead of making a general objection to it. *St. L., I. M. & S. Ry. Co. v. Hoshall*, 82 Ark. 387, 102 S. W. 207; *St. L., I. M. & S. Ry. Co. v. Barnett*, 65 Ark. 255, 45 S. W. 550.

Third. Counsel for appellant asks for a reversal of the judgment because in ascertaining the value of the damaged crop Daniel, the manager of the plantation, was permitted to answer the following question: "Did you have a similar piece of land, similarly situated, similarly cultivated, similar area, that you cultivated in 1905?" It is claimed that this was permitting Daniel to give his opinion to the jury as to what the damaged lands would have produced, and as to what tracts were similar. Daniel had already testified what amount of cotton and of cotton seed the damaged land produced. His answer to the question and to those of similar import shows that he simply stated to the jury what an equal area of adjoining land of similar quality of soil produced the same year when cultivated by him in the same manner as the overflowed land. The jury were left free to determine whether the negligence of the railroad caused the difference in production, and how much of it was caused thereby. The facts were stated to the jury, and under the instructions of the court they were left to draw their own inferences.

Fourth. Counsel for appellant also asks a reversal on account of the second instruction, which is as follows: "No. 2. The jury are instructed that if they believe from the evidence that the parties working the land claimed to have been damaged were share hands, working for a proportion of the crop, and no part of it belonged to the parties working the land, but to the plaintiff, then he is entitled to recover the entire damage and not the share hand, that the share hands were not the owners." Daniels was the only witness who testified on that point, and we quote from his testimony as follows: "Q. I want you to explain just what kind of a contract you have with your hands—whether or not you actually rent any land. A. I don't rent any land at all. I furnish the hands to make

the crop. When the crop is gathered and ginned, I get one-fourth, and their provision and supplies come out of their part. Q. Have you any other kind? A. Some work on the halves under the same contract." This testimony shows that the owner did not intend to rent the land, and, taken in connection with his other testimony, shows that the owner had control of the land, and that the other parties were merely hired to make the crop. *Hammock v. Creekman*, 48 Ark. 264, 3 S. W. 180; *Tinsley v. Craig*, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570. The witness Daniel made a detailed statement of the amount of damage suffered, and it is sufficient to say that his testimony warranted the verdict.

Finding no reversible error in the record, the judgment is affirmed.

PHOENIX ASSUR. CO., Limited, v. LUDWIG, Secretary of State.

(Supreme Court of Arkansas. Oct. 12, 1908.)

CORPORATIONS (§ 643*)—FOREIGN CORPORATIONS—LIABILITY FOR FILING FEES.

A foreign corporation, which ceased indefinitely to transact business within the state and to comply with the laws with reference thereto (*Kirby's Dig.* §§ 4337-4339, 4363), is liable, on again seeking to do business in the state, for the filing fee imposed by Act May 13, 1907 (Acts 1907, p. 746) § 3, and is not relieved therefrom on the ground that, though it suspended active business operations, there had been no complete extinction of its legal existence in the state.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 643.*]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Mandamus by the Phoenix Assurance Company, Limited, to compel C. C. Ludwig, Secretary of State, to accept and file a copy of its charter and certificates, etc., tendered him, without requiring payment of the filing fee prescribed by Act May 13, 1907 (Acts 1907, p. 744), known as the "Wingo Act." Judgment for defendant, and the assurance company appeals. Affirmed.

Campbell & Stevenson, for appellant. Wm. F. Kirby, Atty. Gen., and Daniel Taylor, Asst. Atty. Gen., for appellee.

McCULLOCH, J. Appellant is a foreign insurance corporation, and prior to March 23, 1905, entered this state for the purpose of operating its insurance business herein. It fully complied with the laws of the state, established agencies throughout the state, and continued the operation of its business up to the above-mentioned date, when it ceased to transact business. On that date its manager in the city of New York notified the Auditor of the state of Arkansas in writing that its agents had been instructed "to cease at once from transacting business in the state," and the Auditor immediately made

an indorsement on his records to the effect that appellant company had ceased to do business in the state. The General Assembly enacted a statute, approved May 13, 1907 (Acts 1907, p. 744), known as the "Wingo Act," requiring that every foreign corporation, including railroad and insurance companies, before doing business in the state, shall file in the office of the Secretary of State a copy of its charter or articles of incorporation, etc., together with a statement of its assets, liabilities, capital stock, etc., and a certificate designating its place of business in the state and an agent upon whom process may be served. The third section of the act also provides that "all corporations hereafter incorporated in this state and all foreign corporations seeking to do business in this state shall pay into the treasury of this state for the filing of articles a fee of \$25.00 where the capital stock is \$50,000, or under; \$75.00 where the capital stock is over \$50,000 and not more than \$100,000; and \$25.00 additional for each \$100,000 of capital stock." Subsequently appellant company made tender to the Secretary of State of compliance with all the provisions of the Wingo act, except that of payment of the fee, and claimed the right to resume business in the state without paying the fee. This claim was denied by the Secretary of State, and this action was instituted in the circuit court of Pulaski county to compel him by mandamus to accept and file the copy of charter and certificates, etc., tendered to him by appellant, without requiring payment of said fee, and to issue to appellant a certificate thereof.

The position assumed by appellant's counsel in support of the claim of their client's exemption from payment of the fee is (1) that a foreign corporation, which was admitted into the state prior to the passage of the Wingo act, and whose domestic rights have not been legally terminated, cannot be required to pay the prescribed fee; and (2) that appellant's corporate rights and legal existence in the state had never been terminated, but that its legal existence in the state was still preserved. We do not deem it necessary to express an opinion as to the first contention of counsel, for we have reached the conclusion that appellant had, prior to the passage of the Wingo act, voluntarily withdrawn from the state, relinquished whatever domestic rights it possessed, so far as its right to transact business was concerned, and that in order to come into the state again for the purpose of doing business it is amenable to all the requirements of the new statute, including a payment of the prescribed fee.

It is argued by counsel with much earnestness that there is a difference between suspension of active business operations in the state by a foreign corporation and the com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

plete extinction of its legal existence here. This difference is, we think, more theoretical than real, for a foreign corporation is admitted into the state only to transact business. Article 12, § 11, Const. 1874. It does not, by such admission, become a domestic corporation, nor acquire a permanent domicile in the state, like a domestic corporation. 19 Cyc. p. 1206; *Liverpool Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 11 South. 91, 16 L. R. A. 56; *St. L. & S. F. Ry. Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; *Wilson v. Railway Co.*, 64 S. C. 162, 36 S. E. 701, 41 S. E. 971. It has no other tangible existence, except in the maintenance of its place of business and the transaction of business, and when it ceases to perform those functions it has ceased to exist in the state. In this respect it is easily distinguishable from a domestic corporation, and the same rules for determining its continued existence do not apply. We do not mean to say that a mere temporary cessation of business would necessarily operate as a complete withdrawal from the state; but we hold that where a foreign corporation ceases indefinitely to maintain its place or places of business and its agents in the state and to transact business here, its legal existence here is terminated.

Moreover, there are certain annual duties required of foreign insurance corporations by the statutes of this state in order to continue their legal existence in the state after having been duly admitted, which appellant failed to do. These statutes were in force when appellant originally came into the state, and it is not contended that it has complied with them after it ceased to do business in 1905. These omissions of annual duties are set forth in the agreed statement of facts, as follows: "(b) That it did not transmit to the Auditor of State the statement required by section 4337 of Kirby's Digest. (c) That it did not file with the Auditor of State the statement required by section 4338 of Kirby's Digest, and did not pay into the state treasury the tax therein stipulated on its net receipts, except for the year 1905. (d) That it did not give the bond required by section 4339 of Kirby's Digest. (e) That it did not certify to the Auditor of State the names of agents appointed by it to solicit risks and insurance policies, or receive applications therefor, as required by section 4363 of Kirby's Digest." These omissions manifest in the most unequivocal manner an intention to completely withdraw from the state and from reach of its laws.

We are again met with the argument that these statutory requirements relate only to the transacting of business in the state and not to the right of continued existence in the state: that, notwithstanding the failure of appellant to comply with the law and its discontinuance of business in the state, it maintained an opaque existence here, which

preserved its right to resume active operations at any time, with immunity from payment of an entrance fee. We do not, however, concur in this view; for, as already shown, when the foreign corporation wholly withdraws its business from the state, and ceases to do business, and ceases to comply with the laws of the state with reference thereto, it withdraws itself from the state and loses its legal identity here, except in so far as the statute restrains its departure while outstanding contracts made here remain unperformed.

The circuit court was right in refusing to issue the writ of mandamus, and his judgment is therefore affirmed.

PINKERTON v. HUDSON.

(Supreme Court of Arkansas. Oct. 12, 1908.)

1. BROKERS (§ 63*)—CONTRACT OF EMPLOYMENT—PERFORMANCE—RIGHT TO COMMISSION.

Where a broker furnished a purchaser, to whom defendant contracted to sell land, defendant thereby accepted the purchaser as satisfactory; and, having thereafter elected not to enforce the contract, plaintiff was entitled to recover commissions, though it was understood that plaintiff was not to have commissions until the deal was closed and the purchase money paid, when the commissions were payable therefrom.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 95; Dec. Dig. § 63.*]

2. BROKERS (§ 52*)—PAYMENT OF PURCHASE PRICE.

Though a broker's contract of employment provided that he should not receive commissions unless the deal was closed, and that the commissions were payable from the proceeds of the sale, the broker, in the absence of a contract to that effect, was not required to see that the purchase price was paid before he could receive commissions, as the duty to collect the price devolved on the seller, and not on the broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 73; Dec. Dig. § 52.*]

3. CONTRACTS (§ 65*)—CONSIDERATION.

A broker being under no obligation to see that the purchaser complied with his contract, there was no consideration for the broker's promise to pay half of the costs of a suit by the seller, to enforce the contract.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 65.*]

4. BROKERS (§ 80*)—RIGHT TO COMMISSIONS—DEFENSES.

Where a broker bound a purchaser by an enforceable contract, the broker's refusal to fulfill a promise to pay half of the costs of the seller's suit to enforce the contract was no defense to the broker's right to commissions.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 80.*]

5. BROKERS (§ 63*)—CONTRACT—CONSTRUCTION—ENFORCEMENT.

Where a broker's contract postponed his right to receive commissions until the purchase money was paid, and provided for payment therefrom, the seller, having dismissed a suit to enforce the contract, and refused to collect the purchase money, became immediately liable to the broker for commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 95; Dec. Dig. § 63.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Insurance Company, and in the Standard Fire Insurance Company, to an amount, at par value, of \$210,900; and that said companies are insurance companies, organized under the laws of the state of Arkansas; and that said stock was not given in and assessed to him by the assessor of this county; and that the raise complained of here was the addition of the amount complained of, in the petition by the said equalization board, to cover the taxable value of the stock of said Banks in said insurance companies. That said stock was of the value of \$212,900, and was added to the assessment list of said A. B. Banks at the amount of \$105,000. That said A. B. Banks was a resident at assessment time of Dallas county; and that said insurance companies had their domicile in said county." The court declared the law to be that the petitioner, "A. B. Banks, was not required to list his stock in the insurance companies for taxation, and that the equalization board should not have added the same to his assessment. That the said insurance companies are required under the law to list for taxation their capital and property." The appellant duly excepted, and asked the court to declare the law to be: "That the petitioner, A. B. Banks, was required to list his stock in the insurance companies for taxation, and that the equalization board should have added the same to his assessment; that the said insurance companies are not required to list their capital stock for taxation"—which the court refused. Appellant duly prosecutes this appeal from a judgment in favor of appellee.

Wm. F. Kirby, Atty. Gen. (T. B. Morton of counsel), for appellant. Gaughan & Sifford, and Rose, Hemingway, Cantrell & Loughborough, for appellee.

WOOD, J. (after stating the facts as above). Under section 7004, Kirby's Dig., the county boards of equalization, "may add to or take from the valuation of the personal property of any person returned by the assessor, or which may have been omitted by him, or add other items to it upon such evidence as is satisfactory, whether such return is made upon the oath of such person or upon the valuation of the assessor." Under the above section the equalization board had the authority to add the stock of the appellee in the insurance companies to his personal assessment, if such stock was liable to taxation as against him. Section 6902, Kirby's Dig., provides that "no person shall be required to include in his statement as a part of the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise which he is required to list, any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this state." And section 6910 does not re-

quire the individual to list all his corporate stock, but only those "which such person is required to list." Under article 16, §§ 5, 6, 7, Const. Ark., all property in the state is subject to taxation, except certain specified exemptions, and stock in corporations and the property of corporations are not exempt. On the contrary, by the express provision of section 6873 of Kirby's Dig., "all property whether real or personal, in this state, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise of persons residing therein, the property of corporations now existing or hereafter created * * * shall be subject to taxation," etc. But while the stock in controversy is subject to taxation, it is clear from the language of section 6902 of the Digest, supra, that it was the intention of the Legislature that such stock should not be taxed both as the property of the corporation and of the stockholder; in other words, that it should not be subject to double taxation. So the question is, under our statutes, are insurance companies required to list or return their capital and property for taxation? For if they are, then by the express language of section 6902, supra, appellee was not required to list for taxation "any of his shares of the capital stock or property" of the insurance companies named. Section 6906 of Kirby's Digest provides that "each person required to list property shall make out and deliver to the assessor a statement, verified by his oath or affirmation, of all personal property, moneys, credits, investments in bonds, stock, joint-stock companies or otherwise, in his possession or under his control on the first Monday in June of each year," etc. Under the definition of "words and phrases" of the revenue laws (section 6872, Kirby's Dig.) the word "person" as used in the act shall be held to mean and include firm, company, and corporation. The word "person," therefore, as used in 6906, supra, by express definition includes companies and corporations. The statement required by the above section "shall truly and distinctly set forth * * * the total value of all other articles of personal property which such person by this act is required to list." Section 6910, subd. 15. "The term 'personal property' wherever used in the act shall be held to mean and include: First. Every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming a part of any parcel of real property as hereinbefore defined. Second. The capital stock, undivided profits, and all other means not forming a part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion or interest in such stock, profits or means, by whatsoever name the same may be designated." Section 6872, supra. We think it clear from a consideration of these various provisions of the revenue law that the in-

insurance companies whose stock appellee held were required to list the stock for taxation.

But it is argued by the Attorney General that other provisions of the revenue laws require all other companies and corporations, except insurance companies, to file a list or schedule by which their capital stock and tangible property may be assessed for taxation, which differs from the list required by sections 6906 and 6910, and that therefore the latter sections cannot be held to apply to any of these corporations without double taxation, and he contends that when these various sections (6920, 6929, and 6936) having reference to other corporations are construed in connection with sections 6906 and 6910, the conclusion must be that the latter sections apply only to the assessment by individuals, or, if to companies and corporations at all, then only as to other property than their capital stock. Conceding, without deciding (for the question is not before us), that the sections requiring other designated companies and corporations to file a different schedule from that demanded by section 6906, *supra*, are not merely cumulative provisions, and conceding that the companies and corporations named are exempt by these specific provisions from the requirement of the general provision contained in section 6906, it does not follow that insurance companies are also exempt from the operation of the latter section. On the contrary, the fact that insurance companies are exempt from the requirements of section 6936, as to other corporations, by the express language thereof, leads to the inevitable conclusion that the Legislature intended that they should file the schedule required by sections 6906 and 6910. The contention that these sections refer only to the assessment by individuals ignores the provision contained in section 6872, above quoted, that "the word 'person,' as used in this act shall be held to mean and include 'firm, company and corporation.'" We find no provision in our revenue laws exempting the capital stock and property of insurance companies from taxation, and as they are required to list, appellee, under section 6902, *supra*, was not.

The judgment of the Dallas circuit court is correct, and it is affirmed.

HARROD v. STOUT-GREER LUMBER CO.
(Supreme Court of Arkansas. Oct. 12, 1908.)

MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—CONCEALED DEFECTS—NEGLIGENCE—QUESTION FOR JURY.

Plaintiff was assigned to instruct a boy in the use of a lath trimmer. The machine embraced saws which were shielded by boxes to prevent injury to the operator. Plaintiff rested his arm on one of the boxes, which tilted, and the saw cut through the wood and amputated his arm. He did not know that the box would

tilt. *Held*, that the master, having covered the saw with a box apparently secure, was not as a matter of law free from negligence respecting the hidden defect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1017, 1028; Dec. Dig. § 286.*]

Appeal from Circuit Court, Calhoun County; Geo. W. Hays, Judge.

Personal injury action by W. M. Harrod against the Stout-Greer Lumber Company. There was a directed verdict for defendant, and plaintiff appeals. Reversed, and remanded for a new trial.

This action was brought by W. M. Harrod against the Stout-Greer Lumber Company to recover damages for injuries sustained by him while in its employ by reason of its alleged negligence. The plaintiff was injured on the 13th day of July, 1906, and at that time was 31 years old. The particular duties which he was performing when he was injured were that of tying, sizing, and removing laths from a lath machine. The machine which trims off the end of the laths is called the "trimmer." The machine is set on two boxes about 4½ feet long, with two saws and a pulley about 4 feet apart. In front of the opening between the two saws is a clamping machine, fastened to a frame supporting the saws. When the bundles of lath are put between these, there is a lever which causes the jaws to shut and clamp them, and the clamping machine goes forward, and the saws trim the two ends of the bundles at the same time. A box was placed over the trimmer or cut-off saws to protect the employees from flying in their eyes while the machine is in operation. The box was about 4 inches from the top of the saws. The plaintiff's duties were to tie, trim, and remove the laths, and also to instruct a boy, who was working at the adjoining machine, how to perform his duties. On the third day after he began this work, the boy went to cut some strings. Plaintiff looked at him, and went over to give him directions about cutting the string. While doing so, he rested his arm on the box which covered the trimmer saw. This caused the box to tilt, and to strike the trimmer saw. It was revolving rapidly at the time, came up through the wood, and cut off the plaintiff's arm. The fact that the box would tilt when a weight was placed on it was not known to the plaintiff. The court directed the jury to return a verdict for the defendant, and plaintiff has appealed.

Nixon & Shaw and Taylor & Jones, for appellant. Gaughan & Sifford and T. D. Wynne, for appellee.

HART, J. (after stating the facts as above). In the case of *Hazen v. West Superior Lumber Co.*, 91 Wis. 208, 64 N. W. 857, where the employé was accidentally injured while

operating precisely the same kind of a machine, the court held as a matter of law that the master was not liable. There the saw was partially covered with loose boards to prevent the sawdust from flying in the face of the operator. The court said: "The rapidly revolving saws were there, in plain sight, where the plaintiff could not but see them, and he knew perfectly well, without any instruction or information, that if he fell upon them, or came in contact with them, he would certainly be seriously, and perhaps fatally, injured. There was no possible chance of his being deceived, or for misjudgment on his part in that respect. The result would be inevitable, and in no sense a matter of judgment or opinion." Continuing, the court said: "It was just as plain to him as to his employer that such an accident might occur in the course of his employment." In the present case, the saw was entirely covered with a wooden box, which, if properly secured to the machine, would have afforded protection to the operator in leaning his arm upon it. The danger was hidden, and there was nothing to warn plaintiff that it was not securely fastened.

For the reason that the alleged defect was hidden or secret, the present case may be also differentiated from the case of *Schiefelbein v. Badger Paper Co.*, 101 Wis. 402, 77 N. W. 742. There was nothing to deceive the operator in that case. The machine in question was used for the manufacture of paper. The operator was directed to clean a screen at the bottom of a hopper through which was fed pulp by means of suction. There was a revolving fan in a drum, which carried off the air sucked from the machine, and an opening in the top of the drum allowed the air to escape. It was several feet higher than the top of the hopper, and a foot distant. The opening was ordinarily covered with a wire screen. The servant had to stand in the hopper to do his work, and rested his hand on the edge of the opening, and when he arose to an erect position his fingers were torn off by the fan. There the opening was in plain sight. It was obvious to a person of ordinary intelligence that a slight weight would cause the wire screen to sag, and that the instant it came in contact with the rapidly revolving fan it would be cut, and thus expose his hand to the danger. There the element of hiddenness or deceptiveness of the danger was wanting, and in the case at bar it is present.

It is not a question of whether or not the master owed the servant the duty of guarding the saws with a covering; but, having elected to do so, can it be said as a matter of law that there was no negligence in furnishing a covering apparently secure, but in fact with a hidden defect? We think not.

The fact that the saw was covered with a wooden box, apparently secure, might have had a tendency to lead plaintiff to believe that the guard would protect him, and thus cause him to pay less attention to the real danger. At least it should have been left to the jury to say whether, from all the attendant circumstances, negligence was not inferable.

For the error in giving a peremptory instruction for defendant, the judgment is reversed, and the cause remanded for a new trial.

HIGHT v. OATES.

(Supreme Court of Arkansas. Oct. 19, 1908.)

1. REPLEVIN (§ 22*)—PARTIES.

Where, in an action for possession of a cow purchased by H. with money advanced by plaintiff, and later sold by H. to defendant, plaintiff claimed that the cow was to remain his property until paid for under his agreement with H., and the latter made no claim to the cow, the court properly refused to make him a party to the action.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 122; Dec. Dig. § 22.*]

2. ACTION (§ 57*)—CONSOLIDATION.

In an action for possession of a cow purchased by H. with money advanced by plaintiff, and later sold by H. to defendant, the court properly refused to consolidate it with a suit pending between plaintiff and H. concerning a settlement of the accounts between them.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. § 632; Dec. Dig. § 57.*]

Appeal from Circuit Court, Washington County; J. S. Maples, Judge.

Action by J. P. Hight against J. N. Oates. Judgment for defendant, and plaintiff appeals. Affirmed.

E. B. Wall and McGill & Lindsey, for appellant. R. J. Wilson, McDaniel & Dinsmore and Walker & Walker, for appellee.

McCULLOCH, J. This is an action for recovery of possession of a cow. One Harding was engaged in the dairy business near the city of Fayetteville, and mortgaged his outfit to appellant, Hight, to secure an indebtedness to the latter amounting to \$1,850, and "all other indebtedness" which he might thereafter owe. After the execution of the mortgage a lot of cows, including the one in controversy, was purchased from one Shelton for use in the dairy business, and appellant furnished the money to pay for them. Appellant claims that he purchased these cows, and caused them to be delivered to Harding pursuant to an oral agreement with the latter that the cows should remain the property of appellant until paid for, and that a memorandum to that effect was indorsed on appellant's account books and signed by Harding. Harding testified that he purchased the cows from Shelton, and that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

appellant advanced the money to pay for same, but that there was no agreement that the title should pass to and remain in appellant as security for the debt. He denied that he signed any memorandum showing reservation of title in appellant, and claimed that the mortgage was security for the money advanced. Harding sold one of the cows to appellee Oates, and this action at law resulted. There was a sharp conflict between the testimony of appellant and Harding concerning the reservation of title, and the jury settled the issue against appellant's claim of ownership. There was evidence legally sufficient to sustain the finding.

The instructions given to the jury at the request of the respective parties were quite numerous, and the court refused to give several instructions requested by appellant. We think the issues were correctly put before the jury, and that there was no error in the proceedings.

Appellant requested that Harding be made a party, and that the action be transferred to the chancery court and consolidated with a suit pending between appellant and Harding concerning a settlement of the accounts between them. The court denied the request, and this ruling is assigned as error. Harding claimed no interest in the property in controversy, and therefore was not a proper party to the action. There was no reason either for making him a party or for consolidating the two causes.

Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. JAMISON.
(Supreme Court of Arkansas. Oct. 12, 1908.)

1. MASTER AND SERVANT (§ 213*)—INJURY TO SERVANT—ASSUMPTION OF RISKS.

One entering another's employ assumes the ordinary risks incident thereto, is presumed to have contracted with reference to them, and cannot recover for injuries therefrom, and hence, where plaintiff was employed as a railroad section hand principally to remove old rails, the common method being to break the bolts holding them together, he assumed the risk of injury incurred by the breaking, and could not recover therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 559-564; Dec. Dig. § 213.*]

2. MASTER AND SERVANT (§ 149*)—INJURY TO SERVANT—FELLOW SERVANTS—INJURY RESULTING FROM ORDER OF FOREMAN.

The fact that a foreman of railroad section hands ordered one of them to break the bolt by which another of them was injured did not render the master liable, where he did not direct the manner of breaking it, and the order was not negligently or improperly given.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 291; Dec. Dig. § 149.*]

3. MASTER AND SERVANT (§ 149*)—INJURY TO SERVANT—NEGLIGENCE—DIRECTION OF WORK—DUTY OF FOREMAN.

Railroad section hands whose principal duty was to remove old rails, often necessitating the breaking of the bolts joining them, were

presumed to know how to do the breaking, and it was not the duty of the foreman in ordering a bolt broken to direct the method.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 291-295; Dec. Dig. § 149.*]

4. MASTER AND SERVANT (§ 198*)—INJURY TO SERVANT—FELLOW SERVANTS—SECTION HANDS.

Railroad section hands engaged in removing an old track are fellow servants, and the master is not liable for an injury to one of them if caused by the negligence of another.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 493; Dec. Dig. § 198.*]

Wood and McCulloch, JJ., dissenting.

Appeal from Circuit Court, Green County; Frank Smith, Judge.

Action by W. E. Jamison against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

T. M. Mehaffy, J. E. Williams, and Campbell & Stevenson, for appellant. W. W. Bandy, for appellee.

BATTLE, J. W. E. Jamison was in the employment of the St. Louis, Iron Mountain & Southern Railway Company. He had been 10 or 11 years at the time he was injured as hereinafter stated. He was employed as a section hand, the principal part of whose work was to take up old ties and rails, and replace them with new. In doing this work, the bolts which held the old rails together were sometimes broken. This was not an uncommon occurrence on defendant's road, and was well known by Jamison, and had been done by himself, and was attended by danger of injury to employes at the time engaged in the work. It was necessary to be done when nut attached could not be unscrewed. In the month of December, 1906, Jamison and others in the employment of the railroad company, in the course of their employment, were engaged in removing the old track on the Knobel-Helena Branch of the company's road between Lefe and Gainesville in Green county, and replacing it with new and larger steel rails. While so engaged many bolts were broken before the 17th day of December, 1906, when the foreman of such employes ordered one of them to break a certain bolt, which he (the employe) did by striking it so as to make a part of it fly in the direction of Jamison, and hit and severely injure him. He brought this action against the railroad company to recover damages on account of the injuries received, and recovered judgment. Was he entitled to recover?

"When a servant enters into the service of another, he assumes all the ordinary and usual risks and hazards incident to his employment. He is presumed to have these risks in contemplation, and to contract in reference thereto when he enters into the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

employ of the master, and consequently cannot recover for injuries resulting to him therefrom." *S. W. Telephone Co. v. Woughter*, 56 Ark. 206, 19 S. W. 575.

In this case the plaintiff had been in the service of the defendant for 10 or 11 years at the time of the accident, and in that time bolts were broken in removing old rails in the railroad track of the company for the purpose of replacing them with new. While they were not in all such cases broken, yet it was a means employed in removing them. Plaintiff knew this, and, when he entered into or continued in the service of defendant, assumed the risks of dangers incurred by the breaking of bolts in such removal as an ordinary incident, and the railroad company was not liable to him for the damages caused by the breaking. *Railway Company v. Davis*, 54 Ark. 389, 15 S. W. 895; *Kuhns v. Wisconsin, etc., R. Co.*, 70 Iowa, 561, 31 N. W. 868; *Abbot v. McCadden*, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910; 3 *Ellott on Railroads* (2d Ed.) § 1289, and cases cited. And the order of the foreman in this case did not make it liable. The evidence does not show that there was any negligence in making the order or that it was improper. The foreman did not direct how the bolt should be broken, neither was it his duty to do so; the presumption being the servant who did the breaking knew how. It was one of the duties he had undertaken to perform when he was employed. If the injury received from the breaking was caused by the negligence of any one, it was of the servant in driving a part of the bolt in the direction of plaintiff. If it was, the defendant is not liable for damages; the plaintiff and the servant at that time being fellow servants.

Judgment reversed, and action dismissed.

McCULLOCH, J. (dissenting). I cannot agree to the conclusion reached by the majority of the Judges as expressed by Mr. Justice **BATTLE**. Giving the evidence its strongest probative force, which we should do in testing its legal sufficiency, there was abundant evidence to sustain the verdict.

Appellee was working under the orders of Harris, foreman, and the Greek, who knocked the bolt, was working under the orders of Jourdan, foreman of another gang. Harris ordered appellee to take a lining bar and remove an old rail, and, while he was standing on the track, absorbed in doing this work in accordance with his foreman's orders, Jourdan ordered the Greek to break a bolt at the other end of the rail. The Greek struck the end of the bolt with a maul, striking and knocking it in the direction of appellee. Jourdan was standing there watching the Greek strike the bolt, and could see that he was striking in the direction of appellee, and could see that the latter was absorbed in his work and unconscious of dan-

ger. The jury must have found that Jourdan, who was not a fellow servant with appellee, but a vice principal of appellant, saw what was going on, and could have avoided the injury either by warning appellee of the danger or by directing the Greek to strike in another direction. Conceding that the Greek was a fellow servant with appellee, the negligence of the master concurred in causing the injury, and that rendered the master liable. It is a familiar principle in the law of master and servant that the latter does not assume the risk of danger caused by the negligent act of the former. Authorities are too numerous to require citation. The evidence shows, it is true, that it was customary for the workmen engaged in this work to break the bolts with a hammer or maul when they could not unscrew the nut from a bolt with a wrench, and, as appellee is presumed to have known of that custom, he must be held to have assumed the risk of any danger resulting from negligence of a fellow servant in breaking the bolts, but not that resulting from the negligence of the master. He had the right to proceed upon the presumption that the master would commit no negligent act to his injury, and he is not, therefore, deemed to have assumed the risk of any such danger.

WOOD, J., concurs.

WARD v. McPHERSON, Sheriff, et al.

(Supreme Court of Arkansas. Oct. 19, 1908.)

1. APPEAL AND ERROR (§ 818*)—DEFECTIVE RECORD—CONTINUANCE OF HEARING—PROPRIETY.

The Supreme Court will not continue a hearing to enable appellant to cure a defective record where it appears that no error occurred below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3199; Dec. Dig. § 818.*]

2. CORPORATIONS (§ 542*)—INSOLVENCY—LEASE—VALIDITY.

A lease of an insolvent corporation's quarry to its president and general manager, whose relatives were the principal stockholders, was fraudulent as to the corporation's creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2156; Dec. Dig. § 542.*]

3. CORPORATIONS (§ 542*)—INSOLVENCY—LEASE—FAIRNESS—BURDEN OF PROOF.

In suits to replevin stone levied upon under executions against an insolvent corporation, which leased its quarry to plaintiff, its president and general manager, the burden was on him to show the fairness of the lease.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 542.*]

4. CORPORATIONS (§ 547*)—INSOLVENCY—REMEDIES OF CREDITORS.

Where, in actions to replevin stone levied upon under executions against an insolvent corporation, which leased its quarry to plaintiff, its president and general manager, the answer alleged the fraudulent character of the transaction and the evidence sustained it, the court

without transferring the case to equity had jurisdiction to grant relief to defendant creditors.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 547.*]

Appeal from Circuit Court, Johnson County; Hugh Basham, Judge.

Consolidated replevin suits by Zeb Ward against W. H. McPherson, sheriff, and others. From judgments on the replevin bonds, plaintiff appeals. Affirmed.

Atkinson & Patterson, for appellant. Cravens & Covington, for appellees.

HILL, C. J. W. H. McPherson, sheriff of Johnson county, levied two executions upon a lot of stone, which was replevied from him by Ward. One of the executions was in favor of Ord Morgan and the other in favor of the Indiana Road Machine Company, and each was against the Mississippi Valley Construction Company. The replevin suits were consolidated in the circuit court, and on the trial the court directed verdicts in favor of the defendant. Judgments were rendered against the plaintiff Ward and the sureties upon his replevin bonds for the value of the stone taken under the writs of replevin, and he has appealed therefrom.

The hearing has heretofore been continued in order to enable the appellant to get the bill of exceptions into the record, as it is not in the transcript; the original bill having been lost for a time. It has now been found and brought here by certiorari since the submission of the cause, but the record fails to show that the bill of exceptions was filed within the time fixed by the court for it to be filed. Appellant says that this is a clerical error, and can be corrected by nunc pro tunc order, and asks for a further continuance for the purpose of having the correction made, and having the bill of exceptions copied into and made part of the transcript. The case has been fully abstracted and briefed on the merits. If the court was satisfied that error was committed, then it would consider whether due diligence had been exercised in having the record perfected and whether it would grant a continuance; but the court is satisfied that no error has been committed, even if the record presented by the appellant be taken as properly authenticated and filed within time. Hence it would be idle to continue it for the purpose of getting the record in reviewable shape.

This is the case: The Mississippi Valley Construction Company owned a quarry at Cabin creek, in Johnson county. Zeb Ward was the president and general manager, and the members of his family were the principal stockholders. It became insolvent, and judgments were obtained against it at various places, and it was unable to obtain the means to carry on its business of quarrying rock. In August, 1906, when it was in this condition, Ward obtained a contract for furn-

ishing stone to contractors in New Orleans, and he took over the quarry under what he called a "verbal lease," and proceeded to take out stone in his own name in the fulfillment of this contract. The verbal lease of August was authorized by the treasurer, Ward's brother-in-law, and one other director, with the consent of the German National Bank, the principal creditor of the company. There was no meeting of the board of directors, and no minute made of it. The consideration was to be \$300 per year for two years. Subsequently, on January 2, 1907, there was a formal meeting of the board of directors, and this verbal lease was ratified and a written lease executed covering the period intended to be covered by the oral lease. Prior to the execution of this written lease in December, 1906, Ord Morgan and the Indiana Road Machine Company recovered judgments in the Johnson circuit court against the construction company. Stone quarried by Ward was levied upon January 18, 1907, in favor of the Indiana Road Machine Company, and the 27th of February in favor of Ord Morgan. The case was tried on the testimony of Ward, and the facts are undisputed.

Passing all questions of the form, duration, and manner of the execution of said oral lease, it was a fraud upon the creditors of the corporation. The corporation was then hopelessly insolvent, and was at that time indebted to the Indiana Road Machine Company and to Ord Morgan for matters upon which they subsequently obtained judgments. It operated to withdraw from the reach of creditors the stone in the quarry, which was being taken out by Ward, its president, general manager, director, and stockholder, in fulfillment of an individual contract. Some authorities hold such contracts to be absolutely void, but the weight of American authority is that contracts between corporations and their directors, dealing with the corporate assets, are not void, but voidable. Where they are held voidable, however, all agree that they are more closely scrutinized than ordinary contracts; and the burden is upon those claiming under them to prove that they are made in good faith and fair to the corporation. 2 Thompson on Corporations, 4040-4049, 4060-4064; 3 Clark & Marshall on Corporations, p. 2302-2307 (section 761); Helliwell's Supp. to Clark & Marshall, § 78; Jones, McDowell & Co. v. Ark. Mech., etc., Co., 38 Ark. 17; Town of Searcy v. Yarnell, 47 Ark. 269, 1 S. W. 319. The burden was upon Ward to show the fairness to the corporation of this lease, and this he has wholly failed to do. The relief of creditors is usually worked out in equity. But where the creditors are not simple contract creditors, but, as in this case, have a lien upon the property from the date of their judgment, a different rule may prevail. 3 Clark & Marshall on Corporations, 2330. However, that is not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

important here, for the answer set forth the fraudulent character of the transactions and the evidence sustained it, and this court has held that "courts of equity and law have jurisdiction to relieve against frauds upon creditors. And, where no motion is made to correct an error in the adoption of the proceedings, the court may either transfer upon its own motion, or may proceed to a trial upon the merits." *Catchings v. Harcrow*, 49 Ark. 20, 3 S. W. 884. That principle is applicable here.

The judgment is affirmed.

**CHICAGO, R. I. & P. RY. CO. v. NELSON.
SAME v. BUCHANAN.**

(Supreme Court of Arkansas. Oct. 19, 1908.)
**FALSE IMPRISONMENT (§ 15*)—RAILROADS—
LIABILITY.**

A railroad company is not liable for the arrest of plaintiffs, who, on insisting on being entitled to pass through a station gate, were arrested by a policeman, who was directed by the gatekeeper and station master to take charge of them, where the policeman was not under the company's control, though it paid one-half of his salary; he being stationed at the depot to arrest offenders, etc., as an ordinary policeman, and receiving his instructions from the chief of police.

[Ed. Note.—For other cases, see *False Imprisonment*, Dec. Dig. § 15.*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Consolidated actions by Homer N. Nelson and by E. W. Buchanan against the Chicago, Rock Island & Pacific Railway Company. From judgments for plaintiffs, defendant appeals. Reversed and actions dismissed.

Buzbee & Hicks, for appellant. Trimble, Robinson & Trimble, J. W. Blackwood, and J. G. Dunaway, for appellees.

BATTLE, J. These two cases are based and were tried upon the same facts, and the transcripts therein are the same in every material respect.

On May 17, 1906, Homer N. Nelson and E. W. Buchanan purchased of the Chicago, Rock Island & Pacific Railway Company tickets for transportation from Hot Springs to Little Rock, Ark., and return. They used that portion of the tickets which entitled them to transportation from Hot Springs to Little Rock. The other portion of the ticket showed that it was to hold good until the 17th day of June, 1906, and that it had been repeatedly used to gain entrance through the gate of the railroad company at the depot at Little Rock, but not on the train. On the 6th day of June, 1906, they appeared in a line of 25 or 30 persons before the gate to the depot at Little Rock, again seeking entrance thereby by going through a narrow passageway leading to the same. They were among the first in the line, and were among the first to pre-

sent their tickets to the gatekeeper and demand entrance. He refused to allow them to enter because their tickets had before that time been punched by him or his predecessor, and requested them to get out of the passageway and allow others in their rear to come forward, and, they insisting on entrance, he called A. E. Bourland, a policeman at the depot, to take "charge" of them, who requested them to step aside, which they did, and so remained until nearly all of those standing in front of the gate had passed in, when they again presented their tickets, with the same result as before; and, expressing a desire to go upon the passenger train then at the depot, and insisting that they had the right to do so, the gatekeeper asked the policeman to "take charge of them," which he did, and confined them in the city prison of Little Rock, where they were compelled to remain about 30 minutes. On the next morning, the 7th of June, they were tried in the police court and discharged. After that each one of them brought an action against the railroad company for damages on account of the arrest and imprisonment, and recovered judgment for \$500 for compensatory damages, and \$200 for punitive damages.

Bourland was an ordinary policeman, appointed and sworn as such and in the same manner. The railroad company paid one half of his salary, and the city the other half, yet he was not employed by the company, nor under its control. Hawkins, the chief of police, testified that he considered that it had some control over him because it paid one half of his salary, but there is no evidence that it had, or exercised any. No such act was shown. It had no power to remove him, and was not responsible for his acts. He was stationed at the depot to arrest offenders and protect life and property, as an ordinary policeman, and received his instructions from the chief of police, reported every day to police headquarters, and exercised powers vested in him by law, and not by employment of the railroad company. The only reasonable inference is that it paid one-half of his salary to induce the city of Little Rock to station a policeman at its depot, with the same effect had it not paid any part of the salary.

Gallagher, the gatekeeper, was a station master. Bourland, the policeman, not being a station employé of the railroad company, was not subject to his control, and he had no authority to direct him to arrest. His powers and duties were defined by a rule of the company as follows:

"702. The station master reports to the superintendent, and must obey the orders of the trainmaster and chief dispatcher. He has charge of the passenger station and the station employés where he is located. It is his duty to see that the station is kept in proper condition, preserve order about the station,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

prevent confusion and delay in seating the passengers and receiving and delivering baggage, and attend courteously to the comfort and wants of passengers and see that the employes do the same. He must see that the cars in the train starting from his station are inspected, cleaned, and properly equipped, that the trainmen are ready for duty at the appointed time, with the necessary signal and other appliances, and that the trains are properly made up, and leave on time."

The defendant is not liable in damages for the arrests of plaintiffs.

Judgments in the two cases reversed, and actions dismissed.

HORTON v. JACKSON et al.

(Supreme Court of Arkansas. Oct. 19, 1908.)

1. LIBEL AND SLANDER (§ 74*)—LIABILITY—PUBLICATION—RATIFICATION.

Where defendant requested the publication of a notice that plaintiff was expelled from a secret order for violating his obligations, but it was never published, and another notice was published in its stead, signed by defendant's name, to the effect that plaintiff was thereby denounced as a traitor to the order, and unworthy of the respect of its members, but which defendant did not cause to be published, he was not liable for the publication of the second notice; and hence an instruction was properly refused that, if defendant discovered and read the notice above his signature, and did not correct it in the same public manner in which it originally appeared, he would be liable as having ratified it.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 175; Dec. Dig. § 74.*]

2. TRIAL (§ 261*)—INSTRUCTIONS—NECESSITY OF REQUEST.

Where the court properly refused to instruct as requested, it was not bound to give a proper instruction on the same subject, in the absence of a request therefor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 675; Dec. Dig. § 261.*]

Appeal from Circuit Court, Pope County; Hugh Basham, Judge.

Action by J. E. Horton against I. C. Jackson and others. From a judgment for defendants, plaintiff appealed. Affirmed.

U. L. Meade, for appellant. Brooks, Hays & Martin, for appellees.

BATTLE, J. J. E. Horton sued I. C. Jackson, A. C. Thompson, and Milton Bridges for libeling him by the publication in a newspaper of the following notice:

"Notice is hereby given that by order of Zion Hill Local No. 680, John F. Whorton is hereby denounced as a traitor to the order, and that he is not worthy of the confidence or respect of any member of the order.

"Done by order of the Zion Hill Local No. 680, April, 28, 1906. Other papers please copy. I. C. Jackson, Pres.

"Attest: A. C. Thompson, Sec.-Treas."

The defendants denied that they published or caused to be published the foregoing notice. The undisputed evidence in the case shows that they did not publish such notice, or cause it to be published. But they did request the publication of the following notice:

"This is to certify that John E. Horton is expelled from Zion Hill Local Union No. 680 for violation of his obligations and divulging secrets of the order. By order of Zion Hill Union No. 680, April 2, 1906.

"I. C. Jackson, Pres.

"Attest: A. C. Thompson, Sec.-Treas."

And in lieu thereof the first-mentioned notice was published. In the last-mentioned notice they stated that plaintiff had been expelled from a certain society for violation of his obligations and divulging secrets of the order. This was true.

There was only one publication of the first notice, and none of the last.

The court refused to instruct the jury in the trial in the case, at the request of the plaintiff, as follows:

"You are instructed that a notice published in a paper is presumed to have been authorized by those whose names appear as subscribing to said notice. And if the defendants Thompson and Jackson discovered and read said notice above their respective signatures, and did not correct the same in that same public way and manner as it originally appeared, they (the said Thompson and Jackson) will be held as ratifying the same, and are therefore as liable, if liable at all, as if they had authorized said notice to have been printed in the first instance."

The defendants recovered judgment, and the plaintiff appealed.

The two notices are entirely different and clearly distinct. To the publication of the first the defendants were not parties. When it was published the wrong was complete, and the defendants inflicted no injury thereby, and did not thereafter add to the injury already done, and the last, being so entirely different, furnished no excuse for its publication. They had done no wrong by its publication. Why should they repair the wrong done thereby? That should be done by the parties responsible for its existence. The court properly refused to instruct as the plaintiff requested. But appellant says if it was not correct, the court should have given one upon the same subject which was, and cites *Bruce v. State*, 71 Ark. 475, 75 S. W. 1080, to support his contention. But that case, so far as it supports such contention, has been impliedly, and is now expressly, overruled. See *Snyder v. State* (Ark.) 111 S. W. 465; *Allison v. State*, 74 Ark. 444, 86 S. W. 409; *Mabry v. State*, 80 Ark. 349, 97 S. W. 235.

Judgment affirmed.

LOUISIANA & A. R. CO. v. HOBBS.

(Supreme Court of Arkansas. Oct. 12, 1906.)

1. APPEAL AND ERROR (§ 1003*)—VERDICT—CONCLUSIVENESS.

Where the evidence was legally sufficient to warrant the submission of an issue to the jury, the verdict will not be disturbed on appeal, though the preponderance of the evidence was in favor of the defeated party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

2. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A verdict for \$10,000 for injuries sustained by a man 23 years old, in good health, a plumber by trade, and earning about \$2 per day, is not excessive, where the injuries necessitated the amputation of a limb about four inches above the ankle, and where the injuries caused him to suffer greatly.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 380, 381; Dec. Dig. § 132.*]

Appeal from Circuit Court, Hempstead County; Jacob M. Carter, Judge.

Action by Silas Hobbs against the Louisiana & Arkansas Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit by appellee against appellant to recover damages for personal injuries alleged to have been sustained by appellee through the negligence of appellant. The complaint, so far as it is necessary to set it out, alleged "that on October 13, 1906, while he [appellee] was engaged in loading a car of lumber on a side track, defendant's [appellant's] engine was switching cars to and from same, and pulled the car he was loading onto the main line, and, after said engine had gone several hundred yards north of the side track, plaintiff started to return to the place where he was loading said car, and, as he stepped on rail of main line, a brakeman of said company negligently and carelessly threw the switch, catching heel of plaintiff's foot between switch rail and rail of main track, and held him so firmly fastened that he could not release himself, and that said brakeman negligently and carelessly failed to open the switch and release him, and, while in this condition, a train of cars and engine at a speed of 20 miles per hour, without signal or lookout for danger or warning, was carelessly and wantonly driven by the employés of said company against plaintiff, knocking him down and running over his foot, and cutting off same while he was being held fast by the rail, causing plaintiff great physical pain and mental suffering." Appellee laid his damages at \$25,000, for which he prayed judgment. The appellant answered, denying all the material allegations, and setting up the contributory negligence of appellee in going about and in front of a moving train, and in attempting to get on one of its cars, as an affirmative defense.

The case was submitted to a jury upon substantially the following facts (stated by appellee's counsel), as they may be considered from a view point most favorable to appellee: "On the 13th of October, 1906, the appellee was engaged in loading a car of lumber at Patmos on the line of the appellant's road. The train that caused the injury arrived about 2 o'clock p. m., going north towards the town of Hope, Ark. Appellee was in the car when the train went in on the side track and remained until the train pulled the car out, as he had a plank partly in the car. The train pulled the car out on the main line, and he got out on the platform as soon as he got the lumber he had hold of placed. The train pulled the car he was in and also a loaded car behind it out from the spur onto the main line for the purpose of taking the loaded car back to the detached section of the train, which was down on the main line. Appellee alighted from the train on the platform and the train ran up the main line about 120 feet from the switch, going towards the town of Hope, which is north from the switch. Appellee started back to the lumber pile, to be ready to go to work when the car returned. He followed a path across the track used by the public, and started across, while the train was still going north or away from him. As he stepped upon the rail, the brakeman threw the switch to let the engine and cars go down on the main line to place the loaded car in the train, and the switch rail caught his foot and held him until the train, which could have been stopped within eight or ten feet, came back and cut his foot off. The fireman saw appellee while he was on the track. Appellee hallooed when he was caught. The brakeman ran from the switch nearly to him, then back to the switch, as though to open it and release him, but failed to do so. Then, turning once more, he ran to appellee, and was trying to pull him out of the switch, when the train ran over his foot, and cut it off." Appellee was a tinner and plumber by trade, and was earning at the time of his injury about \$2 per day. The injury rendered him less efficient for that work. His foot and ankle were so severely mashed that amputation of the limb was necessary. The limb was amputated about four inches above the ankle. Appellee was 23 years of age and in good health. His expectancy was about 40 years. He suffered greatly.

The jury returned a verdict in favor of appellee for \$10,000. Judgment was entered accordingly, and this appeal was duly prosecuted.

Henry Moore and Henry Moore, Jr., for appellant. Jobe & Carrigan and McRae & Tompkins, for appellee.

WOOD, J. (after stating the facts as above). The issues of the negligence of appellant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the contributory negligence of appellee were submitted to the jury under proper instructions. The principles announced as applicable to the facts of this record have been so often declared by this court we deem it unnecessary to set out the requests for instructions and discuss the rulings upon which error is predicated. It is sufficient to say that the court's rulings were in conformity with the law. On the issues of the negligence of appellant, and the contributory negligence of appellee, there is a sharp conflict in the evidence, and the preponderance, we think, is in favor of appellant. But we cannot say there is no evidence to support the verdict here. On the contrary, the evidence was legally sufficient to warrant the court in submitting these issues to the jury, and its verdict under familiar rules will not be disturbed here when such is the case.

The verdict was not excessive. This court in recent cases has affirmed judgments for as large, and even larger, amounts where the physical injury and mental anguish was no greater than in the case at bar. *Railroad Company v. Sparks*, 81 Ark. 187, 99 S. W. 73; *Railroad Company v. Moody*, 82 Ark. 603, 102 S. W. 375.

Affirmed.

HIGHT v. HARDING.

(Supreme Court of Arkansas. Oct. 19, 1908.)

TRIAL (§ 120*)—ARGUMENT OF COUNSEL—DISCRETION OF COURT.

There was an abuse of discretion, requiring reversal, where in an action involving the ownership of a cow, and depending mainly on the credibility of the parties, plaintiff's counsel in his closing argument was allowed to discuss defendant's failure to have the cow assessed for taxes as bearing on his credibility, the court having instructed that the question of assessment could not be considered, plaintiff's counsel having said nothing of it in his opening argument, and defendant's counsel in his argument having merely read the instruction, and stated that it was useless to discuss the matter; a new matter being thus injected into the case by the permission, when defendant had closed his argument, and so could not reply to it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 285-287; *Dec. Dig.* § 120.*]

Appeal from Circuit Court, Washington County; J. S. Maples, Judge.

Petition by W. A. Harding against J. P. Hight. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

E. B. Wall and McGill & Lindsey, for appellant. R. J. Wilson, McDaniel & Dinsmore, and Walker & Walker, for appellee.

HART, J. This is an action of malicious prosecution brought in Washington circuit court by W. A. Harding against J. P. Hight. The complaint alleges, in substance, that the defendant Hight had falsely, maliciously, and

without probable cause procured the grand jury of Washington county to find an indictment against the plaintiff, Harding, charging him with the crime of obtaining money under false pretenses, which indictment was returned November 4, 1905. The false pretense charged consisted in selling a cow in his possession to one J. N. Oates for \$45, which he represented to be his own property, and which in reality was alleged to be the property of the defendant, Hight. Harding was at the October term, 1906, of said court duly acquitted of said charge by a jury, whereupon he was by the court discharged and the prosecution thereby terminated. The complaint further alleged that Hight had maliciously and without probable cause caused Harding to be imprisoned in the county jail of Washington county on said charge for 72 days, and had afterwards caused him to be prosecuted in said circuit court on said charge until his acquittal and discharge; that prior to the beginning of said 72 days' imprisonment Harding had given bail for his appearance in said court to answer said charge, but that Hight had gone to one Charles Vance and other sureties on his bail bond, and falsely and maliciously represented to them that, by remaining on his bond, they would be compelled to pay the amount thereof, and would be otherwise injured, and did thereby cause them to surrender Harding into custody, whereby he was imprisoned in the county jail for 72 days; that after said imprisonment Hight absented himself from a term of said court, and caused Harding to be deprived of his right of a speedy trial, by which he was greatly humiliated. Hight answered, making a general denial. The case was tried before a jury at the fall term, 1907, of said court. The jury returned a verdict in favor of plaintiff for \$1,800 damages, and the defendant has appealed.

Harding had been in the dairy business near Fayetteville, Ark., and J. A. Ferguson had held his notes for \$1,850 and a mortgage on the property used in his dairy business to secure the same. Hight bought the notes and mortgage about May 1, 1905. Harding executed to Hight a new note and mortgage. Shortly afterwards seven cows, one of which was called "Dandy," were purchased from Hugh Shelton for \$180 or \$190, and delivered to Harding. Here is where the conflict of testimony begins. Harding claims that he bought the cows from Shelton for \$190, and paid him by giving him \$10 in money and a check on Hight for the balance. On the other hand, Hight contends that he bought the cows from Shelton, paying him therefor \$180, and then sold them to Harding for the same price, retaining the title in the cattle until they were paid for. It is not disputed that the cow called "Dandy" was sold to Oates by Harding for \$45, and that Harding at the

time represented that she was his property, and was free from any lien or other incumbrance. Hight produced a memorandum in writing showing a sale of the Shelton cattle, together with others by him to Harding. The memorandum purports to have been signed by Harding, and shows that the title to the cattle was retained by Hight until they were paid for. Harding says this memorandum is a forgery. Other evidence was adduced by each party tending to show his ownership in the cattle, but it consisted chiefly of circumstances from which ownership might be inferred by the jury.

Over the objections of Hight, Harding was permitted to prove that Hight had never assessed these cattle for taxation; the court at the time stating in the presence of the jury that he would permit the assessment list of Hight to go to the jury for what it was worth, and would fix it with proper instructions. Defendant saved his exceptions. On that point the court instructed the jury as follows: "As to whether Dr. Hight should have or should not have assessed the cow or cattle in controversy is not a question for the jury. And the jury will not consider that fact in determining this cause." Counsel for plaintiff in making his opening argument before the jury did not discuss the matter of assessment. Counsel for defendant read the above instruction on the subject of the assessment of the cattle to the jury, then stated that it was useless to discuss that matter, and thereafter did not refer to it. Counsel for plaintiff in his closing argument to the jury referred to the fact that Dr. Hight had not had said cow assessed to him for taxation for the years 1905 and 1906. Thereupon counsel for defendant made objection to the court to any argument against defendant in the matter of the assessment for the reason that the court had excluded that matter from the jury, and that the counsel for the defendant had not presented it to the jury for that reason. Counsel for plaintiff replied that he only wanted to argue it as a circumstance affecting the credibility of the defendant as a witness, and the court replied that he might argue it to the jury for that purpose. Counsel for the defendant saved their exceptions. Thereupon counsel for the plaintiff proceeded to argue the matter before the jury as affecting the credibility of the defendant as a witness.

After the argument was closed, and as soon as the jury had retired, counsel for defendant again called the attention of the court to the fact that the matter of the assessment had been excluded from the jury by the court's instructions, and that they had not argued the matter for that reason, and had had no opportunity to argue it since counsel for plaintiff had presented it to the jury. Counsel was then informed by the court and by counsel for plaintiff that Mr. J. W. Walker had gone to the court after the instruc-

tions had been read to the jury, and the argument had commenced, and had stated to the court in the absence of the counsel for the defendant, and without their knowledge, that he intended to argue the fact of the failure of Hight to assess the property as a circumstance affecting his credibility as a witness; that he stated to the court that he did not intend to do so if the court considered it would be in conflict with the instructions, and had been informed by the court that for that purpose such argument would be proper. Mr. Thompson in his work on Trials, at paragraph 969 of volume 1, says that it is reversible error for the trial judge to permit counsel in argument before the jury to comment upon evidence which has been excluded. The testimony in regard to the assessment list had been excluded from the jury, and for that reason had not been discussed by counsel for plaintiff in their opening argument, and counsel for the defendant had stated to the jury that they did not discuss it because the court had excluded it from their consideration. While it may be said that the permission by the court to plaintiff's counsel to argue it to the jury was to admit it again as evidence, still it was, in effect, to permit evidence to be given to the jury after the defendant had closed his argument to permit plaintiff to comment on its effect and to deny defendant the right of a reply. This could be hardly less prejudicial than commenting on evidence which has been excluded in a case like the present, where the chief reliance of either party for a verdict rested upon the credence which the jury should place upon his own testimony. His credibility as a witness, then, became of vital moment to him in the trial. Mr. Thompson says that the true office of counsel is that of aids or helps to the court and jury in the administration of justice.

Defendant's credibility as a witness was a matter that vitally affected his interests. After his counsel had closed their arguments before the jury, new matter was injected into the case which materially affected his rights. The aid of his counsel in arriving at the truth of the case should not have been denied him. The defendant had a right to know what arguments were to be urged against him, and he could only learn this from the opening argument and inferentially from the instructions of the court. While in cases of this sort the appellate court will not reverse a judgment unless an abuse of the discretion of the trial court is shown, we think such abuse clearly appears in this case where the credibility of the parties to the suit was one of the main issues to be decided by the jury, and where a new subject and a new argument was permitted the plaintiff in his closing argument to which the defendant was denied an opportunity of reply.

For this error, the judgment is reversed and the case remanded for a new trial.

ST. LOUIS SOUTHWESTERN RY. CO. et al.
v. WELLS.

(Supreme Court of Arkansas. Oct. 19, 1908.)

APPEAL AND ERROR (§ 1133*)—CONSOLIDATED
CASES—DEFECTIVE RECORD—EFFECT.

A suit for injury to a son was consolidated with one by his mother for her damage, and judgments were rendered in their favor. In disposing of the son's case on defendant's appeal, nothing was done about the mother's case; the abstract and brief failing to show that appeal was prayed therein. The record fails to show any motion for new trial in her case or bill of exceptions, and the case is not referred to in the motion or bill in the son's case. There are two motions for new trial in the record, each bearing the caption of the son's case, and the bill of exceptions bears the two captions. *Held*, that it is too late to correct any mistake in preparing the papers in the mother's case, since the Supreme Court was not asked to consider the appeal therein, and treated it as abandoned, and that the judgment must be affirmed for noncompliance with Supreme Court rule 9, and because the record does not contain either a motion for new trial or bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4450-4453; Dec. Dig. § 1133.*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Action by Minnie Wells against the St. Louis Southwestern Railway Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Sam H. West and J. C. Hawthorne, for appellants. Geo. F. Chapline, for appellee.

McCULLOCH, J. This is a companion suit with that of Silas Adams, by next friend, against the St. Louis & Southwestern Railway Company and Otto Smith, 112 S. W. 186, which was determined by this court July 6, 1908, and reversed and remanded, with directions to remove the case to the federal court. Minnie Wells is the mother of Silas Adams, and sued to recover for damages sustained by herself, as mother, by reason of the personal injuries inflicted on her son. She laid her damages in the sum of \$500. The cases were consolidated and tried together, and the jury returned a verdict against the defendant railway company in each case, assessing damages at the sum of \$350 in the boy's case, and at \$50 in the mother's case. There was no effort to remove the mother's case to the federal court, as the complaint did not pray for amount of damages up to the jurisdictional amount of that court. We disposed of the Silas Adams Case solely on the ground that the petition for removal should have been granted, though there were assignments of numerous other errors of the trial court. In disposing of the case we said nothing about the Minnie Wells Case, as the abstract and brief failed to call our attention to the fact that any appeal had been prayed in the latter case. Upon our attention being now called to that

fact, we find, after exploring the record, that a separate judgment was rendered in this branch of the case, and an appeal prayed and granted. The record does not, however, set forth any motion for new trial in the case, nor bill of exceptions. This case is not referred to, either in the motion for new trial or bill of exceptions. There are two motions for new trial in the record, but each bears the caption, "Silas Adams, by Next Friend, v. St. Louis Southwestern Railway Co. and Otto Smith." The bill of exceptions also bears the two captions. It may be that this is an error made in the haste of preparing those papers; but, if so, it is too late now to correct them, as we were not asked to consider the appeal in the Minnie Wells Case, and we took it for granted that the appeal in that case had been abandoned.

However, since our attention is called to the fact that the appeal is still pending, the case should be affirmed, because rule 9 of the court has not been complied with, and because the record does not contain either a motion for new trial or bill of exceptions.

The judgment is therefore affirmed.

ST. LOUIS & S. F. R. CO. v. DYER.

(Supreme Court of Arkansas. Oct. 19, 1908.)

1. RAILROADS (§ 303*)—DUTY TO KEEP HIGH-
WAY CROSSINGS IN REPAIR—USE BY EX-
TRAORDINARY VEHICLES.

Railroads must use ordinary care to keep highway crossings in a reasonably safe condition for travel and crossing, but need not provide facilities for vehicles other than those in common use in the locality.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 959; Dec. Dig. § 303.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—ERROR CUR-
RED BY CORRECT INSTRUCTION.

In an action against a railroad company for damages to a traction engine, caused by an imperfect highway crossing, the refusal of a charge limiting defendant's duty to maintaining a crossing suitable for the passage of ordinary vehicles was not cured by the giving of a charge on its general duty as to maintaining crossings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 718; Dec. Dig. § 296.*]

3. RAILROADS (§ 350*)—DEFECTS IN CROSSINGS
—ACTION FOR INJURY TO VEHICLE—QUES-
TION FOR JURY—NEGLIGENCE.

In an action against a railroad company for damages to a traction engine while attempting to pass a defective highway crossing, whether plaintiff's servants in charge of the engine were negligent in attempting to cross, notwithstanding the defects, *held* to be for the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 350.*]

4. RAILROADS (§ 326*)—DEFECTS IN CROSSING
—ACTION FOR INJURY TO VEHICLE—NEGLI-
GENCE.

Those in charge of the engine were not bound to reject the only crossing reasonably accessible, unless the danger was so apparent that one of ordinary care would not have attempted to use it.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1038; Dec. Dig. § 326.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by Leonard Dyer against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

W. F. Evans and B. R. Davidson, for appellant. Sam R. Chew, for appellee.

MCCULLOCH, J. Appellee owned a traction engine, and attempted to propel it across appellant's railroad track at a public road crossing, when it was overturned and injured. He sues the company to recover damages, and alleges negligence on the part of the company in failing to properly construct the crossing and keep it in repair. He recovered \$200 damages, and the company appealed.

When appellee's employes in charge of the engine got to the railroad crossing, they found that the planks, which are usually placed next to rails at the crossings to enable vehicles to pass over the rails, were missing, thus leaving the rails exposed, and they procured fence rails, and placed them next to the steel rail, in an effort to temporarily repair the defective crossing. They attempted to propel the engine over the crossing, but the drive wheels failed to climb the steel rail, and slid along until the engine was overturned and thrown down the embankment. The testimony is conflicting as to the precise condition of the crossing. Some of the witnesses say that the dirt was worn away where the planks were missing next to the rails, so that the rails were exposed to a height of 5 or 6 inches; but one of appellant's witnesses says that the dirt was banked against the rail so that it was not exposed more than 2½ or 3 inches. We think there was evidence sufficient to sustain a finding either way on the question of negligence in maintaining the crossing in good repair. Aside from the conflict in the testimony as to the height of the exposed rails, the facts were such that different minds might reach different conclusions as to whether or not ordinary care had been exercised to make the crossing reasonably safe for travel. The court gave the following instruction which is found to be a correct general statement of the law applicable to the case: "The law requires the defendant to use ordinary care to keep the crossing of the public highway over its tracks in a reasonably safe condition for travel and crossing. If it used such care as that it is not guilty of negligence, but if it did not use such care as that to keep the crossing in a reasonably safe condition for crossing, the

defendant is guilty of negligence." The court refused, however, to give the following instruction requested by appellant: "I charge you that, if the crossing was in such condition that an ordinary vehicle in passing upon the highway could cross in perfect safety, then the company was not negligent in maintaining the crossing in such condition." It was error to refuse this instruction. Railroads in constructing and maintaining highway crossings are not required to anticipate and provide against extraordinary dangers, and are not required to provide facilities for the passing over of vehicles other than those in common use in the locality. Travelers along the highway, when they encounter railroad crossings, are entitled to facilities which are reasonably safe and convenient for vehicles in common use; but, when they attempt to use crossings for other purposes, they have no right to demand extraordinary facilities to meet the necessities of the special use. If a traveler attempts to cross with some kind of a vehicle not in common use, he must take the crossing as he finds it constructed for use of ordinary vehicles. *Railway Co. v. Aven*, 61 Ark. 141, 32 S. W. 500; 3 *Elliott on Railways*, p. 383; *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 23 N. E. 965, 7 L. R. A. 588, 18 Am. St. Rep. 303; *Railway Co. v. Johnson* (Tex. Civ. App.) 85 S. W. 476. Appellant was entitled to have this particular question submitted to the jury, as it narrowed the inquiry to the precise issue of the case; and it is no answer to the demand to say that the court gave a correct instruction in general terms on the subject. *Railway Co. v. Crabtree*, 69 Ark. 124, 62 S. W. 64; *Hamilton Brown Shoe Co. v. Choctaw Mer. Co.*, 80 Ark. 438, 97 S. W. 284.

Other errors of the court are assigned, but we find the proceedings in other respects free from error.

It is urged that the undisputed testimony shows appellee's servants to have been guilty of contributory negligence in attempting to cross with the engine under the circumstances. We do not think so. The testimony made a question for the jury to determine whether or not it was negligent on the part of those servants to attempt to cross, notwithstanding the defects. They were not bound to abandon the only crossing reasonably accessible, unless the danger from using it was so apparent that a person of ordinary care would not have attempted to use it. *St. L., I. M. & Sou. R. Co. v. Box*, 52 Ark. 368, 12 S. W. 757.

For the error indicated the judgment is reversed, and the cause remanded for a new trial.

COMBS et al. v. STACY et al.

(Court of Appeals of Kentucky. Oct. 28, 1908.)
TRESPASS TO TRY TITLE (§ 41*)—PROCEEDINGS—SUFFICIENCY OF EVIDENCE—TITLE TO SUPPORT ACTION.

In trespass to try title where plaintiffs relied on certain deeds, a patent, a copy of the original survey, and a plat to establish title, but the deeds and the patent did not include the land claimed, and the plat did not tend to show ownership in plaintiffs, verdict was properly directed for defendant.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*]

Appeal from Circuit Court, Perry County.
 "Not to be officially reported."

Action by Anderson Combs and others against James Stacy and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Miller & Ward, F. J. Eversole, E. E. Hogg, and P. T. Wheeler, for appellants. Bailey P. Wootton and Jesse Morgan, for appellees.

CLAY, C. This is an action of trespass to try title, and involves the ownership of a small tract of land situated in Perry county, Ky. Appellants pleaded title to the property in question; appellees denied their title, and pleaded adverse possession. Upon the hearing of the case appellants introduced their deeds and a certain patent to Archibald Cornett for 400 acres of land, dated December 18, 1848, also a copy of the original survey and the plat. Upon the conclusion of the testimony the court gave a peremptory instruction in favor of appellees. It is admitted that the land in question is not covered by the deeds or by the patent; but counsel for appellants insist that the plat does cover the land, and that it shows what land appellants actually purchased. A careful examination of the conveyances, however, shows that there is nothing in any of them to indicate that the grantor intended to convey the Archibald Cornett 400-acre patent. As the deeds do not embrace the land in question, and, as the patent and plat do not throw any light upon the subject, we are of opinion that the trial court properly instructed the jury to find for appellees.

Judgment affirmed.

DANIEL v. TRUNNELL

(Court of Appeals of Kentucky. Oct. 27, 1908.)

1. DEEDS (§ 118*)—CONSTRUCTION—PROPERTY CONVEYED—EVIDENCE.

Evidence held to show that a conveyance from plaintiff to defendant excluded a tract in controversy.

[Ed. Note.—For other cases, see *Deeds*, Dec. Dig. § 118.*]

2. TRESPASS (§ 40*) — COMPLAINT — SUFFICIENCY.

A complaint in an action against a trespasser alleged plaintiff's ownership and the trespass, and asked an injunction. Held, that the action

was not one to quiet title, so as to render the complaint bad for lack of an allegation of possession, but was properly brought under Ky. St. 1903, § 2361, providing that the owner of land may maintain the appropriate action to restrain any trespass thereon or injury thereto, though he may not have the actual possession of the land.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 80, 81; Dec. Dig. § 40.*]

Appeal from Circuit Court, Bullitt County.
 "To be officially reported."

Action by T. J. Trunnell against T. J. Daniel. Judgment for plaintiff, and defendant appeals. Affirmed.

Chapeze & Zimmerman, for appellant. J. F. Combs, for appellee.

NUNN, J. This appeal is from a judgment of the Bullitt circuit court adjudging appellee to be the owner of a lot in Bardstown Junction and restraining appellant from trespassing thereon. The lot in controversy contains about three-fourths of an acre and is situated between the storehouse lot devised to and owned by appellee and the lot belonging to one Willie Herr. Appellee's father owned considerable property and had several children. By his will he made special bequests of real estate to each of his children. The special devise to appellee was this "storehouse and lot and scales and scales lot." By the residuary clause of the will he devised all of the remainder of his real estate, consisting of a hotel and some lots, to all of his children equally. Appellee purchased and received conveyances from all of his brothers and sisters of this property included in the residuary clause of the will.

Appellant claims that appellee sold him all this property. Appellee contends that he obtained the lot in controversy under the special devise made to him by his father; that the scales lot included all between the Willie Herr lot and the storehouse lot. Appellant controverted this, and there was much proof, which was very conflicting, taken upon this question. It is unnecessary, however, to consider this question, for the reason that the deed made by appellee, of date October 5, 1899, conveying the property to appellant, contains this clause: "Out of the above boundary is excluded the right of way of the L. & N. R. Co. and the storehouse lot devised to T. J. Trunnell by Henry Trunnell; also a lot between the said storehouse lot and a lot belonging to Willie Herr." It is contended by appellant that this language does not exclude the lot in controversy, and that his deed covers and includes it. It is evident that the deed excludes all of the lot between the Willie Herr property and the storehouse lot. It appears from the evidence that appellant refused to accept this deed, because of this exclusion, when it was first tendered to him; but it also appears, without contradiction, that he did accept it when he made the

third and final payment of the purchase money, and had it recorded in the county court clerk's office. We are therefore of the opinion that the lot in question is the property of appellee.

Appellant further contends that this was an action to quiet title under section 11 of the Kentucky Statutes of 1903, and that the petition is defective, in that it failed to allege that plaintiff had possession of the land when suit was brought. It is true the petition contains all the allegations essential in an action to quiet title, except that it was not alleged that he had possession of the lot of land described; but it was alleged that he was the owner of it, and that appellant was removing a part of the fence around it and digging holes and putting posts therein, that his fencing marked the boundary line of the lot, and by removing it he was destroying the evidence of the boundary line, and asked that appellant be restrained from committing this trespass. Appellant answered, denying appellee's ownership, and alleged that the property was his. The court adjudged appellee to be the owner of the lot, and restrained appellant from committing further trespass thereon. This proceeding was authorized by section 2361 of the Kentucky Statutes of 1903, which provides: "The owner of land may maintain the appropriate action to recover damages for any trespass or injury committed thereon, or to prevent or restrain any trespasses or other injury thereto or thereon, notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass." Under this section the court, after finding that appellee was the owner of the property, had the right to make an order to prevent and restrain further trespass by appellant upon the lot.

For these reasons, the judgment of the lower court is affirmed.

STEELE v. DISHMAN'S ADM'R et al.
(Court of Appeals of Kentucky. Oct. 27, 1908.)
JUDGMENT (§ 866*)—REVIVAL—DEATH OF PARTY—LIMITATION.

Where 10 years passed after death of surety, and the qualification of his administrator without execution being issued on a judgment against decedent or attempt made to revive the judgment against the administrator or heirs, a motion to revive is barred by Ky. St. 1903, § 2548, providing that a surety shall be discharged from liability under a judgment after seven years without execution issued and prosecuted in good faith.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1604-1606; Dec. Dig. § 866.*]

Appeal from Circuit Court, Knox County.
"Not to be officially reported."

Action by John A. Steele against John Dishman and another. From a judgment overruling plaintiff's motion to revive his judgment against defendant Dishman's ad-

ministrator and heirs, plaintiff appeals. Affirmed.

James M. Hayes, for appellant. Dishman & Dishman, for appellees.

NUNN, J. At the November term, 1880, of the Knox common pleas court, appellant, John A. Steele, recovered a judgment against John Dishman and one C. C. Comstock, as surety of W. H. Brafford, for \$1,300, with interest from February 22, 1875, subject to credits of \$700 paid February 22, 1885, \$600 paid June 6, 1890, and \$227 paid October 27, 1890. John Dishman died April 4, 1894, intestate, domiciled in Knox county, Ky. S. B. Dishman, one of the appellees, qualified as administrator of the decedent May 8, 1894. No steps were taken to revive the judgment against John Dishman's administrator or his heirs until March 30, 1905. The administrator made a settlement of his accounts with the Knox county court March 27, 1905, which settlement shows a distribution of all assets that came to his hands. Under these facts, the court at the August term, 1905, overruled appellant's motion to revive the judgment of 1889 against the administrator and heirs of John Dishman, and from this judgment this appeal is prosecuted.

It is agreed by the parties that John Dishman was only a surety of Brafford. Section 2548, Ky. St. 1903, provides: "A surety shall be discharged from all liability under any judgment or decree, after the lapse of seven years without any execution issued thereon, and prosecuted in good faith for the collection thereof." The facts, as conceded, show that the judgment attempted to be revived against appellees was rendered in November, 1889, against John Dishman as surety of W. H. Brafford, and that as many as 10 years elapsed after the death of John Dishman and the qualification of his administrator without any execution being issued on the judgment, and that no attempt was made to revive the judgment against his administrator or heirs. Under these admitted facts section 2548 presents a barrier to the motion of appellant, and the collection of the judgment from appellee. See Milliken v. Dinning, 6 Bush, 646, and Columbia Bldg. Loan & Savings Ass'n's Assignee v. Gregory, 112 S. W. 608, 33 Ky. Law Rep. 1011.

For these reasons, the judgment of the lower court is affirmed.

O'NEAL v. SOVEREIGN WOODMEN OF THE WORLD.

(Court of Appeals of Kentucky. Oct. 22, 1908.)

1. INSURANCE (§ 724*)—MUTUAL BENEFIT SOCIETY—INITIATION—REGULARITY—ESTOPPEL.

Decedent's certificate of membership having been received by the local camp of defendant society, decedent was directed to appear for required initiation, when a mistake in the num-

ber of the local camp in the certificate was discovered. It was then decided to proceed with the initiation, which was done, the certificate being returned by the clerk for correction. Decedent paid all the required fees and dues, was accepted and recognized as a member of the order until his death, before the corrected certificate had been returned and delivered to him, and was buried by the order as a regular member in full fellowship and good standing. *Held*, that the order was estopped to question the regularity of the initiation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1866; Dec. Dig. § 724.*]

2. INSURANCE (§ 720*)—CONSTITUTION—CONSTRUCTION—"IN PERSON."

The words "in person," used in the constitution of a mutual benefit society directing that there shall be no liability until the insured shall have had delivered to him "in person" his beneficiary certificate while in good health, was not synonymous with "manual possession," so as to require that the certificate be actually placed in insured's hands to constitute a legal delivery, but was merely intended to require a delivery to insured himself, and not to another for him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1856; Dec. Dig. § 720.*]

3. INSURANCE (§ 720*) — MUTUAL BENEFIT CERTIFICATE—DELIVERY—EVIDENCE.

A certificate issued to insured on his application was received by the clerk of insured's local camp, when a mistake in the number of the camp was discovered. Insured was directed to appear for initiation, and was regularly initiated, and paid all the dues and assessments, but the clerk returned the certificate to the sovereign camp for correction, and, before a corrected certificate was returned and delivered to insured, he was killed. *Held* that, when insured was initiated and had paid the dues, the clerk held the original certificate, which was a valid instrument notwithstanding the error, for him and that such acts constituted a delivery of the original certificate to assured personally as required by the society's constitution in order to initiate defendant's liability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1856; Dec. Dig. § 720.*]

Appeal from Circuit Court, Ballard County.
"To be officially reported."

Action by Gertie O'Neal against the Sovereign Woodmen of the World. Judgment for defendant, and plaintiff appeals. Reversed. New trial ordered.

Robbins & Thomas and J. E. Bridgwater, for appellant. Reeves & Tharp, for appellee.

BARKER, J. This action was instituted in the Ballard circuit court by the appellant, as the widow of J. P. O'Neal, on the 15th day of December, 1904, seeking to recover from the appellee, Sovereign Woodmen of the World, the sum of \$500 which she claims is due her as beneficiary in a certificate of life insurance alleged to have been issued by the appellee through its local camp at Bandana, Ky., upon the life of her deceased husband. The sum named in the certificate is \$1,000, but by its terms, where the insured dies within a year from the date of the policy, the sum to which the beneficiary is entitled is one-half the amount named in the certificate, or \$500. There were several amendments, but we may pass the question

of the allegations of the petition by saying that, as a whole, it states a cause of action in the plaintiff against the defendant. The defendant, by its answer, denied all the material allegations of the petition, and especially that he was a member of the lodge, or that any certificate had ever been delivered to him; and there is no question but what its allegations, if true, interposed a valid defense to a recovery by plaintiff. When the case came on for trial, after the plaintiff's evidence was all in, the defendant moved the court to award it a peremptory instruction to the jury to find a verdict in its favor. This motion was sustained, and, under the peremptory instruction of the court, the jury awarded a verdict in favor of the defendant. From the judgment dismissing her petition, the plaintiff now appeals.

The appellee, Sovereign Woodmen of the World, is a fraternal order authorized to issue policies of insurance on the lives of its members. The insurance feature is not substantially different in principle from the ordinary fraternal insurance. On August 14 1904, Joseph P. O'Neal made application for membership and participation in the beneficiary fund of the Woodmen of the World. This application was in writing, and was obtained by a properly authorized officer of the order, one J. N. Helsley, to whom the applicant paid all of the necessary dues in order to obtain an insurance policy of \$1,000 on his life. The application was duly forwarded to the Sovereign Camp, where it was approved and a policy issued, by which the appellee agreed to pay to the wife of the applicant \$500 should his death occur during the first year of his membership, \$750 should his death occur during the second year of his membership, and \$1,000 should his death occur after the second year of his membership. This beneficiary certificate was forwarded to Bandana Camp No. 32, located at Bandana, Ky., for delivery to the applicant whenever he should become a member by being regularly initiated into the order and have paid all dues necessary to his proper initiation.

We do not feel it is necessary to set forth with any greater particularity the contents of the application for insurance, or the certificate which was issued in pursuance of the application. The real defense to liability is based upon the alleged fact that the certificate was never delivered personally to the applicant during his lifetime. After the certificate was issued and forwarded to the clerk of Bandana Camp No. 32, the applicant was notified to be on hand for initiation into the order, and at the proper time he was present and was initiated, thereby becoming a member. At this time the certificate which had been duly and legally issued was in the hands of the clerk of the local camp for the purpose of delivery to the applicant when he

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

should be lawfully obligated as a Sovereign Woodman of the World. Just prior to the initiation of the applicant, the clerk, who had the policy, observed that the number of the local camp was not stated correctly in the certificate, it being stated as No. 31, when it should have been No. 32, and he was of opinion that the policy would have to be returned to the Sovereign Camp for correction of this minute error, and the question was then raised in the lodge as to whether or not, under these circumstances, it would be lawful to initiate the applicant. The regular presiding officer was of opinion that it would not be lawful, but the district deputy, Helsley, took the position that the certificate had been issued and the applicant was present, ready for initiation, and therefore he should be initiated. After some debate the lodge acquiesced in this view, the regular officer left the chair, and Helsley presided, and from this point on it is not denied that the initiation was in all respects regular and in accordance with the constitution and by-laws of the order. Although the clerk was of opinion that he should return the certificate to the Sovereign Camp for the correction of the error in the number of Bandana Camp, still he required and the applicant did pay over to him all dues which were necessary to be paid in order to entitle him to the possession and ownership of the certificate. And then, with the acquiescence (at least) of the insured, the policy was returned by the clerk for the correction of the error above mentioned. Before it was returned, corrected, to the clerk, O'Neal had been killed by the falling of a tree upon him.

The appellee's defense is based upon the following stipulation contained in the application for membership and insurance in the order: "I agree to pay all assessments and dues for which I may become liable while a member of the order, as required by its constitution and laws, and that the liability of the Sovereign Camp for the payment of benefits shall not begin until after this application shall have been accepted by a Sovereign physician, a beneficiary certificate issued thereon and personally delivered to me by an authorized person while I am in good health, until I shall have been obligated in due form and all the requirements of section 58 of the constitution and laws of said order have been complied with." Section 58, above referred to, is as follows: "The liability of the Sovereign Camp for the payment of benefits on the death of a member shall not begin until after his application shall have been accepted by a Sovereign Physician, his certificate issued, and he shall have: First. Paid all entrance fees. Second. Paid one or more advance monthly payments of assessments and dues known as 'Sovereign Camp Fund.' Third. Paid the physician for medical examination. Fourth. Been obligated or introduced by a camp or

by an authorized deputy in due form. Fifth. Had delivered to him, in person, his beneficiary certificate while in good health. The foregoing are hereby made a part of the consideration for, and are conditions precedent to, the liability for the payment of benefits in case of death." It is not disputed (and, if it is, the evidence abundantly establishes it) that the applicant complied with all the provisions of section 58, except Nos. 4 and 5. The fourth, it seems to us, may be very readily disposed of. Whatever may be said as to the technical regularity of the initiation, there can be no dispute that it took place, and that the members of the lodge accepted it as regular and recognized the insured as a member of the order from that time on until his death; and, when he was killed, he was buried by the order in due form as a regular member in full fellowship and good standing. It seems to us entirely too late, after all of this was done, to question the regularity of the initiation. We think it was regular.

This leaves remaining only the question as to whether or not the certificate was delivered to the insured while in good health; and it may be conceded (for the purposes of this case only) that, unless the certificate was delivered to the insured in person, appellant, as beneficiary, has no cause of action against appellee. Was the certificate delivered to the insured in person while in good health? Because the constitution of the order requires that the delivery of the certificate shall be made to the insured in person while in good health, counsel for appellee have assumed that the words "in person" are synonymous with "manual possession," and that, therefore, the certificate was required actually to be placed in the hands of the insured before there could be a legal delivery. We cannot subscribe to this construction. There is no hard and fast rule as to what constitutes a legal delivery of a writing. We think the words "in person" were placed in the constitution in order that the delivery should be to the insured himself, and not to another for him. It is a well-settled rule that the delivery of a deed to A. for B. is a valid delivery; and it has often been held that the placing of insurance policies or deeds in the mail, directed to those for whom intended, was a valid delivery, and therefore the words "in person" were inserted after the word "delivered" to cut off such delivery as that of which we are speaking, and confine it to the insured in person. But it does not follow from this that it was intended to require that the certificate should be placed in the hands or actual physical possession of the insured. Such a possession has never been required as to deeds or other instruments which require delivery in order to be effective. The contrary of this is well settled in Kentucky. In the case of Bunnell, etc., v. Bunnell, 111 Ky.

566, 64 S. W. 424, we said on this subject: "So far, we have considered this question as if an actual manual delivery of the deeds was necessary. But such is not the law. No particular form of procedure is required to effect a delivery. It is not essential that the paper be actually transferred. If the grantor, when executing it, intends it as a delivery, and this is known to and understood by the grantee, and they treat the estate as having actually passed thereby, it will have that effect, though the instrument be left in the possession of the bargainor. [Authorities omitted.] Delivery may be shown by acts without words, or words without acts, or by both combined." And in *Shoptaw, etc., v. Ridgway's Adm'r*, 60 S. W. 723, 22 Ky. Law Rep. 1495, it was said: "But a manual delivery of the deed is not required, nor is the acceptance of the bodily possession of the paper itself. This delivery may be shown by acts without words, or words without acts, or by both combined. And possession by the grantee of the thing conveyed is persuasive evidence of such previous delivery. *Hughes v. Easten*, 4 J. J. Marsh. 572, 20 Am. Dec. 230." To the same effect is *Hudson v. Redford*, 67 S. W. 35, 23 Ky. Law Rep. 2347. It follows from this that whether or not there has been a legal delivery of an instrument is a question of intent, and we think that it cannot be asserted as a principle of law that what took place between the officers and members of Bandana Camp and the insured in regard to the certificate under discussion did not amount to a delivery of the certificate herein sued on within the meaning of the constitution of the order. It may be assumed that the insured did not take manual possession of the certificate, but he had done everything that was required of him to entitle him to a delivery of it, and the camp had regularly initiated him in order that it could be delivered to him. He had paid all that was required, and the money has never been returned. The mere fact that the clerk was of opinion that the insignificant error in regard to the number of the lodge being corrected required that the certificate should be sent back to the Sovereign Camp for this purpose did not militate against the delivery being completed prior to its return for the correction. No one would assert that the correction was necessary to the validity of the certificate. If the error had not been discovered, and the certificate had been taken away by the insured, no one would for a moment contend that this slight error would in any degree invalidate the instrument as an insurance policy. The certificate for all legal purposes was a valid instrument; and, if it was intended by the lodge by what was done that it should be delivered to the insured, then the latter was entitled to possession, and the mere fact that

he permitted the clerk to return the certificate to the Sovereign Camp for correction of the number of the subordinate camp cannot be said as a matter of law to show that there was not a personal delivery. When the insured had paid all dues and had been initiated into the order, the clerk held the certificate for him. He had by his conduct accepted it personally, and the clerk in returning it for the correction of the number of the camp returned it for him. It was his certificate, just as fully as it would have been if nothing had been said about the error in the number of the camp.

We think the trial court erred in awarding a peremptory instruction to the jury to find for the defendant under the circumstances and facts herein detailed, and the judgment is therefore reversed for a new trial under principles consistent with this opinion.

LEE v. WESTERN UNION TELEGRAPH CO.

(Court of Appeals of Kentucky. Nov. 5, 1908.)

TELEGRAPHS AND TELEPHONES (§ 68*)—FAILURE TO DELIVER MESSAGES—DAMAGES—RELATIONSHIP BETWEEN PARTIES.

Damages for mental anguish for failure of a telegraph company to send or deliver a telegram announcing the sickness or death of a relative cannot be recovered, unless the relationship between the parties is that of parent and child, husband and wife, sister and brother, or grandparent and grandchild.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

Appeal from Circuit Court, Pulaski County. "To be officially reported."

Action by Columbus Lee against the Western Union Telegraph Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Virgil P. Smith, for appellant. O. H. Waddle & Son and Geo. H. Fearons, for appellee.

CARROLL, J. This action was brought by the appellant to recover damages from the appellee company, growing out of its failure to deliver within a reasonable time a message notifying him that his aunt was dead. A demurrer was sustained to the petition upon the ground that the relationship between the deceased and the addressee in the telegram was not within the degree that entitled him to recover damages for mental anguish in being prevented by the negligence of the company from attending the burial and funeral of his aunt.

The question involved in this case has heretofore been considered by this court. In *Denham v. Western Union Tel. Co.*, 87 S. W. 788, 27 Ky. Law Rep. 999, a recovery was sought by an aunt because of the failure of the

company to deliver a telegram to the parents of her nephew, notifying them of his injury and death, by reason of which she was compelled to keep the body two days and nights, during which time she suffered great mental anguish. In rejecting her right to maintain the action, the court said: "Even if such an action could have been maintained for mental anguish by a near-degree relative on the averments of the petition, still the appellant is not entitled to recover, because she did not sustain that relationship." In *Robinson v. Western Union Tel. Co.*, 68 S. W. 656, 24 Ky. Law Rep. 452, 57 L. R. A. 611, it is said: "This court is committed to the doctrine that a telegraph company is answerable in damages for mental suffering caused by its failure to deliver a social message, by reason of which the sender or person addressed is prevented from attending at the bedside, at the death, or at the funeral of a near relative. We have not applied the doctrine further than to the class of cases referred to, and then the liability has been restricted to those of the first degree of relationship." In *Western Union Telegraph Company v. Steenbergen*, 107 Ky. 469, 54 S. W. 829, the delayed telegram was sent by the father-in-law, Steenbergen, announcing the death of the addressee's mother-in-law; but the court held that the degree of relationship was too remote to authorize a recovery, saying: "It is insisted for the company that, even in the courts of those states where mental anguish can be made the basis of a recovery, the rule has never been extended beyond the nearest degrees of blood relationship. This contention seems to be supported by the authorities. Certainly no legal presumption of such affection arises as will warrant a recovery for mental anguish, except in cases of such relationship." In *Western Union Telegraph Company v. Van Cleave*, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366, a recovery was held allowable where the relationship of brothers existed, and so in *Western Union Telegraph Company v. Lacer*, 122 Ky. 839, 93 S. W. 34, 5 L. R. A. (N. S.) 751, 121 Am. St. Rep. 502, and *Western Union Telegraph Company v. Caldwell*, 102 S. W. 840, 31 Ky. Law Rep. 497, 12 L. R. A. (N. S.) 748. In *Western Union Telegraph Company v. Fisher*, 107 Ky. 830, 54 S. W. 830, a father was held entitled to recover for the delay in sending a telegram announcing the illness of his child. To the same effect is *Thomas v. Western Union Telegraph Company*, 120 Ky. 194, 85 S. W. 760, and *Taylor v. Western Union Telegraph Company*, 101 S. W. 969, 31 Ky. Law Rep. 240.

In the recent case of *Randall v. Western Union Tel. Co.*, 107 S. W. 235, 32 Ky. Law Rep. 859, the principle announced in the foregoing cases was approved. So that it may be considered as the settled doctrine in this state that in cases of this character, where

damages are sought for the failure to send or deliver a telegram announcing the sickness or death of a relative, a recovery can not be had unless the relationship between the parties is that of parent and child, husband and wife, sister and brother, or grandparent and grandchild. This rule may be considered, and indeed it is, arbitrary; but the peculiar and speculative nature of the doctrine upon which the right of recovery rests in cases of this character makes it necessary that there should be limitations placed upon it. It must be conceded that the restrictions we have placed on the right of recovery are not satisfactory. Often persons farther removed in kinship and relationship than those we have enumerated would suffer greater mental anguish at being prevented from attending the bedside of a sick or burial of a deceased friend or relative than would a sister or brother. But, as the line must be drawn somewhere, it seems appropriate to put it at the point where the parties are united by close blood relation or marriage ties.

Wherefore the judgment of the lower court is affirmed.

IRELAND et al. v. BOWMAN & COCKRELL (Court of Appeals of Kentucky. Oct. 29, 1908.)

1. TRUSTS (§ 235*)—TORTS OF TRUSTEE—PUBLIC NUISANCE.

Trustees are answerable as such for any damage due to the maintenance of a public nuisance by them.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 343; Dec. Dig. § 235.*]

2. ESTOPPEL (§ 93*)—EQUITABLE ESTOPPEL—SILENCE.

That parties knew that another was negotiating for property, and knew that a dam, above which they were operating a mill, was a material inducement to the purchase, and made no objection to the maintenance of the dam before he had purchased the property, did not estop them, on thereafter operating another mill below the dam, to complain that it was an unlawful obstruction of the stream and interfered with the floating of logs.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 267; Dec. Dig. § 93.*]

3. NUISANCE (§ 72*)—PUBLIC NUISANCE—SPECIAL DAMAGE.

Where logs are caught and held by a dam until they rot, or the owners, at special expense and labor, get them over the dam, such owners sustain a special damage, not common to the public, for which they may sue, notwithstanding the dam may be a common nuisance.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

4. NUISANCE (§ 66*)—PRIVATE NUISANCE—PRESCRIPTIVE RIGHT TO MAINTAIN DAM.

The right to maintain a dam may be acquired, as against another private owner, by prescription, notwithstanding the dam may be a public nuisance.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. § 139; Dec. Dig. § 66.*]

5. JUDGMENT (§ 251*)—CONFORMITY TO ISSUES RAISED BY PLEADINGS.

Judgment cannot be entered on an issue not made by the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

6. NAVIGABLE WATERS (§ 22*)—PRESCRIPTIVE RIGHT TO MAINTAIN DAM—HEIGHT.

The right to maintain a dam by prescription extends only to the height at which it has been maintained for the prescriptive period, and no right to raise it above that height is acquired.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 112; Dec. Dig. § 22.*]

7. NAVIGABLE WATERS (§ 22*)—PRESCRIPTIVE RIGHT TO MAINTAIN DAM.

No right to maintain a dam which materially interferes with the floating of timber can be acquired by the maintenance of a dam which does not constitute such an interference.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 112; Dec. Dig. § 22.*]

8. NAVIGABLE WATERS (§ 1*) — FLOATING TIMBER.

A stream may be navigable for the purpose of floating timber, though not navigable for boats.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 9; Dec. Dig. § 1.*]

Appeal from Circuit Court, Rockcastle County.

"To be officially reported."

Action by Bowman & Cockrell against Mary T. Ireland and others. Judgment for plaintiffs for nominal damages, and defendants appeal, and plaintiffs prosecute a cross-appeal. Reversed on appeal and on the cross-appeal.

T. E. Moore, Jr., Jno. W. Brown, Eli H. Brown, J. W. Alcorn, and L. A. Nuckol, for appellants. T. Z. Morrow and C. C. Williams, for appellees.

HOBSON, J. Bowman & Cockrell have a steam sawmill on Rockcastle river about a mile below a sawmill owned by Mary T. Ireland, etc., who hold it under the will of J. M. Thomas, the former owner, and own land on both sides of the stream. In the year 1888 one Sam Brooks, who then owned this sawmill, built across Rockcastle river a dam, which he maintained until about the year 1894, when he sold out to W. R. Dillon, who raised the dam higher, and afterwards sold the property to Thomas. Thomas operated the mill as long as he lived, and at his death devised it to Mary T. Ireland and others, who have since operated the mill and maintained the dam. At the time Thomas bought the property, Bowman & Cockrell were operating a mill above this one, and afterwards, being required to take out a boom which they had maintained, they ceased operating that mill, and started one about a mile below Thomas' mill, which they have since operated. On July 12, 1906, they brought this suit against the devisees of Thomas, alleging that Rockcastle river is a navigable stream; that the dam obstructs

the navigation of the stream, and prevents them from floating logs down the stream to their mill; that the stream is navigable for floating logs, and has for many years been used for this purpose, but that logs coming down the stream to their mill are caught by the dam, and detained until they are injured; and that by reason of this obstruction of the stream they had been damaged in the sum of \$2,000. They prayed that the defendants be required to remove the dam from the stream, and for judgment for the damages sustained. In the first paragraph of their answer, the defendants set up the will of Thomas, and charged, among other things, that they held the property, and operated it, only as trustees under the will. In the second paragraph of the answer they denied the allegations of the petition. In the third paragraph they alleged that Thomas and those under whom he claimed had maintained the dam for over 15 years, and had acquired by prescription a right to maintain it, pleading the statute of limitation in bar of the action. By the fourth paragraph they pleaded that Bowman & Cockrell knew that Thomas was negotiating for the purchase of the property, and knew that the dam was a material inducement to him to make the purchase, and that with this knowledge they stood by and made no objection to the existence or maintenance of the dam before he had purchased and paid for the property. These facts they pleaded as an estoppel. The plaintiff filed a demurrer to all of the answer except that which controverted the allegations of the petition. The circuit court sustained the demurrer, and, the case having been prepared on the questions of fact raised by the answer, the circuit court entered a judgment, adjudging that the defendants remove the dam, and that the plaintiffs recover one cent in damages. From this judgment the defendants have appealed, and the plaintiffs have prosecuted a cross-appeal because they were not allowed substantial damages.

1. The court did not err in sustaining the demurrer of the plaintiffs to the first paragraph of the answer. The trustees and devisees were both made defendants to the petition. If the dam was a public nuisance, J. M. Thomas could not by his will confer upon the defendants authority to maintain it, and the trustees are answerable as trustees for any damage which they may have done by the maintenance of the nuisance. They are sued here as trustees. The trustees and devisees simply stand in the shoes of J. M. Thomas. The suit is against them as the representatives of his estate.

2. The court did not err in sustaining the demurrer to so much of the answer as pleaded the estoppel. Bowman & Cockrell were not then operating a mill below the dam. They had at that time no cause of complaint

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

about it, it was not in their way. They were not under the circumstances called upon to hunt up Thomas and make known to him that the dam was an unlawful obstruction in a navigable stream. He knew the facts as well as they did. They were not called upon then to complain of a dam that was not injuring them in any way, as they were above it, and it in no wise interfered with their floating logs down the river to their mill, which was then located above the dam.

3. The plaintiffs show a right to maintain the action. While the dam in the stream may be a common nuisance if it is an unlawful obstruction of the stream, and causes a special damage to the plaintiffs, they may sue. If the plaintiffs' logs are caught and held by the dam until they rot, or until the plaintiffs, at special expense and labor, get them over the dam, they have sustained a special damage, not common to the rest of the public. Where property is destroyed or injured by a public nuisance, the owner of the property may have an action for redress. *Wood on Nuisances*, § 787; 30 Am. and Eng. Cyc. 377.

4. The question of limitation is of more difficulty. It is insisted that prescription does not run in favor of a public nuisance, and that each continuance of the nuisance is a fresh wrong. This was the common-law rule, and it was perhaps based on the maxim that time does not run against the king. But in Kentucky time runs against the commonwealth. *Ky. St. 1903*, § 2523; *Rowan v. Portland*, 8 B. Mon. 232; *Cornwell v. L. & N. R. R. Co.*, 87 Ky. 72, 7 S. W. 553. In *Wood on Limitation*, §§ 180, 181, the rule is thus stated: "The rule in reference to acts amounting to a nuisance is that every continuance is a new nuisance, for which a fresh action will lie, so that, although an action for the damage from the original nuisance may be barred, damages are recoverable for the six years preceding the bringing of the action, provided such a period of time has not elapsed that the person maintaining it has acquired a presumptive right to do so. Thus, in the case first cited in the last note, in an action brought to recover damages for injuries sustained by reason of the erection of a dam, which set back the water of a stream and overflowed the plaintiff's land, it was held that, while the plaintiff was barred from recovering damages arising from the erection of the dam, he might recover for its continuance." Section 180. "While, as we have stated, each continuance of a nuisance is treated as a new nuisance, and furnishes a new ground of action which affords a good ground of recovery, although the statute may have run upon former injuries from the same nuisance, yet this proposition only holds good when the action is brought before the person erecting or maintaining the nuisance has acquired a prescriptive right to do so, by the lapse of such a period as bars an entry upon lands adversely held by another, that being the period universally adopted in this country for the ac-

quisition of prescriptive rights." Section 181

The rule thus laid down was followed by this court in *Manier v. Meyers*, 4 B. Mon. 514, in which the defendant's dam on the stream below the plaintiff's mill caused the water to flow back on the plaintiff's wheel, and the court recognized the rule that a right to maintain a dam may be acquired by prescription as well as by grant. We do not find it necessary to consider how far the rights of the public in a navigable stream may be affected by prescription in the maintenance of a nuisance. This is an action by one owner of land against another owner. Undoubtedly limitation runs against private persons, and if the defendants have acquired a prescriptive right to maintain their dam as against the plaintiffs, the plaintiffs cannot maintain their action. We see no reason why the plaintiffs in a case like this may not be cut off by the 15-year statute of limitation, simply because the nuisance of which they complain is also a public nuisance. If the defendants have acquired the right to maintain their dam by prescription, as against the plaintiffs, then as to the plaintiffs the dam is not unlawful. The person injured in the case of a public nuisance may lose his right of action or right to complain of the nuisance in precisely the same time that he may lose his right to complain of a private nuisance; for the thing for which the action is brought in either case is the wrong to his rights. We are aware that in other jurisdictions the rule usually is that there is no such thing as a prescriptive right to maintain a public nuisance, and that hence prescription is no defense to a proceeding to abate the nuisance, either by the public authorities or by a private individual. 29 Cyc. 1207; Note, 53 L. R. A. 903; *Wood on Nuisances*, § 727. But in Kentucky, in land cases where there has been an adverse holding of the soil for the prescriptive period, a different rule has been written, and it is so well settled that we cannot depart from it. *L. & N. R. R. Co. v. Smith*, 101 S. W. 317, 31 Ky. Law Rep. 1. We, therefore, conclude that the court erred in sustaining the demurrer to the plea of limitation.

It is insisted however, that it is shown by the proof that the dam, as it was maintained up to the year 1894, did not interfere with the navigation of the river for the purposes for which it was navigable, and that the trouble in this case arises from the fact that since the year 1894 the dam has been raised. It is true that the evidence before us sustains this conclusion, but as a demurrer to the defendant's answer had been sustained, they were not called upon to present their proof on this issue; and judgment cannot be entered now on an issue not made by the pleadings. The defendants would acquire no right by prescription to maintain the dam except at the height at which it was maintained for 15 years continuously, and if the dam within 15 years before the bringing of the action has been raised, the court may require the addi-

tion put upon the dam to be taken off, so as to restore it to the height at which it then was; for the defendants by maintaining a dam at a lower height could acquire no prescriptive right to raise the dam above that height. It has been held that, if the dam does not materially interfere with the character of navigation for which the stream is suited, it is not a public nuisance, and a riparian owner has a right to place it in the stream without permission. There is proof in the record that the dam, as originally constructed, did not materially affect the floating of timber down the stream, and the defendants by maintaining such a dam could acquire no right to maintain one which did materially affect the navigation of the stream for the purpose for which it was suited, the floating out of timber. 29 Cyc. 319.

5. Rockcastle river is a navigable stream for the purpose of floating logs and timber to market. A stream may be navigable for such purposes as this, although it is not navigable for boats at ordinary stages of the river.

6. On the return of the case to the circuit court an order will be entered overruling the plaintiffs' demurrer to the third paragraph of the answer. The plaintiffs will then be allowed to file a reply, and when the issues are completed, time will be given to either party to take additional proof if desired; and on the question of the damages sustained by the plaintiffs by reason of the dam, the court will, if either party desires it, order a jury trial. As the case is now presented, it is not proper for us to pass upon the question of the damages to which the plaintiffs are entitled; for on final hearing the proof may be materially different from that now before us.

The judgment of the circuit court is reversed on the appeal and on the cross-appeal. Each party will pay his own cost in this court, the cost of the transcript to be paid one-half by each.

HATFIELD et al. v. HATFIELD et al.

(Court of Appeals of Kentucky. Oct. 28, 1908.)

1. ADVERSE POSSESSION (§ 114*)—EVIDENCE.

Evidence held to warrant a finding that defendants and their predecessors in title had been in continuous, open, and adverse possession of the land in controversy holding the same for a period sufficiently long to give them title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

2. ADVERSE POSSESSION (§ 71*)—DEEDS—DEFECTS.

That a deed in defendant's chain of title was so defective as not to pass title and embraced more land than was intended to be conveyed would not preclude the original grantee thereunder from claiming the whole of the land into the possession of which he entered adversely against his grantor.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 417; Dec. Dig. § 71.*]

Appeal from Circuit Court, Pike County.
"Not to be officially reported."

Action by John W. Hatfield and others against Greeley Hatfield and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

York & Johnson and J. M. Roberson, for appellants. Roscoe Vanover, for appellees.

CARROLL, J. The appellants, who are the children and heirs at law of Valentine Hatfield, brought this action against the appellee Greeley Hatfield and others, who claim title through Richard Hatfield, to recover damages for alleged trespass upon and removal of timber from land alleged to have been owned by them. The defendants in the action, who are the appellees here, after traversing the petition, affirmatively set up that they were the owners of the land in controversy, which contained some 45 acres; that they derived title to the land from Richard Hatfield, a brother of Valentine Hatfield, under whom appellants claim. They further averred that Valentine Hatfield in 1867 conveyed the land in controversy to their ancestor Richard Hatfield, and that after the conveyance Richard Hatfield, and after his death some 10 years ago, these appellees had been continuously in the adverse possession of the land for more than 30 years before the institution of this action. In a reply, the appellants denied that Valentine Hatfield had conveyed the land to Richard Hatfield or that Richard Hatfield and appellees had ever been in the adverse possession of it. Appellants further set up in an amended petition that the deed of Valentine Hatfield to Richard Hatfield, which was executed in 1867, but not recorded until 1905, was not a valid instrument, because insufficiently acknowledged or proven; and, second, because said deed only purported to and did convey the interest of Smith Hatfield. The pleading admits that the land in controversy is embraced in this deed, but avers that it was the intention of Valentine Hatfield and the other grantors therein to only convey to Richard Hatfield whatever interest Smith Hatfield, their deceased brother, who died intestate, owned in the land, and that, by mistake or fraud, the deed, in addition to conveying the land of Smith Hatfield, embraced land owned individually by Valentine Hatfield, which land so individually owned Valentine Hatfield did not intend to convey. The affirmative matter in this petition was controverted by answer. Valentine Hatfield and Richard Hatfield were brothers, and sons of Joseph Hatfield. Many years ago Joseph Hatfield and Valentine Hatfield obtained patents for adjoining tracts of land. After the death of Joseph Hatfield, the land owned by him descended to his children, Valentine, Richard, Smith, and others. His son Smith Hatfield having died intestate,

tate, without leaving surviving him widow or children, his interest in his father's estate which had been partitioned descended to his brothers and sisters, including Valentine and Richard. The deed in question, although made in 1867, was not put to record until 1905. We think it clear that it was only intended by this deed to convey the interest of Smith Hatfield, although it seems the boundary described in the deed includes the land in controversy.

Appellants insist that neither appellees nor their ancestor Richard Hatfield were ever in possession of the land in controversy, and that the deed is not sufficient to convey title; but that, if it is, the conveyance of more land than was owned by Smith Hatfield was a manifest mistake, and, as the deed was not put to record until 1905, the statute of limitation applicable to the correction of mistakes did not begin to run until that time. The appellees insist that there was no mistake in the deed; but that, if there was, it is too late now to correct it; that Valentine Hatfield during his life recognized Richard Hatfield as the owner of the land; that Richard Hatfield was in possession of it at his death; and that appellees have been in its possession since his death, making the time of the adverse holding by Richard Hatfield and appellees more than 30 years. Having reached the conclusion that, upon the issue of adverse possession by appellees, the appellants must fail, it is not necessary to discuss the legal questions involving the validity of the deed.

It appears from the evidence that a ridge lies between Coon branch and Meadow branch, and that Valentine Hatfield lived on the Coon branch side of this ridge and claimed to the top of it; that Richard lived on the Meadow branch side of the ridge, and claimed to the top of it. In other words, the top of the ridge was the dividing line between the land claimed by Richard and Valentine Hatfield during their respective lives. It is also clear that the land in controversy lies on the Meadow branch side of the ridge, and the great weight of the evidence supports the contention of the appellees that they and their ancestor Richard Hatfield have resided on and been in the continuous adverse possession of the land in controversy for more than 30 years, cultivating and cutting timber from it, and claiming to own it. The appellant J. W. Hatfield testified that Richard Hatfield had a few acres of the land in controversy fenced some years before his death. Another witness for appellant, Alvin Hatfield, said that Richard Hatfield cut timber from the land in controversy, and that appellees, after the death of Richard Hatfield, claimed to own it. W. A. Hatfield, a witness 61 years of age, and a son of Richard Hatfield, said that his father had possession of the land in controversy for about 40 years; that he obtained it from the heirs of Joseph Hatfield

about the year 1855. Lewis Hatfield testified that he was employed by Richard Hatfield to, and did, cut and haul timber from the land in controversy some 40 years ago, and that at the time it was in the possession of Richard Hatfield. The appellee Greeley Hatfield testifies that he is and has been living on the land in controversy and paying taxes thereon for more than 13 years, or since he married Richard Hatfield's daughter, and that Richard Hatfield had lived on the land for many years before his death, cultivating and cutting timber from it, and that it was generally known that Richard Hatfield claimed to own it in his life and his heirs at law after his death. Talbott Hatfield testifies that the deed embraced the land in controversy, and that Richard Hatfield lived upon the land, fenced it, and cultivated it, and cut timber on it; that Richard Hatfield and his heirs had been in possession of the land, claiming it as their own for more than 30 years. This witness also testified that he heard Valentine Hatfield 40 years ago say that he owned to the top of the ridge on the Coon branch side, and that Richard owned to the top of the ridge on the Meadow branch side. It also appears that Valentine conveyed to J. W. Hatfield and his sister, Ester Followay, separate tracts of land on the Coon branch side of the ridge, the boundary running with the top of the ridge, but not including any land on the Meadow branch side of it. W. A. Hatfield, a son of Richard Hatfield, testified that he was acquainted with the boundary of land described in the deed made in 1867, and that his father lived on and claimed all the land within the boundary of this deed and all the land to the top of the ridge on the Meadow branch side of it.

A careful consideration of the facts satisfies us that Valentine Hatfield during his life only claimed to own the land on the Coon branch side of the ridge, and that he recognized the top of the ridge as the dividing line between his land and that of Richard Hatfield; that he never claimed to own or exercise any acts of ownership on the land on the Meadow branch side of this ridge; that the land in controversy which lies on the Meadow branch side of the ridge was in the continuous, open, and adverse possession of Richard Hatfield for many years before his death, and this with the knowledge of Valentine Hatfield. There is no evidence whatever of any mistake or fraud in the execution of the deed, nor does the evidence show whether or not it embraces more land than the interest of Smith Hatfield in Joseph Hatfield's estate. In fact, the deed does not play an important part in the controversy. If we should hold as a matter of law that the deed was so defectively executed as not to be a valid instrument to pass title, and further hold as a matter of fact that it embraced more land than was intended to be conveyed, yet it would not

deny the vendee who took possession under it from claiming the whole of the land, into the possession of which he entered adversely to the grantors. And, if his adverse holding continued a sufficient length of time, it would ripen into a possessory title that would enable him to defeat an attempt on the part of the grantors to recover a part of the land. It is probable that under or by color of the deed Richard Hatfield took possession of the land in controversy in 1867 or soon thereafter, but the strength of the case for appellees rests not on the deed or the entry under it, but their adverse holding of the land. Upon this issue, although it may have had its origin in the deed, they must succeed.

The judgment of the lower court is affirmed.

BOOTH'S EX'R v. COMMONWEALTH ex rel. JEFFERSON COUNTY ATTORNEY.

(Court of Appeals of Kentucky. Oct. 27, 1908.)

1. TAXATION (§ 856*)—INHERITANCE TAX—POWER TO IMPOSE.

The power to tax is incident to the legislative power, so that it is necessary, not that the Constitution have a provision authorizing the imposition of an inheritance tax, but that it does not prohibit it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1673; Dec. Dig. § 856.*]

2. TAXATION (§ 856*)—INHERITANCE TAX—POWER TO IMPOSE.

The right to take property by inheritance or bequest is but a creature of the law, and not an absolute right of property, and hence it may be regulated by the state and subjected to a tax as an incident of such regulation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1673; Dec. Dig. § 856.*]

3. TAXATION (§ 859*)—UNIFORMITY—INHERITANCE TAX—"TAX ON PROPERTY."

An inheritance tax is not a "tax on property," within Const. § 171, requiring uniformity and equality of taxes on all property subject to taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1674; Dec. Dig. § 859.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2475-2488; vol. 8, pp. 7653, 7654.]

4. TAXATION (§ 859*)—INHERITANCE TAX—UNIFORMITY.

Even if the inheritance tax be a "special or excise" tax, authorized by Const. § 181, and the rule as to uniformity of taxation applies to a special or excise tax, Revenue Act 1906 (Acts 1906, p. 240, c. 22) art. 19, § 1, imposing a collateral inheritance tax of \$5 on every \$100 of every legacy of the class taxed in excess of \$500, to the extent of the excess, satisfied the rule as to uniformity.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1674; Dec. Dig. § 859.*]

5. TAXATION (§ 873*)—INHERITANCE TAX—EXEMPTION—"ESTATE."

The "estate" meant by the provision of Revenue Act 1906 (Acts 1906, p. 240, c. 22) art. 19, § 1, that the first \$500 of every estate shall not be subject to the tax thereby imposed on legacies to strangers and collateral heirs and inheritances by collateral heirs, is not the estate of deceased, but that passing to a stranger or collateral heir, so that each legacy is entitled to

the exemption; and this, though the executor or administrator is required to pay it in the first instance, he being also required to deduct it from the estate passing to the legatee or collateral heir.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1689; Dec. Dig. § 873.*]

6. CONSTITUTIONAL LAW (§ 50*)—"LEGISLATIVE POWER"—NATURE AND SCOPE.

The words "legislative power," used in Const. § 29, providing that the legislative power shall be vested in a House of Representatives, etc., is a comprehensive phrase, meaning all powers that appertain to or are usually exercised by a legislative body.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 50.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4088, 4089.]

7. WORDS AND PHRASES—"EXCISE."

The word "excise" is a term of very general signification, and means tribute, custom tax, tollage, or assessment.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2548.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Proceeding between the commonwealth, on the relation of the county attorney of Jefferson county, and Armilda U. Booth's executor, relative to an inheritance tax. From a judgment of the circuit court, affirming a judgment of the county court, the executor appeals. Affirmed.

Trabue, Doolan & Cox, Grubbs & Grubbs, Chas. M. Lindsay, Percy N. Booth, Isaac T. Woodson, and Geo. L. Everbach, for appellant. Jas. Breathitt, Atty. Gen., Jno. F. Lockett, Asst. Atty. Gen., Geo. R. Hunt, Isaac Morrison, and Joseph Selligman, for appellee.

SETTLE, J. Mrs. Armilda U. Booth, a childless widow and resident of Jefferson county, Ky., died in December, 1906, leaving a will by which legacies of various amounts were bequeathed to her collateral kindred and to strangers. The executor appointed by the will on December 24, 1906, duly qualified as such and has since had charge of the estate. Shortly thereafter, and before the payment of any of the legacies bequeathed by the will, the commonwealth of Kentucky, on relation of the county attorney of Jefferson county, filed in the Jefferson county court a statement against the executor of the will of Mrs. Booth, claiming for the commonwealth an inheritance tax of 5 per cent. upon the face value of each legacy in excess of \$500 bequeathed by her will; the demand for its payment being based upon the provisions of article 19 of the revenue act of 1906 (Acts 1906, p. 240, c. 22). The executor filed a demurrer to the statement mainly upon the ground that the act was unconstitutional; but in argument upon the demurrer certain questions of construction were also raised. The county court overruled the de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mutter, thereby upholding the constitutionality of the act, but construed it to impose a tax of 5 per cent. upon the net value of each legacy passing to each legatee over the sum of \$500.

An appeal was taken to the circuit court by both the executor and the commonwealth, and that court, concurring in the construction given the statute by the county court, entered judgment imposing the tax as that court had done; and from the latter judgment the executor has appealed, thereby bringing the case to this court for final adjudication. The questions upon which the decision of this court is asked are: First, does the act in question violate any provision of the state Constitution? Secondly, if the act is not unconstitutional, does the exemption in the first section refer to the entire estate of the decedent, or to each legacy? Thirdly, is the tax upon the net amount actually received by each legatee or upon the face of his legacy?

The first section of the act in question imposes the tax and specifies its objects. The remaining sections indicate the means by which the provisions of the first section are to be carried into effect. The first section reads as follows: "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein, or income therefrom, which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, other than to or for the use of his or her father, mother, husband, wife, lawful issue, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the commonwealth of Kentucky, and any lineal descendant of such decedent born in lawful wedlock, shall be, and is, subject to a tax of five dollars on every one hundred dollars of the fair cash value of such property, and at a proportionate rate for any less amount, to be paid to the sheriff or collector of the proper county, as hereinafter defined for the general use of the commonwealth; and all administrators, executors and trustees shall be liable for any and all taxes until the same shall have been paid as hereinafter directed: Provided, that the first five hundred dollars of every estate shall not be subject to such duty or tax." Counsel for appellant insist that the act is violative of the state Con-

stitution, because of the alleged absence from that instrument of a provision authorizing the imposition of an inheritance tax; that the act is in conflict with that provision of the Constitution which requires that all taxes shall be uniform; and, finally, that its operation will result in discrimination, as well as inequality, which, it is claimed, makes it obnoxious to the provisions of the fourteenth amendment of the Constitution of the United States.

The present Constitution of the state declares that the Legislature may by general laws provide (1) for the levy and collection, for state, county, and municipal purposes, of an annual ad valorem tax on all property (sections 171, 172); (2) a tax on incomes, licenses, or franchises (section 174); (3) license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions; and (4) "a special or excise tax" (section 181). It may also be remarked that section 171 of the Constitution declares that: "Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

But, after all, the power of the Legislature to tax is an inherent, rather than a conferred, power, although the legislative department of our state government, like the executive department and judicial department, is a creature of the Constitution. Thus, in section 29 of that instrument, it is said: "The legislative power shall be vested in a House of Representatives and a Senate, which together shall be styled the General Assembly of the commonwealth of Kentucky." The words "the legislative power," as here employed, are a comprehensive phrase, meaning all powers that appertain to or are usually exercised by a legislative body. Perhaps it would more accurately express our meaning to say that the power to tax is incident to, or arises from, the "legislative power" with which section 29 of the Constitution clothed the General Assembly in creating that department of the state government. It cannot, therefore, be successfully maintained that the authority of the Legislature to impose taxes is wholly derived from sections 169 to 182, inclusive, of the Constitution, which relate to revenue and taxation. On the contrary, we think the provisions of those sections are, in the main, limitations upon the power of the Legislature, making mandatory the imposition of certain taxes and forbidding or regulating the imposition of others.

We are told by Mr. Cooley, in his work on Taxation (chapter 1), that: "The power of taxation is an incident of sovereignty, and is possessed by the government without being expressly conferred by the people. It is a legislative power, and when the people, by

their Constitution, create a department of government upon which they confer the power to make laws, the power of taxation is conferred as part of the more general power. * * * Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise, or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the Legislature in its discretion shall at any time select it for revenue purposes; and not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limits, and may be carried even to the extent of exhaustion and destruction, thus becoming in its exercise a power to destroy. If the power be threatened with abuse, security must be found in the responsibility of the Legislature that imposes the tax to the constituency which must pay it. The judiciary can afford no redress against oppressive taxation, so long as the Legislature, in imposing it, violate no express provision of the Constitution. The necessity for imposing it addresses itself to the legislative discretion, and it is or may be an urgent necessity, which will admit of no property or other conflicting right in the citizen while it remains unsatisfied." *Cooley on Taxation*, cc. 1, 2.

We fail to find in that part of our Constitution respecting revenue and taxation any declaration that the power of the Legislature to impose taxes is expressly limited to such taxes as are therein mentioned. We do, however, find that section 181, in explicit terms, authorizes the imposition of a "special or excise tax"; but the Legislature, without this express authority, could have imposed such a tax under the general legislative power before mentioned; there being no provision of the Constitution forbidding it. *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218; *State v. Guilbert*, 70 Ohio St. 229, 71 N. E. 636. As the privilege or right to take property by inheritance or devise is not a natural or inherent right of persons, but is a creature of the law, it is subject to regulation by statute; and the imposition of a tax as incident to the right is authorized under our governmental system, when not expressly forbidden by the state Constitution. Many authorities might be cited in support of this proposition, and our attention has been called to but one case that questions its correctness, viz., *Nunne-macher v. State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121. Yet in that case the tax upon an inheritance was held to be valid upon the sole ground that it could not be considered an unreasonable interference with that right. The right of property, however, is an inherent or inalienable right of the citizen, and "consists in the free use, en-

joyment, and disposal of his acquisitions, without any control or diminution, save only of the laws of the land." *Blackstone's Com.* vol. 1, p. 138. But we venture to say that among the absolute rights of individuals enumerated by Blackstone no mention is made of a right to inherit property from another. All estates derived upon the death of another have been created by law, and are for that reason always subject to regulation by statute; indeed, frequent changes by legislative enactment have been and will doubtless yet be made in the law of descent and distribution. It is patent, therefore, that the guaranty in the Bill of Rights, and other provisions of the Constitution, with respect to the right of acquiring and protecting property, does not include the mere privilege, right, or expectancy of inheritance.

While express constitutional authority for the enactment by the Legislature of the act under which the tax in question is sought to be collected was unnecessary, if the tax comes within the meaning of the words "special or excise tax" appearing in section 181 of the Constitution, it may then be said that instrument expressly authorized its imposition by the Legislature. Although the state of Kentucky has had an existence of more than a century as a commonwealth, no effort, prior to the enactment of the present statute, has ever been made by her Legislature to impose an inheritance tax upon her people. Therefore the novelty of the questions raised by the objections made to the statute and the total absence of judicial light from previous decisions of this court compel us to look for guidance to those of the courts of other states, and of the federal courts, in which such laws have been construed and enforced. Perhaps a majority of the states of the Union impose an inheritance tax in one form or another. In some of these states the tax falls upon all persons, whether lineal descendants, collaterals, or strangers. In other states the tax is paid by collaterals alone, or by collaterals and strangers; the latter, of course, taking the estate by devise. In some states the tax rate is uniform; in others estates of less than a given value are exempt from the tax; in still others the tax is imposed according to a graded rate, without regard to uniformity. We have been cited to no case in which there was a failure by the court to uphold an inheritance tax like that imposed in this state. The Constitutions of many of the states in which an inheritance tax is imposed are, in respect to questions of taxation, in meaning, if not in terms, closely akin to the Constitution of this state, and even a closer resemblance will be found to exist between the inheritance tax statutes of these states and that of this state; indeed, two or more of them are almost identical with ours, and all these statutes provide, as does ours, that the inheritance tax shall be paid by the persons or class designated upon all property passing to them by

will or otherwise, and in every instance the courts, in construing the statutes, have held that the tax was not a tax upon property, but a "privilege," "special," or "excise tax."

In *State v. Hamlin*, 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569, a statute practically identical with that of this state, was attacked upon the same constitutional grounds here urged; but it was held by the Supreme Court of that state that it did not violate a provision of the Constitution of that state, which required all taxes assessed upon personal and real estate to be apportioned and assessed equally according to the just value thereof. With respect to the character of the Maine inheritance tax the court said: "The tax provided for in the statute under consideration is clearly an excise tax. *Scholey v. Rew*, 23 Wall. 346, 23 L. Ed. 99. The whole tenor and scope of the act is one of excise, and not a 'tax upon property,' as that term is used in the Constitution. It is not laid according to any rule of proportion, but is laid upon the interests specified in the act, without any reference to the whole amount required to be raised for public purposes, or to the whole amount of property in the state liable to be assessed for public purposes. It is true that the act contains some language indicating a tax upon property; but it should be construed according to its essential principle, object, and effect. Substance, and not form or phrase, is the important thing. * * *

The tax under this statute is, once for all, an excise or duty upon the right or privilege of taking property by will or by descent under the law of the state. It is uniform in its rate as to the entire class of collaterals and strangers, which satisfies the constitutional requirement of uniformity. The Constitution guarantees to the citizen the right of acquiring, possessing, and protecting property (article 1, § 1), which includes also the right of disposal. But the guaranty ceases to operate at the death of the possessor. There is no provision of our Constitution, or that of the United States, which secures the right to any one to contract or dispose of his property after his death, nor the right to any one, whether kindred or not, to take it by inheritance. Descent is a creature of statute, and not a natural right. 2 Blk. Com. 10, 11; *Strode v. Com.*, 52 Pa. 181."

In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, the constitutionality of the Illinois statute, which is worded precisely as the Kentucky statute, was upheld. In that case substantially every objection was made to the statute that is urged in the instant case; but, after an exhaustive consideration of these objections and a critical review of the decisions of various state courts, the Supreme Court announced the following conclusions: First: "An inheritance tax is not one on property by devise or descent. It is the creature of the law, and not a natural right or privilege; and therefore the authori-

ty which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state Constitutions requiring uniformity and equality of taxation."

The conclusions expressed in *Magoun v. Illinois Trust & Savings Bank* and *State v. Hamlin*, supra, are approved by the following cases: *United States v. Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287; *Strode v. Commonwealth*, 52 Pa. 181; *Eyre v. Jacob*, 14 Grat. (Va.) 422, 73 Am. Dec. 367; *Schoolfield v. Lynchburg*, 78 Va. 368; *State v. Dalrymple*, 70 Md. 298, 17 Atl. 82, 3 L. R. A. 372; *Clapp v. Mason*, 94 U. S. 589, 24 L. Ed. 212; *Re Merriam's Estate*, 141 N. Y. 479, 36 N. E. 505; *State v. Alston*, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178; *Re Wilmerding*, 117 Cal. 281, 49 Pac. 181; *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259; *Gelschrope v. Furnell*, 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 170; *Scholey v. Rew*, 90 U. S. 331, 23 L. Ed. 99; *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168; *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192; *Plummer v. Coler*, 178 U. S. 117, 20 Sup. Ct. 829, 44 L. Ed. 998; *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; *State ex rel. Garth v. Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 288, 65 Am. St. Rep. 653; 27 Am. & Eng. Ency. of Law, 337. We think the numerous authorities, supra, answer every substantial objection made to the inheritance tax statute under consideration. For they clearly present the theory on which taxation on the devolution of estates at the death of their owners is based, and clearly uphold the validity of the statute, by demonstrating that the tax thereby imposed is not one on property, but one on the privilege or right of succession thereto, and that it is not obnoxious to any provision of the state or federal Constitutions requiring uniformity or equality of taxation, or because its enforcement may result in discrimination between relations, or between relations and strangers.

It is, however, insisted for appellant that as the tax is a certain percentum of the value of the estate, and the property pays it, it is therefore a tax on the property itself. This argument is answered by the opinion in *Eyre v. Jacob*, supra, as follows: "But this is by no means a necessary logical conclusion. The intention of the Legislature was plainly to tax the transmission of property by devise or descent to collateral kindred, and to require that a party then taking the benefit of a civil right accrued to him under the law should pay a certain premium for its enjoyment; and, as it was thought just and reasonable that the amount of the premium should bear a certain proportion to the

value of the subject enjoyed, it is fixed at a certain percentum upon the value of the whole estate transmitted." The provisions with respect to equality and uniformity in taxation found in section 171 of the Constitution apply to a direct tax on property. They do not limit the power of the Legislature as to the objects of taxation, but are more especially intended to prevent an arbitrary taxation of property according to kind or quality, without regard to value. We are, however, unable to see that the inequality and want of uniformity complained of by appellant exist in the statute under consideration, for every person not of the class exempted by the act from the payment of the tax, who takes from the estate of a decedent by succession or devise, pays a tax for the privilege, and this tax is proportioned to the value of the interest which he acquires. Nor does the exemption, where the estate is of the value of \$500 or less, constitute inequality or unjust discrimination. *Magoun v. Illinois Trust & Savings Bank*, 178 U. S. 288, 18 Sup. Ct. 594, 42 L. Ed. 1087; *Eyre v. Jacob*, 14 Grat. (Va.) 422, 73 Am. Dec. 375.

In *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 264, it is said in reference to a complaint of inequality urged against an inheritance tax statute: "The tax imposed by the statute we are considering is said to be unequal because it is not imposed upon all estates and upon all heirs, devisees, legatees, and distributees. To make a distinction between collateral kindred or strangers in blood and kindred in the direct line in reference to the assessment of such a tax, either by exempting the kindred in the direct line or by imposing on collaterals and strangers a higher rate of taxation, has the sanction of nearly all states which have levied taxes of this kind. It has a sanction in reason, for the moral claim of collaterals and strangers is less than that of kindred in the direct line, and the privileges therefore greater. The tax imposed by this statute is uniformly imposed upon all estates and all persons within the description contained in it, and the tax is not plainly and grossly oppressive in amount." In *State v. Hamlin*, 86 Me. 495, 30 Atl. 76, 25 L. R. A. 632, 41 Am. St. Rep. 569, it is said: "The constitutional requirement of uniformity is satisfied by a tax on the transmission of property by will or descent to strangers and collaterals, where it is uniform as to the entire class affected, although other classes of persons are exempt from the tax." So, if the rule as to uniformity should be applied to the statute under consideration, we should say that it conforms to the rule; for it only requires the same means and methods to be applied impartially to all the constituents of a class, to the end that the law shall operate equally and uniformly upon all persons in similar circumstances, both in the privilege conferred and the liabilities imposed.

113 S.W.—5

In other words, the tax is uniform on what it is laid—the value of the succession, after deducting the exemption on which no tax is laid. It is upon so much of the legacy received as exceeds \$500. No legacy of \$500 or less is taxed at all, and each legacy over \$500 is taxed equally as to the excess.

It is insisted for appellee that, as the inheritance tax in question is a "special or excise tax," the rule as to uniformity does not apply to it. On the other hand, appellant contends that the tax is not an "excise tax," in the meaning of that term as defined by Phlen on Public Finance and other text-writers. While it is true that "excise" has been defined to be an inland duty or impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities, it is nevertheless a term of very general signification, meaning tribute, custom tax, tollage, or assessment, and in recent years the courts have so enlarged its meaning as to declare that an inheritance tax is an excise tax; indeed, it is so denominated in practically every case included in the list previously cited. While not more conclusive than similar statements in many of these cases, the following excerpt from *State ex rel. Garth v. Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 288, 65 Am. St. Rep. 653, aptly supports the proposition last stated: "As already remarked, no doubt longer exists that it is competent for the Legislature to levy a tax upon the succession of estates. It is quite universally held that such a tax is not a tax upon property, in the ordinary sense, but is in the nature of an excise or bonus, exacted by the state upon the privilege or right to inherit or succeed to an estate." But, in view of our conclusion that the act imposing the tax does not violate the provisions of the Constitution with respect to uniformity of taxation, it is not necessary to decide whether or not the rule as to uniformity applies to a special or excise tax such as this. Therefore that question is not decided.

It is further contended by appellant that the effect of the act is to tax property otherwise exempt from taxation; and as an instance in point it is said that in a companion case submitted with this a religious institution of learning receiving a devise is sought to be taxed thereon, although its property is by law exempt from taxation. The answer to this complaint must be a restatement of the proposition that the tax is not imposed upon the property, but on the right of succession. Bonds of the United States are by act of Congress exempt from taxation; but in the cases of *Plummer v. Coler*, 178 U. S. 115, 20 Sup. Ct. 829, 44 L. Ed. 998, and *Wallace v. Myers* (C. C.) 38 Fed. 184, 4 L. R. A. 171, a state inheritance tax upon legacies of such bonds was sustained upon the principle above stated.

We think the county and circuit courts gave correct answers to the questions of con-

struction raised by appellants. Manifestly the provision of the act declaring "that the first five hundred dollars of every estate shall not be subject to such duty or tax" refers to the estate passing by will to the collateral relative or stranger, or under the statute of descent and distribution to the collateral relative, and not to the estate of the testator or decedent, or, in other words, that an estate passing by will to the collateral or stranger, or under the statute to the collateral, which is valued at \$500 or less, shall not be subject to the tax. The tax is upon the individual, and can be imposed only when the particular interest in the decedent's estate passing to him exceeds \$500. The tax is not, therefore, imposed on the estate of the decedent, but upon the beneficiaries' right of succession to his property. Nor does the fact that the executor or administrator is required by the act to pay the tax make it a tax against the estate of the testator or decedent, for it also requires him to deduct it from the estate passing to the legatee or collateral heir. In *re Hoffman*, 143 N. Y. 327, 38 N. E. 311; In *re Howe's Estate*, 112 N. Y. 103, 19 N. E. 513, 2 L. R. A. 825; In *re Cagers' Will*, 111 N. Y. 443, 18 N. E. 866. In the case at bar the exemption in the first section of the act should be allowed each legacy; and, as held by the court below and said in *State v. Switzler*, 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 288, 65 Am. St. Rep. 669: "Where it is that the tax is upon the succession, it is computed, not on the aggregate valuation of the whole estate of the decedent considered as the unit for taxation, but on the value of the separate units into which it is divided. * * *"

We do not find that the cases of *Schuster v. City of Louisville*, 89 S. W. 689, 28 Ky. Law Rep. 588, and *Hager, Auditor, v. Walker*, 107 S. W. 254, 32 Ky. Law Rep. 748, militate against the conclusions expressed in this opinion. In the *Schuster* Case the court had under consideration the amendment to the Constitution providing a system of assessment of personal property differing from the ad valorem system provided by section 171, and held, in substance, that it was not the object of the amendment to allow any exemption of personal property from taxation imposed upon all property uniformly by section 171, and, further, that the amendment, in authorizing a different mode of assessment of personal property from that theretofore provided for, did not, either expressly or by implication, permit a disregard of the rule imposed by section 171 requiring uniformity in taxes upon all property. In the case of *Hager, Auditor, v. Walker* it was held by the court that a certain section of the revenue act of 1906 imposing a license tax upon agents of real estate was invalid because it graded the license according to the class of the city in which the licensee lived, exempting altogether real estate agents residing outside of an incorporated city. The license

tax was declared invalid, not because it lacked uniformity, but upon the ground of unreasonable and unconstitutional discrimination between citizens, based upon no valid reason, and because the tax was not imposed by "general law," as required by the Constitution. The court, however, expressly held that the provision in section 171 of the Constitution requiring that the tax rate upon property be uniform does not directly and specifically apply to license taxes authorized by section 181 of the Constitution. The act was obnoxious to the Constitution because, in imposing a license tax upon a particular occupation, it attempted to exempt from its provisions and burdens certain persons engaged in the occupation for no other reason than that they did not live in incorporated cities. The exemption was manifestly an unreasonable discrimination against the persons taxed, and in violation of section 3 of the Bill of Rights, which declares that "no grant of exclusive, separate, public emoluments, or privilege shall be made to any man or set of men, except in consideration of public service."

It follows from what we have said that in our opinion the act imposing the inheritance tax is not unconstitutional or otherwise invalid. Therefore it is not our province to question the policy of the Legislature in enacting it, or to refuse to sanction its enforcement.

Wherefore the judgment is affirmed.

ALLEN'S EX'RS v. McELROY, Sheriff.

(Court of Appeals of Kentucky. Oct. 27, 1908.)

Appeal from Circuit Court, Fayette County. "Not to be officially reported."

Proceedings between John Allen's executors and John McElroy, sheriff. From the judgment, the executors appeal. Affirmed.

Fox & Jackson and Allen & Duncan, for appellants. George R. Hunt, for appellee.

SETTLE, J. The questions involved in this case being identical with those passed upon by this court in the case of *Armilda U. Booth's Executor v. Commonwealth of Kentucky* (this day decided) 113 S. W. 61, 33 Ky. Law Rep. —, and the opinion in that case being conclusive of the rights of the parties in this, the judgment herein is affirmed.

BARRETT et al. v. CONTINENTAL REALTY CO. et al.†

(Court of Appeals of Kentucky. Oct. 27, 1908.)

Appeal from Circuit Court, Jefferson County. Chancery Branch, First Division.

"Not to be officially reported."

Proceeding between Matilda N. Barrett and others and the Continental Realty Company and others. From the judgment, said Barrett and others appeal. Affirmed.

E. W. C. Humphrey and Pope Nicholas, for appellants. Mason Barrett, for appellee Continental Realty Co. Joseph Selligman, for appellee Jefferson county.

SETTLE, J. The questions involved in this case being identical with those passed upon by this court in the case of *Armilda U. Booth's Ex-*

† For opinion on rehearing, see 114 S. W. 750.

ecutor v. Commonwealth of Kentucky (this day decided) 113 S. W. 61, 33 Ky. Law Rep. —, and the opinion in that case being conclusive of the rights of the parties in this, the judgment herein is affirmed.

CRAIN et al. v. MALLONE et al.

(Court of Appeals of Kentucky. Oct. 28, 1908.)

1. DESCENT AND DISTRIBUTION (§ 98*)—ADVANCEMENTS—INTENT OF INTESTATE—EFFECT.

A parent's intention in making an advancement cannot defeat Ky. St. 1903, § 1407, requiring property given a descendant to be charged against him on a distribution of the undivided estate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 402; Dec. Dig. § 98.*]

2. PARENT AND CHILD (§ 3*)—ADULT—CHILD'S SUPPORT—PARENT'S DUTY.

One's duty to care for his child does not necessarily terminate when the child becomes an adult, and the parent must support a helpless adult child, if able to do so.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 33-51; Dec. Dig. § 3.*]

3. DESCENT AND DISTRIBUTION (§ 96*)—ADVANCEMENTS—HELPLESS ADULT CHILDREN.

Ky. St. 1903, § 1407, requiring property given a descendant to be charged against him on a distribution of the undivided estate, does not authorize a charge against a helpless adult child for the value of his support by his parent.

[Ed. Note.—For other cases, see Descent and Distribution, Dec. Dig. § 96.*]

Appeal from Circuit Court, Hart County.
"To be officially reported."

Action to settle Susan Mallone's estate. From a judgment sustaining a demurrer to her answer, defendant Annie Lee Crain and another appeal adversely to J. C. Mallone and others. Affirmed.

McCandless & Larimore, for appellants.
C. B. Dowling, for appellees.

CARROLL, J. Mrs. Susan Mallone died intestate, leaving surviving her three children—the appellant Annie Lee Crain, wife of L. F. Crain, and J. C. and W. S. Mallone. This action was brought to settle her estate and distribute the proceeds between her children. J. C. Mallone was a person of unsound mind, and the guardian ad litem appointed to defend for him sought to charge Mrs. Crain and W. S. Mallone with advancements made to them by Mrs. Mallone. Mrs. Crain and W. S. Mallone admitted in a pleading that they had received from their mother advancements in land and money, amounting to the value of about \$2,000 each; but they denied that they should be charged with these advancements for the benefit of J. C. Mallone, because, as they averred, he was some 45 years of age when his mother died, and had been destitute of mind since his infancy, and an idiot, and was supported and cared for all of his life by his mother; and that this care and attention for the

years after he reached his majority was worth at least \$200 per year, and that their mother, recognizing that she had in this way advanced to J. C. Mallone largely more than \$2,000, for the purpose of making her other children equal with him, advanced to them \$2,000 each. After this pleading was filed, W. S. Mallone not desiring to further contest the fact that he should be charged with \$2,000, advanced to him, his name was stricken from the pleading denying that J. C. Mallone was not entitled to charge the other children with the advancements. Thereupon the demurrer filed by the guardian ad litem of J. C. Mallone to the answer of Mrs. Crain, setting up the reasons why she should not be charged in the settlement of the estate with the \$2,000 advanced to her, was sustained; and, declining to amend, she prosecutes this appeal. So that the only question in the case is whether or not her answer presented a good defense.

Ky. St. 1903, § 1407, provides that: "Any real or personal property or money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant of those claiming through him in the division and distribution of the undivided estate of the parent or grandparent; and such party shall receive nothing further therefrom until the other descendants are made proportionately equal with him, according to his descendible and distributable share of the whole estate, real and personal, devised and undivided. The advancement shall be estimated according to the value of the property when given. The maintaining or educating, or the giving of money to a child or grandchild, without any view to a portion or settlement in life, shall not be deemed an advancement." Therefore, unless the value of the services, attention, and care rendered by his mother to the idiot, J. C. Mallone, after he arrived at the age of 21 years, should be charged to him as an advancement, there is no escape from the conclusion that, under the statute, the appellant Mrs. Crain must in the settlement of the estate, as between herself and J. C. Mallone, be charged with the \$2,000 advanced to her. The intention of Mrs. Mallone in making the advancements will not be allowed to defeat the statute, or to relieve the children who received the advancements from accounting for them. *Bowles v. Winchester*, 13 Bush, 1. Indeed, counsel for the appellant concede that, unless the answer of Mrs. Crain presented a defense, she must be charged with this sum. Their only contention is that, admitting as true the averments of their pleading, J. C. Mallone received in the way of advancements more than Mrs. Crain, and hence no account as between them should be taken of advancements in the settlement and distribution of the estate. In other words, their argument is that an idiotic and help-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

less adult child who is taken care of by his parents must in the settlement of the parent's estate be charged as an advancement with the value of the services, attention, and care rendered to him by the parent. It does not appear that J. C. Mallone had any estate aside from that received from his mother, so that whether or not his mother might under any circumstances have charged him with and collected from his estate a reasonable sum for caring for him is not before us. Hence it is not necessary to particularly consider section 2178 of the Kentucky Statutes of 1903, providing that "any person other than the keeper of a tavern or house of private entertainment, who shall entertain in his house, or furnish him with diet or storage for his goods, not making an agreement for compensation therefor, shall not recover anything against the person so entertained or furnished with diet or storage, or against his estate, but the person so furnishing another shall be considered as doing the same of courtesy," or the cases construing it, that hold that this statute does not apply to boarding, lodging, and attention bestowed upon an idiot or a person incapable of entering into a contract. *Combs v. Beatty*, 3 Bush, 613. The effort here is not to require a helpless adult child to contribute to or pay for his maintenance, but to permit the parent to charge the cost of maintaining as an advancement, and have the same deducted from the child's part of the estate. It is conceded that it is the duty of a parent to care for its infant child, and admitted that, except in rare cases, he will not be permitted to charge for such services (*Hedges v. Hedges*, 73 S. W. 1112, 24 Ky. Law Rep. 229); but insisted that, when the child arrives at the age of 21, the obligation and duty of the parent ends, and thereafter the child may be charged for the care and attention necessarily bestowed upon him. Based upon this premise is the argument of counsel that Mrs. Mallone had the right to charge J. C. Mallone as an advancement with the value of the services rendered him by her; but the premise is not sound. The duty and obligation of a parent to care for his offspring does not necessarily terminate when the child arrives at age or becomes an adult; nor is it limited to infants and children of tender years. An adult child may from accident or disease be as helpless and incapable of making his support as an infant, and we see no difference in principle between the duty imposed upon the parent to support the infant and the obligation to care for the adult, who is equally, if not more, dependent upon the parent. In either case the natural as well as the legal obligation is the same. If the parent is financially able to furnish the necessary assistance. If the parent has no estate, or is indigent or otherwise unable to support his infant child, who is possessed with ample means, the chancellor when appealed to might make an allowance out of

the child's estate; and, in the case of an unfortunate adult, the court under similar circumstances would grant relief. But this is not the case we are considering. Here the mother had ample estate. The adult child had none. The charge was not made by the mother to enable her to support her son, or because she was unable to render him freely and without charge the services performed. But her other children for their own benefit are seeking to have the interest inherited by the child charged by the amount expended in his support by his mother. This they cannot do. Certainly they do not occupy any better position in this particular than their mother. She could not have exacted from J. C. Mallone compensation because he had no estate, and she was financially able to care for him. Nor was the maintaining of J. C. Mallone by his mother with any view to a portion or settlement in life within the meaning of section 1407 of the statute, supra. It was done in the discharge of a filial duty that a mother owed to her helpless child. The advancements made were only those necessary to sustain him from day to day, and can in no sense be considered as an advancement made with a view to a portion or settlement in life.

Nor are the views herein expressed in conflict with the opinion in *Central Kentucky Asylum v. Knighton*, 113 Ky. 156, 67 S. W. 366. In that case the court was considering the meaning and effect of a statutory provision authorizing the state, under certain conditions, to recover from the parent the board of the child while an inmate of an asylum; and it was said that the statute only applied to infants, and not an adult child. It is true the court in the course of the opinion said: "Being entitled to the services of the child until of age, there is some reason for holding the parent to a legal liability when the necessities of the child require that he should be supplied with food and clothing. But when of full age, the parent being entitled to no control over the child, and having no right to his custody or services, no such legal obligation exists and none can be created by statute unless by consent of the parent. He may contract to support the child, and it would be binding, but not otherwise." This rule might be invoked in this case if it was sought by strangers to charge Mrs. Mallone with care and attention to her son—a question, however, it is not necessary to decide in this case. But the fact that the parent might not be liable to third persons for the support of adult children is a long step from proving that the parent may himself charge them under facts like the ones shown by this record. It does not follow from the proposition that the parent may be exempt from liability at the hands of third persons that he is thereby permitted to charge for services and attention rendered by him.

Looking at the question as it is presented

by the record, we cannot find any authority, statutory or otherwise, that would warrant us in holding that J. C. Mallone should be charged as an advancement with his maintenance; and the judgment of the lower court is affirmed.

D. C. HEATH & CO. et al. v. COMMONWEALTH et al.

(Court of Appeals of Kentucky. Oct. 21, 1908.)

1. APPEAL AND ERROR (§ 136*)—RIGHT TO APPEAL—EFFECT.

The right of appeal may exist independently of whether appellant will be entitled to the relief sought thereby.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 136.*]

2. ATTORNEY AND CLIENT (§ 101*)—AUTHORITY OF ATTORNEY—RIGHT TO COMPROMISE CLAIMS.

An attorney, employed to sue on and collect a claim, cannot, in the absence of special authority, compromise the claim for less than the full amount thereof, nor release a judgment by accepting something not sued for in satisfaction thereof.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 209-215; Dec. Dig. § 101.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 81*)—BONDS—ACTIONS—AUTHORITY OF COUNTY SUPERINTENDENTS.

Ky. St. 1903, § 4422, as amended by Act March 1902, creating a county board of examiners, to consist of the county superintendent and two others, and sections 4423, 4424, requiring the board to adopt a list of text-books and a seller of text-books to give a bond that the text-books sold shall not exceed the lowest price at which the same books are sold by the seller elsewhere, and requiring the county superintendent to bring suit for a forfeiture of such bond, etc., authorize the county superintendent to sue for a forfeiture of the bond, collect the same, and pay the proceeds into the county school fund; but he cannot accept in satisfaction of a judgment less than the whole thereof, and his act in accepting a note for a less sum and entering satisfaction of the judgment is void.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 81.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 81*)—ACTION OF COUNTY SUPERINTENDENT—ESTOPPEL.

An action by a county superintendent to recover on a note given in satisfaction of a judgment of forfeiture of the bond required by Ky. St. 1903, § 4424, requiring a seller of text-books to enter into a bond that he will sell text-books for a price not exceeding the lowest price at which such books are sold by him elsewhere, is unauthorized, and does not estop the state from suing to set aside the satisfaction of the judgment by the county superintendent on receipt of such note.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 81.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 81*)—BONDS—ACTIONS—SATISFACTION OF JUDGMENT—SUIT TO SET ASIDE.

Under Civ. Code Prac. §§ 18, 21, requiring every action to be brought by the real party in interest, and providing that a person expressly authorized to do so may sue without joining the person for whose benefit it is brought, the commonwealth is the real party in interest in an

action on a bond required by Ky. St. 1903, § 4424, requiring a seller of text-books to give a bond that he will sell books at a price not exceeding the lowest price at which such books are sold by him elsewhere, where an action to set aside a satisfaction of the judgment rendered in an action on the bond in the name of the commonwealth and county superintendent is instituted in the same way, the superintendent cannot dismiss the action against the objection of the county attorney.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 81.*]

6. SCHOOLS AND SCHOOL DISTRICTS (§ 81*)—BONDS—ACTIONS—SATISFACTION OF JUDGMENT—SUIT TO SET ASIDE.

Under Ky. St. 1903, § 130, requiring the county attorney to inquire into unsatisfied judgments in favor of the commonwealth and take steps to collect the same, the county attorney may compel the payment of a judgment of forfeiture of a bond required by section 4424, requiring a seller of text-books to give bond that such books shall be sold at a price not exceeding the lowest price at which the same are sold by him elsewhere, and he may object to the dismissal by the county superintendent of an action to set aside a satisfaction of such judgment improperly entered.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 81.*]

Appeal from Circuit Court, Mercer County.
"To be officially reported."

Action by the commonwealth of Kentucky and Ora L. Adams, as superintendent of schools of Mercer county, against D. C. Heath & Co. and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Wm. B. Moulton and Wm. L. Whittinghill, for appellants. W. I. Allin and B. F. Roach, for appellees.

SETTLE, J. In 1905 H. H. Walker, then county superintendent of schools in Mercer county, in the name of the commonwealth of Kentucky and in his official capacity as such superintendent instituted an action in the Mercer circuit court against the appellant, D. C. Heath & Co., a corporation engaged in publishing and selling schoolbooks, and B. F. Graziani, their surety, in a bond executed to the commonwealth, under sections 4423, 4424, Ky. St. 1903, for the faithful performance on their part of a contract made with the county superintendent of schools of Mercer county, whereby they sold and undertook to furnish for the use of the schools of that county certain schoolbooks. The petition alleged a breach of the contract and bond by appellants in selling to the schools of the state of Ohio schoolbooks of the same quality as those sold Mercer county at lower prices than they had received from Mercer county, and for this alleged breach of contract judgment was asked against appellants for \$10,000 damages, the full amount of the penalty named in the bond. Appellants filed an answer, containing a traverse and plea in abatement, basing the latter upon the pendency of a like action brought against them in the Mason circuit court up-

on the same bond by the superintendent of schools of Mason county, which, it was alleged, deprived the Mercer circuit court of jurisdiction. A demurrer to the plea of no jurisdiction was sustained by the Mercer circuit court, and the case then went to trial upon the issues made by the traverse, resulting in a verdict and judgment in appellees' behalf for \$10,000. The day following the rendition of the judgment appellants and H. H. Walker, the then county superintendent, entered into an attempted written compromise and settlement thereof, whereby the latter accepted in satisfaction of the judgment of \$10,000 the note of one W. S. Smith, an officer of D. C. Heath & Co., for \$2,200, of date May 20, 1905, due 12 months after date, and payable upon determination by this court that the judgment rendered in the Mercer court was valid. The consideration expressed for the alleged compromise was the agreement of appellants to surrender their right to enter a motion for a new trial and of their right of appeal from the judgment in question. Pursuant to the alleged settlement a formal satisfaction of the judgment was entered upon the records of the Mercer circuit court by the county superintendent.

On January 1, 1906, Miss Ora L. Adams succeeded H. H. Walker as superintendent of schools of Mercer county, and on August 20, 1907, she, in the name of the commonwealth of Kentucky and in her official capacity, instituted the present action against the appellants, D. C. Heath & Co., B. F. Graziani, H. H. Walker, and Ben C. Allen, clerk of the Mercer circuit court. The petition sets forth the recovery of the judgment rendered in the first action, and alleges its nonpayment, that the entry of record showing its satisfaction is false and of no effect, that it was without authority, and was procured and made by fraud and collusion between Walker, former superintendent, and appellants. The prayer of the petition asked the cancellation of the entry as to satisfaction of the judgment, and that Allen, clerk of the circuit court, be required by mandamus to issue execution upon the judgment against the property of appellants. After entering various motions and demurrers, following an election by appellees to dismiss so much of the action as asked the writ of mandamus, appellants filed answer containing three paragraphs. The first paragraph, after traversing the petition, set up and relied upon the alleged compromise and satisfaction of the judgment of \$10,000; that Ora L. Adams, present superintendent, had brought suit upon the note of \$2,200 given in satisfaction of that judgment, thereby ratifying the settlement; and that the maker of the \$2,200 note is solvent and able to pay any amount that may be recovered upon the note. The second paragraph contained a plea of estoppel arising from the alleged compromise and satisfaction of the \$10,000 judgment; it being averred that appellants were thereby

prevented from entering a motion for a new trial within three days of the return of the verdict against them, and, further, that their right to prosecute an appeal from the judgment of \$10,000 had been lost by the laches of appellees in allowing two years to elapse after the rendition of the judgment before instituting the action to cancel the entry showing its satisfaction. The third paragraph contained a formal plea of accord and satisfaction, resulting from the acceptance by Walker, the former county superintendent, of the \$2,200 note of W. S. Smith in full satisfaction of the judgment of \$10,000. Appellees filed a general demurrer to the answer, which the circuit court sustained, and, appellants refusing to plead further, judgment was rendered canceling the entry made of record respecting the satisfaction of the \$10,000 judgment, declaring appellees entitled to enforce the full payment thereof, and allowing them their costs. From that judgment this appeal is prosecuted.

It appears from the record that Ora L. Adams, present superintendent of schools of Mercer county, entered a motion before judgment to dismiss it, to which the county attorney of Mercer county objected, and that the circuit court sustained the objection and overruled the motion to dismiss. It also appears that the same superintendent, after bringing the action and while it was pending, brought another in the Mercer circuit court against appellants upon the \$2,200 note to recover the amount thereof, with interest. The record is indefinite as to the disposition made of the latter action, but briefs of counsel seem to concede that it was undetermined when the judgment in this action was rendered. Whether the alleged compromise under which the \$2,200 note was executed was, as surmised by counsel for appellees, arranged before judgment for the \$10,000 was rendered, or was, as claimed by appellants, made afterwards, is not material if the circuit court was right in holding the transaction void. It is manifest that the object of the parties concerned in entering into the alleged compromise was to prevent a recovery against the appellants, D. C. Heath & Co., and their surety, in the action on the same bond then pending in the Mason circuit court; it evidently being their opinion that the court in which suit was first brought would alone have jurisdiction to render judgment for the penalty named in the bond. Doubtless the procedure contemplated was to rely upon the judgment of \$10,000 recovered in the Mercer circuit court as a bar to any recovery on the bond in the action pending in the Mason circuit court; and, to make the plea in bar or abatement more effective, the entry of satisfaction appearing upon the judgment of the Mercer circuit court was made to convince the Mason circuit court that it had been fully paid, though in fact it was wholly unpaid. It is insisted for appellees that appellants, D. C. Heath &

Co., by inducing Walker, the county superintendent, to accept the note of a third party for the \$2,200 that officer consented to receive in satisfaction of the judgment, and providing therein that, although payable one year after date, it was not in fact to be paid until the validity of the judgment of the Mercer circuit court should be determined by the Court of Appeals, intended to put it out of his power to enforce its collection. As the appellants named did not ask a new trial in the Mercer circuit court, or appeal from the judgment of that court, the only way to test the validity of the judgment of that court was through a ruling of the Mason circuit court growing out of an effort to use it therein to defeat a recovery in the action pending in that court against the appellants, D. C. Heath & Co. and B. F. Graziani. The acceptance by that court of the judgment as a bar to a recovery in the action before it, or its refusal to so accept it, would have entitled the party prejudiced by the ruling to have this court, upon appeal, review the ruling complained of, and thereby decide whether the judgment is a valid or invalid one.

A novel disposition seems to have been made of the \$2,200 note accepted by the county superintendent in satisfaction of the \$10,000 judgment. It was to "remain in the possession of C. E. Rankin as attorney for plaintiffs * * * until the sum for which said note is executed shall be paid according to the terms and tenor of this agreement." This singular arrangement with respect to the custody of the note is a matter of more than ordinary significance, in view of the further fact that it was not to be paid until the Court of Appeals rendered a decision in a case that might never get before it; there being nothing in the note or terms of compromise that compelled appellant to test the validity of the judgment of \$10,000 rendered by the Mercer circuit court. In view of this situation, it may well be asked, when could the payment of the note be enforced? Was it due at the end of the year succeeding its date, at the expiration of such a time as appellants might reasonably have required to test by appeal the validity of the judgment of the Mercer circuit court, or will it become due at all? It might be said that an answer is furnished by the opinion of this court in *B. F. Johnson v. Commonwealth*, 97 S. W. 749, 30 Ky. Law Rep. 148, in which it was held that, where there is an action pending in each of two counties for the same breach of a bond such as appellants executed, the pendency of the one first brought may be pleaded in abatement of the second; but, where the second is based upon a different breach from that set up in the first action, the pendency of the first action cannot be pleaded in abatement. Yet, as there can be only one recovery had in either action, this fact may be pleaded in abatement in the other. While it cannot be said that the opinion, *supra*, determined the validity of the judg-

ment of the Mercer circuit court, it does decide that, if valid, it would support a plea in abatement in the action in the Mason circuit court, and thereby defeat a recovery against appellants in that court. But the ruling of this court in *Johnson v. Commonwealth*, *supra*, cannot operate to deprive appellants of the right of appeal in the case in the Mason circuit court involving the same questions determined by the opinion in *Johnson v. Commonwealth*, however much the Court of Appeals might, in passing upon such appeal, feel itself bound to follow the opinion in that case. In other words, the mere right of appeal may exist independently of the question of whether the appellant will be entitled to the relief sought thereby. It does not appear, however, in the case before us, whether an appeal was ever taken by appellants to test the validity of the judgment of the Mason circuit court, but does appear that they are resisting a recovery in the suit brought by the present county superintendent upon the \$2,200 note alleged to have been executed in satisfaction of the judgment. Appellants' position seems to us strangely inconsistent. After, as they claim, compromising and settling with the note of a third party of \$2,200, a judgment they owed of \$10,000, and using that judgment at its face value to defeat a recovery against them in an action in the Mason circuit court, appellants seem to be assisting the obligor in the \$2,200 note in resisting its payment upon the ground that the validity of the judgment, in satisfaction of which it was given, has not been determined by the Court of Appeals, when they, who alone could have tested its validity, have failed to take the matter by appeal to that court.

Being inclined to rest our decision of this case upon the grounds adopted by the circuit court in its opinion, we need not declare collusive and fraudulent the alleged compromise of the judgment rendered by the Mercer circuit court in the former action, or its attempted ratification by the subsequent bringing of the suit upon the \$2,200 note given in satisfaction of the judgment. Back of these questions lies another of greater importance, viz.: Was the act of Walker, the former superintendent, in accepting the note of \$2,200 in compromise and satisfaction of the \$10,000 judgment against appellants, D. C. Heath & Co. and B. F. Graziani, *ultra vires* and in consequence thereof void? If so, it would seem to follow that his successor, the present superintendent, was without authority to dismiss the action brought by her to obtain a cancellation of the record entry showing the satisfaction of the judgment, and also that the action brought by her to recover upon the \$2,200 note was equally unauthorized.

Chapter 113, §§ 4363 to 4553, inclusive, Ky. St. 1903, known as the "school statute," contains the law applicable to this case. Section 4422, as amended by the act of March, 1902,

creates a county board of examiners for each county of the state, to consist of the county superintendent and two other members of his appointment. Section 4423 requires this board to adopt a list of text-books for use in the common schools, under certain restrictions therein indicated. Section 4424 prevents a seller of text-books for use in the common schools of this state, whether a corporation or individual, from entering the market in the state until such seller shall have executed bond before the state board of education in the sum of \$10,000, with good security resident in the state, conditioned that such text-books as are sold for use in the common schools in any county shall not exceed the lowest price at which the same books are sold by such seller in any other state or section of the country, or exceed the price fixed and filed in the office of the Superintendent of Public Instruction at Frankfort. The bond thus provided for was, as before stated, duly executed by the appellant D. C. Heath & Co., the appellant B. F. Graziani becoming surety thereon, following which a certified copy of the bond was forwarded by the State Superintendent of Public Instruction to the county superintendent of Mercer county, as required by section 4424 of the Kentucky Statutes of 1903, *supra*, and this is the bond for a breach of which the judgment of \$10,000, previously mentioned, was recovered against appellants. In the event of a violation by the principal of the provisions of the bond, section 4423, Ky. St. 1903, provides that the county superintendent "shall bring suit in the circuit court of his county for a forfeiture of said bond, and any money recovered therein, after paying the costs of proceedings, shall be covered into the school fund of the county."

The only authority conferred by this section upon the county superintendent is to bring suit for a forfeiture of the bond. While the statute does not expressly so declare, it seems to us to be its meaning that he shall collect the bond, and, when collected, pay it into the school fund of the county. In other words, the commonwealth, to which the bond is payable, constitutes the county superintendent its agent to sue upon and collect the bond; the damages being liquidated and fixed by the terms of the bond itself at \$10,000. If a recovery results at all from the institution of the action on the bond, it must be for \$10,000. It cannot exceed or fall below that sum. It is a cardinal principle of the law of agency that even an attorney at law, acting under employment to bring suit and prosecute and collect a claim, cannot, either before or after judgment, in the absence of special authority from the client, compromise or settle the claim for less than the full amount thereof; nor can he release a judgment by accepting something not sued for in satisfaction thereof. *O'Relley v. Call*, 7 Ky. Law Rep. 516; *Harrow v. Farrow*, 46

Ky. 126, 46 Am. Dec. 60; *Smith v. Dixon*, 60 Ky. 438; *Cox v. Adelsdorf*, 51 S. W. 616, 21 Ky. Law Rep. 421; *Benedict v. Wilhoite*, 80 S. W. 1155, 26 Ky. Law Rep. 178. Manifestly the authority conferred upon the county superintendent by the statute cannot be broader than if it had been conferred upon the Attorney General or the commonwealth's or county attorney, neither of whom, under the mere power to sue upon and collect the bond, could have accepted in satisfaction of a judgment recovered on the bond a less sum than the whole thereof, or a note for even the full amount of such judgment, in lieu of money. This case is not one in which appellants can rightfully claim that the act of the former county superintendent, Walker, in accepting the \$2,200 note in satisfaction of the judgment, or those of the present superintendent in attempting to dismiss the action and to ratify her predecessor's acceptance of the note by suing upon it herself, were within the apparent scope of their power as agents, or that the principal, the state, had recognized similar acts performed in its name by the agents; for the only powers possessed by either agent are such as were conferred by the statute, with which appellants must be presumed to have been familiar at the time of all their transactions with the agents, and that the authority conferred by the statute is specific, in that it directs the county superintendent, in the event of a breach of the bond, to bring suit for a forfeiture, and provides that the money recovered thereon shall, after paying the costs of the action, be covered (i. e., paid) into the school fund of the county. The power granted the county superintendent is restricted by the language of the statute to the particular acts it requires him to perform, and cannot be enlarged to embrace such as were attempted in the matter of the alleged compromise of the \$10,000 judgment, the bringing of a suit on the \$2,200 note accepted in pursuance of such compromise, or the attempted dismissal of the action. We therefore concur in the conclusion reached by the circuit court that these several acts on the part of the county superintendents were unauthorized, and therefore void. As well said in *Long, Treasurer, v. McDowell*, 107 Ky. 14, 52 S. W. 812: "There is no better settled principle of law than that the state cannot be estopped by the unauthorized acts of its officers."

It is contended by appellants that the commonwealth is only a nominal party to the action; that, by reason of the provisions of the statute requiring the county superintendent to institute the action, he is the real party in interest; and that the power given him to sue carries with it the power to dismiss the action at any stage of the proceedings. We think it clear that, before the adoption of our present Code, an action upon a bond like that of appellants was required to be brought in the name of the common-

wealth alone, though some officer might be authorized to institute it. But section 21, Civ. Code Prac., provides that a person expressly authorized to do so may bring an action without joining with him the person for whose benefit it is brought. As the statute makes it the duty of a county superintendent to bring suit upon the bond, perhaps the bringing of the suit in his name alone would not be held sufficient to justify its dismissal. In at least one such action (*American Book Company v. Wells*, 83 S. W. 622, 26 Ky. Law Rep. 1159) the county superintendent seems to have been the only plaintiff, though it does not appear that objection was made to the petition on account of defect of parties. However, section 21, *supra*, is but an enlargement of section 18, Civ. Code Prac., which requires that every action must be maintained in the name of the real party in interest. The bond was taken to the commonwealth, and it was the party injured by its breach. Therefore the commonwealth is the real party in interest; the superintendent being the nominal party. The original suit, in which the judgment of \$10,000 was recovered against appellants, was brought in the name of the commonwealth, as well as that of the county superintendent; and the present action was instituted in the same way. If the county superintendent in either case had refused to institute the action, it might have been brought in the name of the commonwealth by the state board of education, or in the name of the commonwealth by the trustees of any school district of Mercer county, or in the name of the commonwealth alone for the benefit of the common schools of Mercer county, as they are the beneficiaries.

It is the general doctrine in this state that, where a bond is taken in the name of the commonwealth for the benefit of a person or class of persons, an action may be brought by such person or persons in the name of the commonwealth for his or their use and benefit. So, where the rights of a corporation are involved and the directors refuse to sue, a stockholder may sue for the corporation or for himself and associates and join the corporation as a party plaintiff or defendant. Such is likewise the rule of practice where the personal representative of an estate refuses to sue. In such case suit may be brought by the distributees, joining the personal representative as defendant. *Commonwealth v. Tilton*, 48 S. W. 143, 20 Ky. Law Rep. 1056; *Shawhan v. Zinn*, 79 Ky. 300; *McChord v. Fisher* (Ky.) 13 B. Mon. 194. But this matter seems to have been put at rest by this court in the case of *B. F. Johnson Co. v. Commonwealth*, *supra*, in the opinion of which it is said: "But, stripped of all form, the action is an action by the commonwealth on the bond executed to it; the county superintendent being simply the officer

of the state authorized to institute the suit for it." This being true, when the present county superintendent entered her motion to dismiss the action, the county attorney had the right, and it was his duty, to object to and resist the granting of the motion. Had the county superintendent withdrawn from the action after the refusal of the court to dismiss it, such action upon her part could have had no effect upon the case. In *Wright v. Baker*, 94 Ky. 343, 22 S. W. 335, which was a suit brought in behalf of a school district, two of the trustees attempted to withdraw from the suit, with respect to which this court said: "The effort by the two Bentleys to withdraw their names as plaintiffs in the action did not affect the proceedings."

Section 130, Ky. St. 1903, relating to the duty of county attorneys, provides: "He shall investigate and inquire into the condition of all unsatisfied judgments in his county in favor of the commonwealth, and take all necessary steps, by motion, action or otherwise, to collect or cause the same to be collected and paid into the state treasury." Under the authority here given the county attorney had the right to take such action as would compel the payment by appellants of the judgment of \$10,000 rendered against them by the Mercer circuit court, and it is further his duty, upon collecting the judgment, to see that it is "covered into the school fund of the county," instead of being paid into the state treasury; such disposition of it being required by section 4423, Ky. St. 1903. In the absence of statutory authority to that effect, we cannot afford to say that county school superintendents may exercise such powers as were exercised by the two superintendents of Mercer county in the matter of the attempted compromise of the judgment of the Mercer circuit court, as to do so would tend to destroy in large measure the salutary aim of the statute with reference to the sale of schoolbooks in the state, which was and is to prevent extortion and fraud upon the part of those permitted to supply its schools with these instruments for the mental and moral advancement of the children within its bounds.

Finding no error in the rulings of the circuit court, the judgment is affirmed.

UNION TRUST & SAVINGS CO. et al. v. MARSHALL'S ADM'RS.

(Court of Appeals of Kentucky. Nov. 5, 1908.)

1. PARTIES (§ 75*)—DEFENDANTS—NECESSARY PARTIES—OBJECTIONS—MODE OF OBJECTIONS.

In a suit by administrators for the settlement of an estate, if a necessary party was not before the court, either by summons or warning order, the party objecting on that ground should have stated the name of such party.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 116; Dec. Dig. § 75.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

**2. EXECUTORS AND ADMINISTRATORS (§ 356*)—
PAYMENT OF CLAIMS—SALE—AUTHORITY TO
MAKE.**

In a suit by administrators to settle an estate, consolidated with a suit by creditors to have certain alleged preferences declared an assignment for the benefit of decedent's creditors, certain lienholders being made parties and their liens set up, a sale of the land could be ordered, though such lienholders, had not filed their answers and set up their liens when judgment was entered, under Civ. Code Prac. § 692, requiring the plaintiff in an action to enforce a lien to make other lienholders defendants, and permitting a judgment of sale to satisfy all the liens, though such defendants failed to assert their claims, but providing that they shall not be allowed to withdraw or receive any of the proceeds until they have shown their right thereto by answering and cross-petition.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 356.*]

**3. EXECUTORS AND ADMINISTRATORS (§ 329*)—
SALE FOR DEBTS—PROPERTY SUBJECT TO
DISPOSAL.**

Where decedent had the right under his father's will to purchase the interests of other remaindermen in land in which decedent had a remainder within a certain time after the life tenant's death, and decedent elected by his will to purchase the interest of a deceased remainderman, the representatives of such remainderman being made defendants, decedent's administrators, in proceedings to sell the estate to satisfy debts, could consummate his election to purchase by paying the stipulated price out of the estate, and then sell the land for debts together with the rest of the estate; it being unnecessary to institute a separate proceeding to vest title in themselves.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 329.*]

**4. EXECUTORS AND ADMINISTRATORS (§ 341*)—
SALE—REPORT—DETERMINATION AS TO NE-
CESSITY OF SALE.**

Under Civ. Code Prac. § 429, authorizing the court to order a sale of real property for the payment of debts, if it appears to the satisfaction of the court that the personal estate is insufficient, the real property may be sold where the pleadings alleged without contradiction that decedent's debts were greater than the value of his estate, though there was no reference to a commissioner, or report of the necessity of sale; since, where the rights of infants are not involved, a reference and report are not essential to the validity of the sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1434-1437; Dec. Dig. § 341.*]

**5. EXECUTORS AND ADMINISTRATORS (§ 356*)—
SALE—CONTEST OF CLAIMS.**

A suit by administrators to sell land to satisfy debts was consolidated with a suit by creditors to have certain mortgages, alleged to be preferences, declared an assignment for the benefit of creditors. Several of the lawyers in the case resided in another county, and the alleged preferences were numerous so that it would have taken a long time to adjudicate them, and in the meantime the assets of the estate would have been diminished. The sale was attacked on the ground that, until the determination of the alleged preferences, the lienholders would not know how much to bid on the land in case of sale. *Held*, while the rights of the various lienholders should be first determined, where it could be done without prejudicing the estate, the trial court had a large discretion in the matter, and, under the circumstances, the

sale was properly made before determining the rights of creditors and lienholders.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 356.*]

**6. MORTGAGES (§ 398*)—RIGHT TO FORECLOSE
—MATURITY OF DEBT—DEFAULT IN INTER-
EST.**

Where a mortgage contained an absolute provision that, if any interest remained due and unpaid for 30 days, the whole debt should become due, the entire debt and interest became due without any action by the mortgagee on the failure to pay the interest for that period.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1163; Dec. Dig. § 398.*]

Appeal from Circuit Court, Fleming County.

"To be officially reported."

Action by Robert Marshall's administrators against the Union Trust & Savings Company and others for a settlement of the estate, and to have the property sold to pay debts. From a judgment for plaintiffs, one of defendants appeals. Affirmed.

Worthington & Cochran and Garrett S. Wall, for appellant. B. S. Grannis, for appellees.

CLAY, C. R. T. Marshall died on May 7, 1907, in Fleming county, Ky., the owner of a large estate, consisting of personal property and 710 acres of land which he owned in fee simple and the remainder interest in 400 acres, subject to the life estate of his mother, who was then a very old woman. His will was probated on May 27, 1907. On May 29, 1907, L. M. Marshall and John Marshall, appellees herein, qualified as his administrators, and on June 26th they instituted this action in the Fleming circuit court for a settlement of his estate. To this action the widow and children of R. T. Marshall, the husband and children of Eliza C. Ambler, the appellant Union Trust & Savings Company, which held a mortgage on the land involved in the sum of \$40,000, and other lienholders and creditors, were made parties defendant. The petition, after setting out a great many of the debts of the decedent, R. T. Marshall, charged that he at the time of his death was wholly insolvent; that his debts amounted to \$90,000 or more; that his estate, real and personal, including some \$13,500 life insurance, payable to his estate, did not amount to more than \$70,000; that his wife, Rebekah Marshall, had renounced the provisions of the will, and asked that she be allowed her rights under the law; that it was necessary to make a sale of all the personal estate of R. T. Marshall and of all the real estate of said R. T. Marshall subject to the rights of his wife, Rebekah Marshall, and his mother, Jane Marshall. These allegations of the petition were not denied. On July 3, 1907, J. P. Taylor and others, creditors of R. T. Marshall, filed their suit under the act of 1856, by which they sought

to have the \$40,000 mortgage executed to appellant Union Trust & Savings Company and a number of other alleged acts of preference committed by R. T. Marshall within six months just prior to his death declared to operate as an assignment for the benefit of all his creditors. Thereafter these two suits were consolidated. On February 1st the circuit court ordered all of decedent's land to be sold in the month of June, 1908. From that judgment, the Union Trust & Savings Company prosecute this appeal.

It is insisted by appellant that the sale was premature because numerous nonresidents and infant defendants were not before the court. Counsel for appellant, however, have failed to point out what necessary parties were not before the court. If there was a single party required by the Code to be made a defendant who was not before the court, either by summons or warning order, the name of such party should have been stated by counsel. Notwithstanding this fact, however, we have examined the record, and are of opinion that all the necessary parties were before the court at the time of the entry of the judgment.

It is next insisted that certain parties did not file their answers and set up their lien claims at the time the judgment was entered. This, we think, was unnecessary. The petition did make the lienholders parties, and set up their liens. Under this condition of the record a sale could be ordered, although such lienholders could not withdraw or receive any of the proceeds of the sale until they had shown their right thereto by answer and cross-petition. Section 692, Civ. Code Prac.

The further objection is made that Abner Clary filed a claim on May 13, 1908, against the one-third interest of the Amblers in the 400 acres of the Marshall land. It appears, however, that Clary was not asserting a lien on the interest of the Amblers in the 400 acres of land, but was setting up only a general claim against the Ambler estate and the fund coming to them.

The next objection is that Marshall did not own the one-third interest of his sister, Mrs. Ambler, in the 400 acres occupied by his mother for life, and that the sale was therefore improper. The record discloses the fact that by the will of Charles Marshall, the father of R. T. Marshall, he gave his wife, Jane Marshall, 400 acres of land for life, with remainder in equal parts to R. T. Marshall, Sallie D. Taylor, and Eliza C. Ambler. He further provided, however, that R. T. Marshall should have the option to buy the interests of Eliza C. Ambler and Sallie D. Taylor in the 400 acres of land at the price of \$4,000 each, and that he should have four years from the death of his mother, Jane Marshall, within which to exercise the option. R. T. Marshall, by his will, elected to exercise the option and to purchase the interest of Eliza C. Ambler in said 400 acres

of land, and pay her therefor the price fixed by his father's will. At the time of filing the petition Eliza C. Ambler was dead, leaving several infant children. The administrators of R. T. Marshall, therefore, asked that the election of R. T. Marshall to take said interest in said 400 acres of land and pay therefor the sum of \$4,000 out of his estate be carried into effect, and Mrs. Ambler's husband and children were all made defendants for the purpose of carrying out that election, and passing title from them to the purchasers of the land. Manifestly, under these circumstances, it would be unnecessary first to institute judicial proceedings for the purpose of investing the interest of the Amblers in the representative of R. T. Marshall, and then afterwards institute another suit for the purpose of having the interest so vested sold for the purpose of paying his debts. With the necessary parties before the court the whole arrangement could be perfected in one suit and the purchaser get a clear title to the property purchased. This is exactly what the administrators sought to have done, and we cannot see how appellant or any one else was prejudiced by ordering a sale of the land in question under these circumstances.

Counsel further insist that there was no report on claims against the estate, and it did not appear that it was necessary to sell the real estate. The pleadings allege, however, and it is not denied, that decedent was in debt for more than \$90,000, and that all of his estate amounted to about \$70,000. Under these circumstances, the court had a right to order a sale of the land in question; for it is well settled that in cases where the rights of infants are not involved a reference to the commissioner is not indispensable to the validity of a judgment directing a sale of the real estate of a decedent, nor need it always precede the judgment. Section 429, Civ. Code Prac., authorizes the court to order the real property to be sold for the payment of the residue of the debts, if it shall appear to the satisfaction of the court that the personal estate is insufficient for payment of all the debts, no matter whether it appears from the report of the commissioner or from the pleadings. *Harlammert, etc., v. Moody's Adm'r*, 26 S. W. 2, 15 Ky. Law Rep. 839.

Appellant's chief objection to the sale is based upon the fact that until the action attacking its mortgage and the other liens upon the land as preferences under the act of 1856 could be determined neither it nor any of the other lienholders would be in position to know how much to bid on the land in case of a sale. Of course, where it can be done without sacrificing the interest of the estate, it would be well to adjudicate the rights of the various lienholders; but in such matters the chancellor has a large discretion. His primary duty is to conserve the interests of all the lienholders, of all the creditors, and of all the parties in any wise interested in

the estate. Very frequently an action involving a preference is long drawn out. In this case, where several of the lawyers do not reside in the county where the action was brought, and the action involved many acts of alleged preference, it would have doubtless taken a long time to adjudicate the rights of the parties. In the meantime the assets of the estate would certainly not have increased; on the other hand, the debts bearing interest would have vastly increased. Under the circumstances, the circuit court must have been of the opinion that it was better for the interests of all concerned that the sale should take place at the earliest possible moment, rather than that it should be postponed because appellant would not know how much to bid on the land.

Another point raised by counsel is that appellant's debt was not due, and that a sale could not be ordered until it was due. It appears, however, that there was a provision in the mortgage to the effect that, if any interest remained unpaid for a period of 30 days, the whole debt should become due and collectible. The provision did not contain the usual words, "shall become due and collectible at the option of the mortgagee." The language is absolute, and we conclude as a matter of fact that there is no merit in appellant's contention that its debt and interest were not due.

For the reasons given, the judgment is affirmed.

COMMONWEALTH v. WEST.

(Court of Appeals of Kentucky. Oct. 28, 1908.)

1. HOMICIDE (§ 194*)—EVIDENCE—ADMISSIBILITY—THREATS.

W. had been convicted of a criminal assault, and while serving sentence therefor asserted that when he got out he would kill all instrumental in his conviction, and, after his release, he shot the brother of the assaulted woman, and a special deputy was appointed to arrest him, the deputy summoning accused and another as a posse to aid him, and in making the arrest accused shot deceased, thinking he was W. *Held*, in a prosecution for the shooting, that, since the posse would be justified in arresting W. if they had reasonable grounds to believe he had committed a felony, his declaration while in prison that he intended to kill the family that caused his conviction was admissible to show that the shooting for which accused attempted to arrest W. was felonious, so as to justify the attempted arrest.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 417-419; Dec. Dig. § 194.*]

2. HOMICIDE (§ 194*)—EVIDENCE—ADMISSIBILITY—CHARACTER OF DECEASED.

W.'s statements while in prison were also admissible in connection with his subsequent execution of his threats to show his dangerous character, and accused's peril in attempting to arrest him, as defendants were justified in shooting more quickly in attempting to arrest such a man than if he were less dangerous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 417-419; Dec. Dig. § 194.*]

3. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the undisputed evidence showed that accused alone killed deceased, it was error to instruct as to his responsibility in aiding and abetting others in the killing, though the indictment contained counts charging accused with aiding and abetting others in committing the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1979, 1985; Dec. Dig. § 814.*]

4. ARREST (§ 65*)—CRIMINAL CHARGES—AUTHORITY UNDER WARRANT—PEACE OFFICERS.

Where a justice of the peace appointed one as a special bailiff to execute a warrant for a homicide not committed in his presence, and the one appointed selected a posse to aid him, the warrant and appointment would not authorize the posse to make the arrest, they not being peace officers, since under the direct provisions of Cr. Code Prac. §§ 37, 38, a private person may make an arrest only where he has reasonable ground to believe a felony has been committed, and the felon is at large, or where he is ordered by a magistrate to arrest one committing a public offense in the magistrate's presence.

[Ed. Note.—For other cases, see Arrest, Dec. Dig. § 65.*]

5. HOMICIDE (§ 105*) — CRIMINAL CHARGE — FORCE NECESSARY.

One authorized to make an arrest for felony could use such force as reasonably appeared to be necessary, even to the extent of taking life.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 135; Dec. Dig. § 105.*]

6. HOMICIDE (§ 184*)—EVIDENCE—ADMISSIBILITY—MOTIVE.

In a prosecution for a homicide committed while attempting to make an arrest under a warrant, though the warrant under which the arrest was attempted to be made and the indorsement thereon did not authorize the arrest, the warrant, indorsement, and the acts done under it were admissible, in connection with the other evidence, to show the motive prompting accused's conduct.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 388; Dec. Dig. § 184.*]

7. ARREST (§ 68*)—CRIMINAL CHARGE—MODE OF MAKING ARREST.

One making an arrest on a criminal charge should inform the person arrested, if there was reasonable opportunity to do so, of his intention to make the arrest, and of the offense charged, unless these facts were already known to the person arrested.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. § 168; Dec. Dig. § 68.*]

8. HOMICIDE (§ 116*)—TRIAL—SELF-DEFENSE.

In a prosecution for homicide for killing a person who was with W., whom defendants were attempting to arrest for a felony, if W. did not have reasonable ground to believe that defendants intended to kill him, or do him great bodily harm, but himself first attempted to kill defendants, or any of them, or do them great bodily harm, and one of defendants believed and had reasonable ground to believe that he or the other defendants were in danger of death, or great bodily harm, and it appeared necessary to kill W. to avert such peril, and W.'s companion was killed, defendant believing, and having reasonable ground to believe, that he was shooting at W., he was justified on the ground of self-defense, but if defendant did not have reasonable ground to believe that himself or the other defendants were in danger, and himself first assaulted W. so as to endanger the latter's life or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

person, and in so doing made the danger to himself, if any, necessary or excusable on the part of W., defendant was not excusable on the ground of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

Appeal from Circuit Court, Laurel County.
"Not to be officially reported."

Dempsey West was convicted of voluntary manslaughter, and the commonwealth appealed to have certain rulings settled and certified. Rulings certified as stated.

Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., and Wm. Lewis, for the Commonwealth.

BARKER, J. The commonwealth of Kentucky has appealed in this case, complaining that the law was not properly ruled in several particulars upon the trial in the court below; and it now asks that the questions mooted by it be adjudicated and certified to the circuit court.

The appellee, Dempsey West, was indicted by the grand jury of Whitley county on the 13th day of November, 1906, together with Samuel Lewis and John W. Johnson, charged with the willful murder of Esrom Lawson. The venue of the action on motion was transferred from Whitley to Laurel county. When the case was called for trial, Dempsey West demanded a separate trial, which was granted by the court, and the commonwealth elected to try him first. The trial resulted in a verdict of guilty of the crime of voluntary manslaughter, and the punishment of the defendant fixed at confinement in the penitentiary for two years. From this judgment West did not prosecute an appeal, and, as said before, the commonwealth has appealed for the purpose of having certain principles of law arising during the trial settled and certified. A short history of the facts which led up to the killing involved in this prosecution will be necessary.

In 1897 one "General" Williams was charged with and indicted for the crime of criminal assault upon a female of the Bays family in Knox county. This prosecution resulted in his being found guilty and sentenced to the penitentiary for a period of 10 years, which term he seems to have served out. While in the penitentiary in Frankfort he was so violent as to lead the officers in charge of him to doubt his sanity, and he was tried in the Franklin county court on an inquisition of lunacy. The verdict of the jury found him sane, and he was returned to prison. During the trial in the Franklin county court Williams openly stated that when his time was out, and he returned home, he intended to kill all who had any part in sending him to the penitentiary. As soon as his term expired, and he returned to his home in Knox county, he armed himself with a Winchester rifle, and went to Corbin,

looking for J. W. Bays, the father of the girl he had wronged, evidently with the intention of assassinating him. Being unsuccessful in his search for the father at Corbin, he came by the Bays' home, and found Levi Bays, the brother of the wronged girl, standing in the yard. He called to Levi to come to him, saying that he desired to converse with him, and when the young man approached, without any provocation on the latter's part, Williams shot him with the Winchester rifle, the ball entering his arm just below the shoulder, having done which, and perhaps supposing his victim dead, he proceeded on his way into the mountains. This high-handed crime naturally excited the neighborhood, and W. H. Burch, a justice of the peace in the district where it occurred, issued a warrant for the arrest of Williams, charging him with the offence of shooting with intent to kill. There being no regular peace officer convenient, Samuel Lewis was appointed by the justice as special bailiff to execute the warrant, and he summoned Dempsey West and John W. Johnson as a posse to aid him in making the arrest. Armed with the warrant, these three started in search of Williams. They followed him for several hours, and finally received information that he was at the house of his aunt, Mrs. Margaret Lawson, in Whitley county, Ky. Having thus located the defendant in the warrant, the posse took counsel among themselves as to the best way to arrest the desperate man for whom they were looking. It was agreed that, as Lewis was the only one of the posse whom Williams did not know, he should go into the house of Mrs. Lawson, and ascertain certainly whether or not Williams was located therein. If Lewis did not return within 10 minutes, his companions were to understand that Williams was in the house, and to at once come forward and aid in his arrest. The Lawson house was situated near the junction of two county roads, and Williams had placed himself in a window from which he could observe the approach of persons on either to the house. His Winchester rifle was lying conveniently on a bed at his side. Lewis, who was a stranger, went to the house, and asked for a drink of water, and engaged the inmates in conversation, inquiring where he could find or purchase some "yoke cattle" which he pretended he wished to buy. At the expiration of the appointed time, Dempsey West and John W. Johnson approached the house from different sides. At this point the evidence for the commonwealth and that for the defendants diverges. The commonwealth's evidence tended to show that, as soon as West and Johnson arrived at the house, Lewis, without warning or demand for the surrender of Williams, opened fire upon him with a pistol, and while he was shooting at him from one direction Johnson was also shooting at him through a door and from an-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

other direction, with the result that Williams was shot through the body some seven or eight times, and almost instantly killed; that, when the shooting commenced, Esrom Lawson and the other inmates of the house fled from it; that Lawson ran out of a door in or near which Dempsey West was standing with a double-barrel shotgun in his hand, and that thereupon West fired upon Lawson, shooting him through the back or side, and instantly killing him. The defendants' evidence was that, as soon as Williams saw Johnson and West approaching the house, he sprang to his gun for the purpose of killing his would-be captors; that thereupon, and in order to save his own life, Lewis opened fire upon him, as did also Johnson, with the result that Williams was almost instantly killed. The testimony of the defendants also tends to show that the reason Williams did not succeed in shooting or shooting at the posse was that, for some unexplained cause, the mechanism of his gun could not be made to work, or, in the language of the witnesses, "his gun hung up on him." Dempsey West in his own behalf testified that, when he approached one of the doors of the Lawson house, he heard a hurried shuffling of feet, and instantly a fusillade of pistol shots were fired within, and he heard also a voice which he took to be Lewis' crying, "Halt! Halt!" and that at this juncture the door was thrown open, and a man whom he thought was Williams sprang out, and with him came a volume of powder smoke which had been confined in the room before the door was opened; that believing the man who sprang out of the door to be Williams, and that he had killed Lewis and was coming to kill him, he raised his gun and fired, with the result that Esrom Lawson fell dead at his feet; that he did not know Lawson at all, did not know he was in the house, and had no desire or motive to injure him in any way; that he believed it was Williams whom he had shot, and did not find out that it was Lawson for some little time afterwards. The three men composing the posse at once sought the sheriff of Whitley county, and surrendered themselves. They were afterwards indicted, with the result above mentioned.

The commonwealth challenges the competency of the testimony of the officers in Franklin county as to the declarations made by Williams that, when he had served his time in the penitentiary, he intended to return home and kill all the persons who had been instrumental in securing his conviction. We think this evidence was competent. The trial court, as we shall hereafter show, correctly ruled that the warrant, and the appointment of Lewis as special bailiff to execute it, did not justify the posse in making the arrest, but that they were authorized, if they had reasonable grounds to believe a felony had been committed and the felon was at large, to arrest him without a warrant. The declaration of Williams that he

intended to kill the members of the Bays family who prosecuted him when he returned home was competent to show that the shooting of Levi Bays was felonious; and it was also competent to show that Williams was a bloody-minded and desperate man, and the necessity on the part of the posse to be on their guard when they undertook to arrest him. In other words, the defendants were entitled to have the jury thoroughly understand the danger of their situation in undertaking to arrest Williams; and his declarations to murder, made in Frankfort, coupled with what he did when he returned home, were all calculated to establish his desperate, dangerous, and lawless character. The defendants were justified in shooting much more quickly in dealing with a man of the character of "General" Williams than they would have been in undertaking to arrest a less ferocious man. Therefore all the evidence of his declarations as to what he intended to do to the Bays family, in the light of what afterwards happened, was competent.

We think the court erred in the instructions in so far as they relate to Dempsey West having aided and abetted Lewis or Johnson in killing Esrom Lawson. In form the instructions on this subject are not open to criticism; but there was no evidence which justified their being given. The indictment, it is true, consisted of several counts, in some of which West is charged with having aided and abetted Lewis and Johnson in killing Lawson; but the evidence, without any contrariety or contradiction, showed that West alone killed Lawson. He testified to this fact himself, and all of the eyewitnesses, both for the commonwealth and for the defendants, corroborated him on this point. This being true, the court should have omitted all reference to the defendant as being an aider or abettor of Lewis or Johnson, and confined its instructions alone to the principles of law arising from the evidence that West alone killed Lawson.

The most insistent complaint that the commonwealth makes as to the instructions is in the giving of No. 6, which is as follows: "Neither the warrant of arrest issued by the Magistrate Burch for the arrest of General Williams, nor the indorsement thereon, admitted in evidence, gave authority to defendants or to either of them to arrest said Williams, and the evidence as to the issual of said warrant, the indorsement thereon, and all that was done under it may be considered in connection with the other evidence to throw light on, and to illustrate, the situation of the parties and the motive prompting their conduct. But if defendants had reasonable grounds to believe that said Williams had committed a felony in Knox county, Ky., and had not been arrested therefor, defendants had the right to arrest him therefor, and to use such force as reasonably appeared to them to be necessary to

accomplish the arrest. But in making the arrest it was the duty of the defendants or one of them to first inform Williams, if he gave them a reasonable opportunity to do so, of the intention to arrest him and of the offense charged against him, unless he already knew of such intention and charge. If he already knew of said intention to arrest him and the charge against him, it was his duty to peaceably submit to arrest. And if you believe, from the evidence, that defendants went to the house where the said Esrom Lawson was killed, not intending to kill him or said Williams, or to do them or either of them any great bodily harm, but only to arrest the said Williams, and at a time when defendants had reasonable grounds to believe that said Williams had committed a felony and had not been arrested therefor, and that said Williams did not have reasonable grounds to believe that defendants or any one or more of them intended to kill him or to do him some great bodily harm, but that he then and there first attempted to kill defendants or one of them, or to do them or one of them, some great bodily harm, and defendant West believed and had reasonable grounds to believe he was or the defendants Lewis and Johnson were, or one of them was, then and there, in danger of death or of the infliction of some great bodily harm at the hands of the said Williams, or the said Esrom Lawson, or any person acting at the time with them or with either of them, and that to shoot at and kill Williams was necessary, or appeared to the defendant, in the exercise of a reasonable judgment, to be necessary, in order to avert said danger, either real or to the defendant apparent, and in such shooting by defendant West, if he did shoot he believed in good faith and had reasonable grounds to believe he was shooting at said Williams and said Lawson, was thereby killed, you ought to find the defendant not guilty on the ground of self-defense and apparent necessity, or the defense of another or apparent necessity. On the other hand, if you shall believe from the evidence beyond a reasonable doubt that the defendant West did not believe and did not have reasonable grounds to believe that his life or person, or the life or person of the defendants Lewis and Johnson, or one of them, was in danger at the hands of Williams or said Lawson or any person acting with them or either of them, but that said West first willfully and feloniously, or that said Lewis and Johnson, or one of them, first willfully and feloniously assaulted said Williams with a deadly weapon, placing his life in danger, or his person, of some great bodily harm, and that defendant West willfully and feloniously aided, assisted, advised, abetted, counseled, or encouraged the said Lewis and Johnson, or either of them, to so willfully and fe-

loniously assault said Williams with a deadly weapon, and, in doing so, defendant or the said Lewis and Johnson made the harm or danger to himself or themselves, if any there was, necessary or excusable on the part of Williams or said Lawson in his own necessary or reasonably apparent necessary self-defense, you should not in that event excuse defendant on the ground of self-defense." The foregoing instruction certainly does not err in favor of the defendant or against the commonwealth. In it the court correctly told the jury that neither the warrant of arrest issued by the justice nor the indorsement thereon gave authority to the defendants to arrest Williams. None of the posse were peace officers, and the only occasion upon which private persons are justified in undertaking an arrest is where they have reasonable grounds to believe that a felony has been committed and the felon is at large; or where they are ordered by a magistrate or judge to arrest a person committing a public offense in the magistrate's or judge's presence. Sections 37, 38, Cr. Code Prac.; *Wright v. Commonwealth*, 85 Ky. 123, 2 S. W. 904; *Begley v. Commonwealth*, 60 S. W. 847, 22 Ky. Law Rep. 1546; *Bates v. Commonwealth*, 16 S. W. 528, 13 Ky. Law Rep. 132; *Salisbury v. Commonwealth*, 79 Ky. 425. The court also properly told the jury that, if the defendants had reasonable grounds to believe that Williams had committed a felony and was at large, they had a right to arrest him therefor without a warrant, and to use such force as reasonably appeared to them to be necessary to accomplish the arrest; and it might have been added with propriety that the force used, if necessary, might be extended even to the taking of the defendant's life. *Reed v. Commonwealth*, 100 S. W. 856, 30 Ky. Law Rep. 1212, and the authorities therein cited. Without further analysis of the instruction complained of, we deem it sufficient to say that, with the suggestion above made, it fairly states the principles of law to which it is directed, and, as said before, certainly does not err in favor of the defendant.

The other instructions of the court are not complained of by the commonwealth, and, except as corrected in this opinion, are not subject to criticism, all of which is certified.

WOODS et al. v. WOODS' ADM'R.

(Court of Appeals of Kentucky. Oct. 30, 1908.)

1. INSURANCE (§ 212*) — ASSIGNMENT — CONTRACT—PARTIES—MENTAL CAPACITY.

Evidence held to show that insured was mentally capable of contracting with her sons to pay the premiums on her life policy and take the proceeds at her death.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 481; Dec. Dig. § 212.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. INSURANCE (§ 116*)—LIFE INSURANCE—INSURABLE INTEREST—PARENT AND CHILD.

The relationship between parent and child is itself sufficient to give either an insurable interest in the life of the other.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 159; Dec. Dig. § 116.*]

3. INSURANCE (§ 122*) — LIFE INSURANCE — CONTRACT WITH STRANGER TO PAY PREMIUMS.

Where a mother contracted with her sons to pay premiums on her life policy and take the proceeds at her death, an agreement between the sons and a nephew of insured, who had no insurable interest, that he should furnish one-third of the premiums and have one-third of the proceeds of the policy did not affect the validity of the policy or affect the sons' interest therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 166; Dec. Dig. § 122.*]

Appeal from Circuit Court, Shelby County.
"To be officially reported."

Petition by H. C. Riner, administrator of Sarah E. Woods for advice as to the distribution of the proceeds of her life policy, to which Joe Woods and another filed a counterclaim and cross-petition. From a judgment awarding cross-petitioners insufficient relief, they appeal. Reversed and remanded, with directions.

P. J. Beard, for appellants. Gilbert & Gilbert and J. C. Beckham & Son, for appellee.

CLAY, C. Sarah E. Woods died intestate on the 14th of March, 1907, leaving as her heirs at law the appellants, Joe Woods and Sam Woods, and the appellees, Oad Woods, Arthur Woods, Mary Woods, and others. In the year 1901 she had her life insured in the Equitable Life Assurance Society in the sum of \$10,000. At the time she obtained the policy of insurance she entered into a contract with appellants, Joe Woods and Sam Woods, by which it was agreed that they should pay the insurance premiums on the policy, and in consideration thereof they should be entitled to the proceeds at her death. At the same time they entered into an agreement with George T. Woods, a nephew of Sarah E. Woods, by which he agreed to furnish appellants one-third of the premiums due on the policy, and in consideration thereof was to share in one-third of the proceeds. Upon the death of Sarah E. Woods the Equitable Life Assurance Society paid the \$10,000 to H. C. Riner, who had qualified as her administrator. He instituted this action in the Shelby circuit court for the purpose of obtaining the advice and direction of the court as to how the fund should be distributed and to whom paid. To this petition Joe Woods and Sam Woods by answer, counterclaim, and cross-petition set up the agreement above referred to, alleged that they had paid the annual premium of \$579.50 for the years 1900, 1901, 1902, 1903, 1904, 1905, and 1906, and asserted claim to the entire proceeds of the policy of \$10,000. To this a reply was filed by the other

heirs, the appellees herein, in which they claimed that the agreement between appellants and their mother was procured by fraud, that she was not mentally capable of entering into an agreement, and that appellants had no insurable interest in the life of their mother. On submission of the case the trial court rendered an opinion and judgment based thereon, by which it was held that the policy was issued on the life of Sarah E. Woods, payable by its terms at her death to her estate; that a written contract was entered into between her and two of her sons, the appellants, by which they were to pay the yearly premiums, and be the beneficiaries of the policy; that these sons made an agreement with George T. Woods, by which he was to receive one-third of the proceeds of the policy, upon paying to them one-third of the premiums; that the premiums were all paid by the appellants; that George T. Woods, and his administrator after his death, paid to the appellants one-third of the premiums. The court then directed that the administrator pay to the appellants the premiums paid by them on the policy, with interest thereon from the dates of the respective payments until paid; that the balance of the \$10,000 was a part of the estate of Sarah E. Woods, and was ordered to be held and so accounted for by the administrator. From the judgment so entered, this appeal is prosecuted.

The trial court seems to have disregarded the plea of fraud and of mental incapacity, and we think properly so. The evidence in this case conduces to show that Sarah E. Woods was a woman of fine common sense, and that she knew how to attend to and manage her own affairs. When she took out the policy she understood perfectly well the nature of the contract which she had made with appellants. There is also evidence to the effect that the same privilege, of taking out insurance on her life, was accorded to her other children, but that they failed to avail themselves of it. All along they knew of the existence of the policy in question and of the fact that appellants were paying the premiums thereon in pursuance of the contract by the terms of which they expected to secure the proceeds. However, the trial court held that appellants, who were the sons of Sarah E. Woods, had no insurable interest in the life of their mother. The court seems to have proceeded upon the idea that some other element, such as that of support or a pecuniary interest in the life of the mother, was necessary in addition to the relationship which existed between the mother and her sons. Appellees below seem to have relied, and the court itself appears to have based, its opinion upon the doctrine laid down in the case of *Life Insurance Company v. O'Neill*, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225. In that case it was decided by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the Circuit Court of Appeals that "an adult son has not, from the bare fact of relationship, an insurable interest in the life of his father." This case followed the English doctrine. The latter doctrine, however, was based upon the statute 14 Geo. III, c. 48, which provided that, to support insurance on the life of another, there must have been a pecuniary interest on the part of the insured in the life of the assured, and the interest ordinarily growing out of relationship or consanguinity is not alone sufficient. Although having no similar statute, the courts of several states have adopted the English doctrine. With all due deference to the courts thus holding, we are of the opinion that the rule announced by them does not accord with the weight of authority, and is not based upon sound reasoning.

In the recent case of *Hess' Adm'r v. Segenfelder, etc.*, 105 S. W. 476, 32 Ky. Law Rep. 225, 14 L. R. A. (N. S.) 1172, this court, in discussing the question of insurable interest, said: "It has been held a son has an insurable interest in the life of his father (*Reserve Mutual Life Ins. Co. v. Kane*, 81 Pa. 154, 22 Am. Rep. 741); a father has an insurable interest in the life of his child (*Williams v. Washington Life Ins. Co.*, 31 Iowa, 541); sisters and brothers have an insurable interest in the life of each other (*May on Insurance*, § 107); a wife has an insurable interest in the life of her husband, and a husband in the life of his wife (*Currier v. Continental Life Ins. Co.*, 57 Vt. 496, 52 Am. Rep. 134; *Ky. St.* 1903, § 654); a person dependent upon the life of another has an insurable interest in that life (*Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38); a granddaughter has not an insurable interest in the life of her grandfather, nor has a nephew, as such, an insurable interest in the life of an aunt, nor a son-in-law an insurable interest in the life of his mother-in-law (*May on Insurance*, § 107). In *Singleton v. St. Louis Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321, an uncle was held not to have an insurable interest in the life of his nephew. In *Burton v. Connecticut Mut. Life Ins. Co.*, 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405, the court held that a grandchild had no insurable interest in the life of his grandfather. A stepson has no insurable interest in the life of his stepfather, where he has a separate home and family of his own. *United Brethren Mutual Aid Society v. McDonald*, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111. "These authorities illustrate the limitations that have been placed on insurable interest, and the extent to which the courts have gone in an effort to prevent wagering and speculative contracts of insurance. Although an examination of them will show various reasons for the conclusion reached, it may safely be said that the relationship of creditor and debtor must exist, or that the beneficiary must have or expect some pecuniary relief, benefit, or advantage from the contin-

uance of the life of the insured, or the relationship growing out of ties of blood or marriage must be so close as to justify the well-founded belief that loss or disadvantage would naturally and probably arise to the party in whose favor the policy is written from the death of the person whose life is insured. Generally, the courts have endeavored to make insurable interest dependent on the question that pecuniary loss would presumably result to the beneficiary from the death of the insured; but, where the relationship, as in the case of husband and wife, parent and child, sister and brother, is so close as to preclude the probability that mercenary motives would induce the sacrifice of life to gain the insurance, the element of pecuniary consideration is not deemed essential to sustain the validity of the policy."

Prior to the above opinion the doctrine that a son had an insurable interest in the life of his parent was recognized in *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057. In *Warnock v. Davis*, 104 U. S. 779, 26 L. Ed. 926, the rule is thus stated: "It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration." In 25 Cyc. p. 704, the doctrine is thus laid down: "It has sometimes been said in definite terms that the relationship of parent and child, without right or liability as to support, and without other direct pecuniary interest, is not sufficient to sustain a policy taken by one on the life of the other. But a more liberal rule seems to be supported by many authorities, in accordance with which such relationship is sufficient in itself to show such interest as will support a policy by the one on the life of the other." Among the cases recognizing this doctrine may be cited the following: *Valley Mutual Life Association v. Teewalt*, 79 Va. 423; *Reserve Mutual Insurance Co. v. Kane*, 81 Pa. 154, 22 Am. Rep. 741; *Equitable Life Insurance Co. v. Hazelwood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893; *Tucker v. Mutual Benefit Life Co.*, 121 N. Y. 718, 24 N. E. 1102; *Trenton Mutual Life Insurance Co. v. Johnson*, 24 N. J. Law, 576; *Hilliard v. Sandford*, 4 Ohio N. P. 363.

In speaking of the duties due from children to their parents, Blackstone (1 Lewis' Ed. p. 428) says: "The duties of children to their parents arise from a principle of natural justice and retribution; for to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after. They who protected the weakness of our infancy are entitled to our protection in the infirmity

ty of their age. They who by sustenance and education have enabled the offspring to prosper ought in return to be supported by that offspring in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents, which are enjoined by positive laws." It may be safely said that no relationship in life, arising from ties of blood, is more sacred or more binding than that of parent and child. As the mother looks into the eyes of her child and uses every effort to guard it from harm and prolong its life, so the child as maturity comes raises a strong arm to protect her in her old age, and looks with fear to the time when she will be taken away. Thus every common instinct, to say nothing of love and affection, makes each interested in the long life of the other. With such a tie uniting parent and child, we cannot accede to the doctrine that some pecuniary loss or disadvantage must result to the son from the death of his mother in order that he may be interested in the continuation of her life. We, therefore, conclude that the relationship between parent and child is of itself sufficient to give either an insurable interest in the life of the other, and that no other element is required.

Nor do we think the fact that appellants entered into a contract with George T. Woods, by which he was to furnish one-third of the premiums and to share in one-third of the proceeds of the policy, had the effect of invalidating the policy so far as the appellants are concerned. This precise question was before this court in the case of *Beard v. Sharp*, *supra*. There the son had for a number of years paid the premium on the policy of insurance on the life of his mother issued for his benefit. After paying several premiums he caused a new certificate to be issued, making himself and a stranger joint beneficiaries, the stranger agreeing to pay the premiums. This court held that the son was entitled to the whole amount of the proceeds of the policy, less the premiums paid by the stranger, with the interest thereon, and further held that the insurance was not invalidated by the designation of a person prohibited by law from being a beneficiary. Indeed, it may be said to be the general rule that a contract of insurance is not invalidated by the designation of a person prohibited by law to be a beneficiary. *Caudell v. Woodward*, 96 Ky. 646, 29 S. W. 614; *Weigelman v. Bronger*, 96 Ky. 132, 28 S. W. 334; *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924.

Being of the opinion that Sarah E. Woods was mentally capable of contracting, and that no fraud was practiced, either upon her or appellees herein, in securing the contract of insurance, that the subsequent contract made by appellants with George T. Woods did not affect the validity of the

policy, or appellant's interest therein, and that the relationship existing between appellants and their mother was sufficient, in and of itself, to give them an insurable interest in her life, we therefore conclude that appellants are entitled to the whole proceeds of the policy.

For the reasons given, the judgment is reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.

McFARLAND'S ADM'R v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Oct. 30, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 29*)—APPOINTMENT OF ADMINISTRATOR—VALIDITY.

Under Ky. St. 1903, §§ 3896, 3897, requiring the granting of administration to relations of decedent on their applying therefor, and authorizing the appointment of any other person where no application by relations is made within a specified time, the appointment of a stranger, made within the time relations might apply for their appointment, is not void, but voidable only.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 177; Dec. Dig. § 29.*]

2. EXECUTORS AND ADMINISTRATORS (§ 29*)—REMOVAL OF ADMINISTRATOR—VALIDITY OF PRIOR ACTS—STATUTES.

Under Ky. St. 1903, § 3848, providing that lawful acts by an administrator subsequently removed shall remain valid and independent thereof, the lawful acts of an administrator holding under a voidable appointment are valid notwithstanding his subsequent removal.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 177; Dec. Dig. § 29.*]

3. EXECUTORS AND ADMINISTRATORS (§ 29*)—CLAIMS IN FAVOR OF ESTATE—COMPROMISE—VALIDITY.

Under Ky. St. 1903, § 3882, authorizing a personal representative to compromise any claim for damages for the death of decedent, an administrator acting under a voidable appointment may compromise a claim for decedent's death.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 29.*]

4. PLEADING (§ 34*)—CONSTRUCTION.

The language of a pleading must be construed most strictly against the pleader.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 66; Dec. Dig. § 34.*]

5. NOTICE (§ 1*)—KNOWLEDGE—NATURE.

The fact that a person could learn of a thing is not equivalent to knowledge, especially where the facts alleged do not show that there was anything to put him upon notice.

[Ed. Note.—For other cases, see *Notice*, Dec. Dig. § 1.*]

6. EXECUTORS AND ADMINISTRATORS (§ 29*)—ACTS OF ADMINISTRATOR—SETTLEMENT OF CLAIMS—VALIDITY.

A woman who lived with decedent as his wife qualified as his administratrix, and settled with a railway company for the death of decedent. There were no circumstances connected with her appointment that would lead one to believe that decedent had a lawful wife and child in a distant state. *Held*, that the settle-

ment was binding on one appointed administrator after the removal of the woman from her position as administratrix.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 177; Dec. Dig. § 29.*]

Appeal from Circuit Court, Whitley County.

"To be officially reported."

Action by Gillis McFarland's administrator against the Louisville & Nashville Railroad Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Johnson & Snyder, R. S. Rose, and T. Z. Morrow, for appellant. Benjamin D. Warfield and Charles H. Moorman, for appellee.

CLAY, C. This is an action by W. W. McFarland, as administrator of Gillis McFarland, deceased, for damages for personal injuries resulting in the death of the latter.

Among other defenses the appellee, Louisville & Nashville Railroad Company, pleaded that at the time of his death the decedent, Gillis McFarland, was a resident of Whitley county, Ky., and died domiciled therein; that thereafter, on the 15th day of August, 1904, the Whitley county court, at a term that day duly held, appointed Isabella McFarland administratrix of the estate of Gillis McFarland, deceased; that she accepted the appointment, and gave bond as required by law, and thereupon took the oath as required by law in such cases, and was granted by the court letters of administration on the estate of said Gillis McFarland; that thereafter, while she was acting as such administratrix, she instituted an action in the Whitley circuit court against the defendant for damages on account of the death of said Gillis McFarland; that while said action was still pending in that court, and she was still acting as administratrix, the cause of action was duly adjusted and compromised and settled between her and the defendant by a contract, by the terms of which she agreed to accept from the defendant the sum of \$200 in full compromise and satisfaction of the cause of action so set out in the petition; that said sum was then and there paid to her by the defendant, and was accepted by her as such administratrix in full compromise, settlement, and satisfaction of her cause of action, and of any and all claim which the estate of Gillis McFarland had against the defendant for damages on account of his death; that the defendant pleaded and relied upon said settlement, compromise, and payment as a bar to this action. In reply to the above paragraph of the defendant's answer, the plaintiff admitted the residence of decedent, the qualification of Isabella McFarland as administratrix, and the settlement with said Isabella as alleged in the defendant's answer; but plaintiff alleged that the county court order appointing said

Isabella administratrix, as well as the order of that court qualifying her as such administratrix, was absolutely null and void, because said Isabella was not at the time of her appointment and qualification as such administratrix of said Gillis McFarland, or at the time of the settlement of the suit brought by her as administratrix of the estate of Gillis McFarland against the defendant, or at the time of the acceptance of the \$200, the sum agreed on in said settlement, or at any other time, the surviving wife of said Gillis McFarland, nor was she in any wise related to him; nor was she next after such surviving wife, or in any wise or at all entitled to a distribution of his estate or any part of it. Plaintiff further alleged that the appointment and qualification of said Isabella McFarland as administratrix of said Gillis McFarland occurred within less than 60 days, and before the second county court in Whitley county, after the death of Gillis McFarland; that said county court was without jurisdiction to make said appointment, and the appointment was, for that reason, null and void; and being, for the reason stated, and also for the reason that said appointment was in fraud of the rights of Nola McFarland and the infant child of the decedent, Hannah McFarland, null and void, it conferred no rights on said Isabella to sue on, compromise, or settle any claim for or against the estate of the decedent with the defendant or any one else, or to administer any estate left by him in Whitley county or elsewhere. Plaintiff further pleaded that on the 17th day of September, 1897, at South McAlester, Ind. T., he, the said Gillis McFarland, was duly married to one Nola Morten, who thereupon became Nola McFarland, his lawful wife, and from whom he was never divorced, and that she, said Nola McFarland, was living at the time of the death of said Gillis McFarland, her husband; that, at the time of the death of Gillis McFarland, Nola McFarland was at Huntington, Ark., and had an infant child, Hannah McFarland, the issue of her marriage with Gillis McFarland, and as soon as she learned of the death of her husband, which was not until after the appointment of Isabella McFarland, and after the compromise pleaded by defendant, she came to Kentucky, and on the 12th day of July, 1905, appeared in the Whitley county court and moved said court to remove Isabella McFarland as administratrix, and for cause shown said Isabella was then removed, and said Nola then in writing waived her right to be appointed administratrix of her husband and requested that plaintiff, who is the father of the decedent, be appointed in her stead, which was done. By another paragraph in the reply plaintiff pleaded that all the foregoing facts were known to the defendant at the time of the settlement and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

payment of the money to Isabella McFarland, or that such knowledge was easily accessible to it. By rejoinder the defendant put in issue all the affirmative allegations of the reply, and further pleaded that many months before his death Gillis McFarland was united in marriage in Campbell county, Tenn., to Isabella Abbott; that within a few days thereafter they came to Whitley county, Ky., and took up their residence therein, and from that time until his death they continued to live together as husband and wife, and were so recognized by their relatives and neighbors; that, after his death, the said Isabella appeared in the Whitley county court, and moved the court that she be appointed as administratrix of the estate of said Gillis McFarland, deceased, and she was thereupon appointed by said court as such administratrix; that she accepted the appointment and duly qualified as such, and while the appointment was in full force she, as such administratrix, made with the defendant, in good faith, the compromise and settlement which is pleaded in the answer. Thereupon the plaintiff filed a demurrer to the above paragraph of the rejoinder. After consideration the court held that the demurrer should be carried back to paragraphs 2, 3, 4, and 5 of the reply, which attacked the validity of the compromise made by defendant with Isabella McFarland, the former administratrix, and also attempted to plead knowledge on the part of defendant of the facts connected with the appointment of Isabella McFarland. Appellant declining to plead further, his petition was dismissed, and he is here on appeal.

It is the contention of appellant that the damages that may be recovered for the death of a person are for the benefit of his widow and child; that this right to such damages cannot be defeated by a settlement with an administratrix not related to the decedent and who had no right to qualify; that the power of the court under sections 3896, 3897, Ky. St. 1903, to appoint a creditor or other person as administrator, applies only where the surviving husband or wife, or such others as are next entitled to distribution, fail to apply for administration at the second county court after the death of the intestate; that in this case the county court did not wait for the second term of the court, but appointed Isabella McFarland administratrix at a time when she had no power to qualify and he had no power to make the appointment, and the appointment was consequently void, and all her acts done in pursuance of said appointment were also void.

This question has been before this court, and it has been decided that an appointment made under such circumstances is not void, but only voidable. In the case of Spayd's Adm'r v. Brown, etc., 102 S. W. 823, 31 Ky. Law Rep. 438, this court said: "But, whilst the appointment of a creditor or other person before the expiration of the second coun-

ty court day, after the death of the intestate is voidable, if any relative qualified to act applies at or before the second county court day, we do not conceive that the appointment of the creditor or other person would be absolutely void." The same doctrine is recognized in *Buckner's Adm'r v. Louisville & Nashville R. R. Co.*, 120 Ky. 600, 87 S. W. 777; also in the case of *Lavinia Estill Cunningham v. Estelle Clay's Adm'r*, 112 S. W. 852, opinion rendered October 13, 1908. If the appointment of Isabella McFarland as administratrix of Gillis McFarland was not void, but only voidable, what, then, was the effect of her acts done while acting as administratrix? In 18 Cyc. p. 141, the doctrine is thus stated: "As a general rule, all acts by an executor or administrator done in the due and legal course of administration are valid and binding, even though the appointment is voidable and the letters issued by the court are afterward revoked or the incumbent discharged from his trust, and he will be protected in all lawful and bona fide acts done before revocation of his letters." In *People v. Cole*, 84 Ill. 327, it was held that the receipt of an administrator regularly appointed will bar any subsequent action for the recovery of the debt, notwithstanding irregularities may have intervened in the appointment of the administrator which would be fatal upon appeal or error. Chancellor Kent (2 Com. 413) says: "It is the received doctrine that all sales made in good faith, and all lawful acts done, either by administrators before notice of a will or by executors or administrators, who may be removed or superseded, or become incapable, shall remain valid, and not be impeached on any will appearing, or by any subsequent revocation." As if declaratory of the doctrine announced by Chancellor Kent, our Legislature enacted section 3848 of the Kentucky Statutes of 1903, which is as follows: "Where an order of administration is set aside or letters of administration revoked, or where any executor or administrator shall be removed, or the will under which he acted shall be declared invalid, all previous sales of personal estate, made lawfully by the executor or administrator, and with good faith on the part of the purchaser, and all other lawful acts done by such executor or administrator, shall remain valid and effectual. But pending an action or procedure to set aside or reject the will there shall be no power to sell the land of the deceased, except under a judgment of court." Thus it will be seen that, not only by the weight of authority in other jurisdictions, but by express statute, it is provided that all lawful acts of an administrator, even though he may subsequently be removed, shall remain valid.

The only question remaining, then, is: Was the act of the former administratrix in making the compromise settlement one which she could lawfully perform while acting as such administratrix? Of this there can be

no doubt, because section 3882 of the Kentucky Statutes expressly provides that a personal representative may compromise and settle any claim for damages growing out of injury to or the death of the decedent. As the appointment of Isabella McFarland as administratrix of Gillis McFarland was not void, but only voidable, and as the compromise which she effected with appellee was within her power as such administratrix, we therefore conclude that it was valid and binding on the estate of Gillis McFarland, even though Isabella McFarland was subsequently removed and appellant appointed in her stead. It therefore follows that the settlement made is a complete bar to any further recovery by appellant.

But counsel for appellant insist that the demurrer should not have been sustained to the reply, because of the plea that appellee had knowledge, or ought to have known, of the facts connected with the appointment of Isabella McFarland. It is a fundamental rule of pleading, however, that the language of a pleading must be construed most strictly against the pleader. Appellant pleads that the facts were well known to the defendant at the time of the settlement and payment of the money, "or that said knowledge was easily accessible to it." The fact that a person could learn of a thing is not equivalent to knowledge, especially where the facts alleged do not show that there was anything to put him upon notice. So far as the record shows, the woman who was actually living with the decedent as his wife had qualified as his administratrix. There was no circumstance connected with her appointment that would lead appellee to believe that the decedent had another wife and a child in a distant state. Of course, if appellant had pleaded and could have shown fraud and collusion on the part of appellee and the former administratrix, this would have been sufficient to prevent the compromise from being pleaded as a bar to recovery by appellant. *McLemore, etc., v. Seebree Coal & Mining Co., etc.*, 121 Ky. 53, 88 S. W. 1062.

For the reasons given, the judgment is affirmed.

FORSYTHE et al. v. SOUTHERN RY. IN KENTUCKY.

(Court of Appeals of Kentucky. Oct. 30, 1908.)

1. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

In a suit to restrain a railroad company from obstructing a farm crossing, error in admitting the testimony of a witness that the owner in conveying the right of way had stated that it was not necessary that the deed should make any reference to the fact that the company should maintain farm crossings was not prejudicial to the company.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

2. RAILROADS (§ 129*)—RIGHT OF WAY—DUTY TO MAINTAIN FARM CROSSINGS.

A railway company purchased the property of another railway company without notice of a verbal contract between the latter company and an owner through whose land the road ran, which required the maintenance of farm crossings. There was nothing to put the company on notice. It obtained a deed from the owner for a right of way which was silent on the question of farm crossings, and there was no mistake in the execution of the deed. *Held*, that the company was not bound to maintain farm crossings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 401; Dec. Dig. § 129.*]

3. RAILROADS (§ 67*)—RIGHT OF WAY—CONVEYANCES—CONSIDERATION.

A deed conveying a railroad right of way which recites that the grantor conveys to the railroad company a railroad right of way in consideration of full payment of the purchase price, and the further consideration that the company shall maintain lawful fences on both sides of the right of way, is supported by a sufficient consideration.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 67.*]

4. RAILROADS (§ 129*)—RIGHT OF WAY—MAINTENANCE OF FARM CROSSINGS.

A railroad company purchasing the property of a railroad company at a time a well-marked roadway under a trestle in the roadbed existed, which way had been used by the owner under the original contract for the right of way, purchased with notice of the existence of the roadway, and could not deprive the owner of the land of the use thereof.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 401; Dec. Dig. § 129.*]

5. RAILROADS (§ 104*)—RIGHT OF WAY—MAINTENANCE OF FARM CROSSINGS.

Evidence *held* not to show the existence of a roadway under a trestle in a railroad roadbed at a time a railroad company purchased the railroad property, relieving the company of the duty to permit the use of any roadway under the trestle after obtaining a deed conveying the right of way without referring to any duty to maintain crossings.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 104.*]

Appeal from Circuit Court, Mercer County.
"Not to be officially reported."

Action by Fred A. Forsythe and others against the Southern Railway in Kentucky. From a judgment of dismissal, plaintiffs appeal. Affirmed.

J. T. Wilson, for appellants. Edward P. Humphrey, E. H. Gaither, and Humphrey, Davie & Humphrey, for appellee.

CARROLL, J. In 1887 the Louisville Southern Railroad Company constructed its line of railway from Louisville to Burgin, Ky. The route for the road was surveyed through the land of J. M. Forsythe, who died some years ago, and the company desired to build the road through his farm, which contained 540 acres of fine land. Mr. Forsythe was very reluctant to permit the road to be built through his place, but finally agreed that it might be done in consideration of the agreement of the company to pay him \$6,000 in money, give him three crossings (one over-

head and two undergrade), and build and maintain the fencing on both sides of the road. The road run through the farm a distance of nearly three-quarters of a mile, dividing it into two nearly equal parts. The overhead crossing was to be at the northern limit of his farm, one undergrade crossing near the center, and another undergrade crossing near the southern boundary of his place. The overhead crossing was over a cut made by the railroad, and the undergrade crossings were under trestles. A short time after this contract was made, and by agreement of Mr. Forsythe, the overhead crossing was converted into a grade crossing; and it may be conceded that he was placed in the use and possession of these three crossings. In 1891, the railroad company having failed to pay the whole of the \$6,000, he instituted an ordinary suit against them for the balance due. This suit in November, 1891, was dismissed settled, coupled with an agreement upon the part of Mr. Forsythe to make a deed for the right of way over the land as soon as a survey of the same was made. The contract between the railroad company and Forsythe was not in writing; nor was there any writing entered into between the parties concerning their agreement until 1898, at which time the railroad had been in operation for some years, and Forsythe and his wife then conveyed to the appellee Southern Railway Company in Kentucky by deed duly acknowledged and recorded the right of way through his land. The deed recites that: "Whereas, the said J. M. Forsythe instituted suit in the Mercer circuit court on April 14, 1891, against the Louisville Southern Railroad Company, whereby he sought to recover for the value of certain lands taken by said company for railroad purposes, and for damages resulting to the adjacent lands on account of the occupancy thereof by said company; and whereas, said suit was dismissed settled by the plaintiff on November 3, 1891, the damages therein claimed having been fully paid; and whereas all the right, title and interest of the Louisville Southern Railroad Company in and to said tract of land was by virtue of an order entered in the circuit court of the United States, district of Kentucky, in the case of Central Trust Company of New York v. Louisville Southern Railroad, transferred by E. T. Lolley, special commissioner in said cause, to the Southern Railway Company in Kentucky, a deed for said interest having been made August 20, 1894, and whereas no deed for the right of way over said land has ever been made by the said Forsythe: Now, therefore, in consideration of the premises and full payment of the purchase price, and the further consideration that the said second party shall permanently maintain lawful fences on both sides of the land herein conveyed, the said first parties hereby sell and convey unto the said Southern Railway Company in Kentucky the right of way over the following described tract of land, and the

use thereof for railroad purposes: [Then follows a description of the land conveyed.] To have and to hold said tract of land for the purposes set forth above, together with all the appurtenances thereunto belonging, unto the said second party, its successors and assigns forever, with covenant of general warranty." In September, 1907, the trestle erected and used by the railroad company that spanned the southern crossing claimed by Forsythe under his agreement became unsafe, and the company commenced to make an embankment under the trestle that was intended to take the place of it. When the company undertook to make this embankment that would obstruct the crossing, and deprive appellants, who were then the owners of the land, of the use of it, they brought this action, setting out the essential facts herein stated, and sought an injunction restraining the company from obstructing the crossing. Upon final hearing of the case, the petition was dismissed, and the plaintiff appeals.

The contentions of the appellants are that the contract, so far as the crossings were concerned, was an executed contract in 1887 and Forsythe was in possession of the crossings at the time the deed was made; that the Southern Railway Company as the vendee and purchaser of the Louisville Southern Railroad could only acquire such interest in the land as the Louisville Southern Railroad had acquired by and under its contract with Forsythe; and that the deed was made by Forsythe and accepted and received by the Louisville Southern Railroad Company with reference to the physical construction of the road and all of the conditions surrounding it. Second. That, if the deed fairly construed conveyed anything more than the Louisville Southern Railroad acquired from Forsythe by its contract, then the reservations of said crossings were omitted from the deed by mistake and oversight, and it is asked that the deed be corrected to conform to the contract.

The appellee insists, first, that it is neither alleged nor proven by appellants that their user of the supposed crossing was adverse; second, that it is not alleged or proven by them that there was any mutual mistake in regard to the execution of the deed; and, third, that, as they had no notice of the contract between their vendor and Forsythe, they are not bound by its terms, no matter what they were, that the deed made to them is the only written contract, and the only contract the terms and conditions of which they are bound by. The contract between Forsythe and the Louisville Southern Railroad was negotiated by John B. Thompson, who was the mutual friend of the contracting parties. It is clear from his evidence that, by the original agreement between Forsythe and the Louisville Southern Railroad Company, Forsythe was to have the three crossings heretofore mentioned. It will be

observed that the only agreement ever made concerning the crossings was the verbal one made in 1887, and that in 1894 the Southern Railway Company purchased under decretal sale all the rights, franchises, and property of the Louisville Southern Railroad Company that built the road. Thompson also testified that in 1898 the appellee company presented a deed to Forsythe, but he refused to sign it because no mention was made in it of either the fencing or crossings, and this deed was returned to the company, and another deed and the one heretofore mentioned sent to him, which he executed. Thompson further testifies that he called the attention of Forsythe to the fact that the second deed, although it specified the fencing, did not mention the crossings, and Forsythe said that his lawyer told him that it was not necessary that the crossings be mentioned as the crossings were there, and the company could not change them. Although it was competent for Thompson to testify to the fact that he saw the deeds and knew their contents, it was manifestly not competent for him to relate a conversation with Forsythe in respect to them, although the conversation as detailed by him is not prejudicial to the interests of the appellee. There is no evidence whatever that the appellee company had any notice of the verbal contract between Forsythe and the Louisville Southern Railroad Company; nor is there any evidence tending to show mistake or oversight in the execution of the deed. Nor was there anything to put them on notice. *Bailey v. Southern Ry. Co.*, 112 Ky. 424, 60 S. W. 631, 61 S. W. 31.

The point is made that there was no consideration for the deed, but this is not well founded. The deed itself recites a consideration amply sufficient to support it.

The only remaining question is: Was the passway or crossing in controversy sufficiently marked or defined to put the appellee company on notice of its existence at the time it became the purchaser of the land. If at that time there had been a well-marked roadway under the trestle, and this way had been used by Forsythe under the original contract, we would say that the purchaser must be held to have made his purchase with notice of its existence, and could not deprive the owner of the land of its use. *Jones v. Prewitt*, 108 S. W. 867, 33 Ky. Law Rep. 358. To illustrate, there was a grade crossing in a cut several feet high on the land of Forsythe made when the road was constructed or shortly thereafter, and in use from that time until the road was sold; and this grade crossing, although there may not have been any writing or record concerning it, was in and of itself sufficient to put the purchaser upon notice that the owner of the land had at that point a crossing, and the

purchaser would not be permitted to close or obstruct the crossing, upon the ground that he had no notice of it. The crossing and the physical facts about it furnished all the notice necessary to estop the purchaser from questioning its existence; and so, in reference to the middle undergrade crossing. If it be a fact, which we do not determine, that there was a plainly marked road under it at the time of the purchase by appellee, indicating its use as a roadway, and the appearance of the ground was sufficient to put a person of ordinary prudence upon notice that it was in use as a passway, we would also say that the appellee company could not deprive Forsythe of the use of it. But the evidence does not show that the use of the undergrade crossing in controversy was at any time sufficient to put a person of ordinary prudence upon notice that there was a crossing there. There was nothing in the appearance of the ground or the surroundings to indicate that there was a crossing or roadway. It is true there is evidence that occasionally a few loads of rails, hay, corn, and other farm produce were hauled by persons living on the farm under this trestle from the adjacent fields of Forsythe, but the hauling was at long intervals. The passway was the farthest one from the residence and buildings, and was seldom used. There was also a fence erected by the side of the trestle that it was necessary to take down whenever this way was used; there being no gate or other opening in the fence. Several witnesses testified, and there is little contradiction of it, that the crossing or passage under this trestle was so seldom used that there was no appearance whatever of a road. The company, when it purchased the railroad, could not be charged with the existence of a crossing at this place. The deed makes no reference to the crossings, and it is entirely probable that mention of them was omitted because Forsythe believed that as they were in existence it was unnecessary to notice them. And, if as a matter of fact the crossings at the time the purchase was made and the deed executed were in use to such an extent that a person of ordinary prudence would know they were there, it would have been unnecessary to mention them in the deed, because the deed related back to the purchase, and the purchaser would be charged with notice of the conditions when he purchased; and this notice would estop him when he accepted the deed. The rights and liabilities of the parties are measured and limited by this deed, except with reference to the crossings, the existence of which the company was bound as before indicated to take notice of.

Perceiving no error, the judgment is affirmed.

ROETTGER et al. v. RIEFKIN et al.†
(Court of Appeals of Kentucky. Nov. 4, 1908.)

1. TIME (§ 10*)—LANDLORD AND TENANT—RECOVERY OF POSSESSION—EXECUTION—SUNDAYS.

Under Civ. Code Prac. § 461, providing that, if the party against whom the inquisition is found in a case of forcible detainer fails to file a traverse on or before the third day after the finding of the inquest, the judge or justice shall on request issue execution, Sunday must be excluded in computing the three days.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 45; Dec. Dig. § 10.*]

2. LANDLORD AND TENANT (§ 318*)—RECOVERY OF POSSESSION—WRIT OF RESTITUTION—WRONGFUL ISSUE—LIABILITY.

One who wrongfully procures a warrant of restitution to issue, and has a constable execute the writ, is responsible to the person injured for the damages sustained thereby.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1345; Dec. Dig. § 318.*]

3. LANDLORD AND TENANT (§ 318*)—RECOVERY OF POSSESSION—WRONGFUL DISPOSSESSION—ACTIONS—SUBMISSION TO JURY.

Where, in an action by tenants against two lessors for damages from wrongful execution of a writ of possession, the agreed facts recited that defendants requested the magistrate to issue the writ, there was sufficient evidence to go to the jury as to both of defendants.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 318.*]

4. SHERIFFS AND CONSTABLES (§ 98*)—PROTECTION BY PROCESS—PREMATURE EXECUTION.

An execution prematurely issued is voidable, and not void, and, unless quashed, it protects the officer or the purchaser at the sale.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 146; Dec. Dig. § 98.*]

5. LANDLORD AND TENANT (§ 318*)—RECOVERY OF POSSESSION—WRONGFUL DISPOSSESSION—ACTIONS—EVIDENCE.

In an action by tenants for wrongful dispossession under forcible entry proceedings, evidence as to plaintiffs having been theretofore evicted by other landlords from rented premises was incompetent.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 318.*]

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Action by Henry Roettger and another against M. Riefkin and another. Judgment for defendants, and plaintiffs appeal. Reversed and remanded for a new trial.

Ramsey Washington and Howard M. Benton, for appellants. Thos. P. Carothers, Wm. A. Burkamp, and Otto Wolff, for appellees.

HOBSON, J. Henry Roettger and wife rented rooms of M. Riefkin and wife to live in. By the lease they were to vacate within three days upon failure to pay rent. They failed to pay the rent, and a warrant of forcible detainer was taken out by the landlords. The case was tried on Friday, January 4th, and a judgment was entered in favor of the plaintiffs. About 4 p. m. on Monday,

January 7th, the Riefkins went to a magistrate, and had him to issue a writ of possession, which was then placed in the hands of the constable, who proceeded with Riefkin to the premises. Riefkin secured a key, and opened up the rooms for the constable to enter. He and the constable then entered, and the constable then and there removed the tenants' goods from the premises, and placed them on the sidewalk, where rain fell upon them the following night. All this occurred about 4:30 p. m. Monday, the tenants not being present, and not knowing that the goods were to be removed. Thereupon the tenants brought this suit to recover damages for the injury to their property, which they charged had been ruined. At the conclusion of the evidence for the plaintiffs the court peremptorily instructed the jury to find for the defendants, and this being done, and the plaintiffs' petition being dismissed, the plaintiffs appeal.

By section 461 of the Civil Code of Practice, if the party against whom the inquisition is found, in a case of forcible detainer, fail to file a traverse on or before the third day after the finding of the inquest, the judge or justice shall on request issue execution. The inquest was returned on Friday; and, as the defendants in that case had three days to file a traverse, no execution could properly issue until the expiration of three days. As the day of the judgment must be counted, the three days would expire on Sunday, if Sunday is to be counted; and, if Sunday is not to be counted, the three days would expire on Monday, but the defendants would have the whole of Monday to file the traverse, and no execution could lawfully be issued on that day. The Code provides that a motion for a new trial must be made within three days after the verdict or decision is rendered. Under this provision it has been held that Sunday is not counted, and that the statute means three juridical days. Long v. Hughes, 1 Duv. 387; Frazier v. Clark, 88 Ky. 260, 10 S. W. 806, 11 S. W. 83. The Code also provides that, in cases of felony, the court shall not pronounce judgment until two days after the verdict is rendered. This has also been held to mean two juridical days. O'Brien v. Commonwealth, 89 Ky. 354, 12 S. W. 471. In the recent case of Geneva Cooperage Company v. Brown, 124 Ky. 16, 98 S. W. 279, the court, upon a consideration of the authorities, laid down the rule that where the statute does not in terms exclude Sunday, yet if the time fixed is less than a week, Sunday will be excluded in computing the time. Sunday must therefore be excluded in computing the three days allowed by the statute for filing a traverse in cases of forcible entry or detainer. It follows that the execution was issued prematurely; and, while it, being fair on its face, protected the officer, it did not protect the persons who pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For opinion on rehearing, see 113 S. W. 902.

cured it to be issued before it was authorized to be issued. A person who wrongfully procures a warrant of restitution to issue, and has the constable to execute the writ, is responsible to the person injured for the damages which he thereby sustains. It is not necessary for us to consider whether the plaintiffs' petition set out a cause of action in trespass or case. It states the facts, and, the facts stated being sufficient to warrant a recovery, the petition is sufficient under the Code. It is recited in the agreed facts that the defendants went to the magistrate and requested him to issue the writ. There is therefore sufficient evidence to go to the jury as to both of the defendants. *Morrison v. Price*, 33 Ky. Law Rep. —, 112 S. W. 1090.

It is true an execution prematurely issued is voidable, and not void. *Freeman on Executions*, § 25; *Galot v. Pierce*, 38 S. W. 892, 18 Ky. Law Rep. 1004. It may be quashed, but unless quashed it protects the officer or the purchaser at the sale; but this case does not turn on the question whether the execution was void or voidable. The defendants, when they were not entitled to the possession of the property, and when they were not entitled to a writ of possession, took out the writ, and set the plaintiffs' property out on the street. This was a tort, and they must compensate the plaintiffs for such damages as they thereby sustained; for the plaintiffs were rightfully in possession of the rooms, and could not be lawfully disturbed until the expiration of the three days after the judgment.

On another trial the court will exclude all evidence as to the plaintiffs having been heretofore evicted by other landlords from places which they had rented. What had occurred on other occasions is incompetent here.

Judgment reversed, and cause remanded for a new trial.

CINCINNATI, N. O. & T. P. RY. CO. v. GILLISPIE.

(Court of Appeals of Kentucky. Nov. 5, 1908.)

1. WATERS AND WATER COURSES (§ 76*)—POLLUTION—DAMAGES.

In an action for damages for the pollution of a spring by permitting oil to escape into it, the spring not being permanently destroyed, an instruction to find for plaintiff such amount as would fairly compensate her for the damage to the spring was erroneous, as fixing no measure of damages; a proper instruction being that they should award such damages as would fairly compensate plaintiff for the diminution in value of the use of the property resulting from the pollution up to the bringing of the action.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 64; Dec. Dig. § 76.*]

2. DAMAGES (§ 62*) — REDUCTION OF LOSS — DUTY TO REDUCE DAMAGE.

If the owner of a spring which was polluted by oil flowing into it from defendant's

tank by ordinary care and at reasonable cost could have cleaned it out, she could only recover for the pollution up to the time she could have cleaned it.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 124; Dec. Dig. § 62.*]

Appeal from Circuit Court, Pulaski County.
"To be officially reported."

Action by Ida Gillispie against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for further proceedings.

John Galvin and O. H. Waddle & Son, for appellant. Morrow & Morrow and R. B. Waddle, for appellee.

CLAY, O. The appellant, Cincinnati, New Orleans & Texas Pacific Railway Company, permitted a tank of oil to escape from its premises into a spring on the property of appellee, Ida Gillispie. This action was instituted by appellee to recover damages for the pollution of the spring. The jury returned a verdict in her favor for \$350, and, from the judgment based thereon, the railway company appeals.

It appears that appellee is the owner of property in the city of Somerset adjoining the right of way of appellant. Upon this property there is located a spring. Around this spring she has built a brick house in which she keeps milk and butter. Upon the property in question are two houses, in one of which appellee lives. After the oil was thrown upon the ground, and permitted to seep into the spring, the water therefrom was utterly unfit for any purpose. Thereupon appellee expended the sum of \$45 for the purpose of getting water connections, and was compelled to expend certain sums for ice which would not have been necessary had the spring not been polluted.

Appellant asks a reversal upon two grounds: First, the verdict is excessive; second, error in the instructions fixing the measure of damages. As we have concluded to reverse this case upon another ground, it will not be necessary to consider the question whether the verdict was excessive.

The court instructed the jury as follows:

"(1) You will find for the defendant in this case, unless you shall believe from the evidence that prior to the 10th day of July, 1907, the time of the filing of this action, the defendant so operated and managed its railway as to cause quantities of oil or other polluting substance to escape from its cars or premises, and run into and so pollute plaintiff's spring as to make it unfit for use for domestic purposes, and, if you so believe from the evidence, you will find for the plaintiff.

"(2) If you find for the plaintiff, you will find such sum as you believe will fairly compensate her for the damage and injury to her

spring, if any, there was caused by its being polluted with oil or other polluting substance, which rendered it unfit for family use or domestic purpose, and for such time as she was deprived of the use of said spring up to the time of this trial, and by reason of any annoyance and inconvenience and discomfort suffered by plaintiff, if any, by reason of the pollution of said spring, providing your finding shall not exceed \$1,000.

"(3) Nine jurors concurring finds a verdict. When as many as nine and less than twelve agree, those agreeing to the verdict will sign it. If all agree, one only will sign it, adding after his name the word 'Foreman.'"

Complaint is made only of instruction No. 2. Manifestly this instruction is erroneous. The language, "you will find such sum as you believe will fairly compensate her for the damage and injury to her spring, if any, there was caused," etc., fixes no measure of damages at all. Under that language the jury might have "roamed at will," and fixed upon any amount they saw fit. Furthermore, the instruction permits a recovery, not only for damages for injury to the spring, but for the time plaintiff was deprived of the use of the spring, and for the annoyance, inconvenience, and discomfort suffered by plaintiff. As there was no testimony given to show that the spring was permanently destroyed, the correct measure of damages in such a case is the diminution in the value of the use of the spring from the time it was polluted up to the time of filing this suit. If, however, plaintiff could, by the exercise of ordinary care, and at reasonable cost, have cleaned out the spring and removed the cause of its pollution, she could only recover up to the time when she could have so cleaned it out. It was her duty to minimize the damages if she could do so by ordinary care and at reasonable expense. She could not sit idly by and recover damages which she might have avoided by the exercise of ordinary care. Long, etc., v. L. & N. R. R. Co., 107 S. W. 203, 32 Ky. Law Rep. 774, 13 L. R. A. (N. S.) 1063; L. & N. R. R. Co. v. Moore, etc., 101 S. W. 934, 31 Ky. Law Rep. 141, 10 L. R. A. (N. S.) 579. For the purpose of determining the diminution in value of the use of the property, all the evidence contained in the record before us is admissible.

Upon the next trial of this case the court, in addition to instruction No. 1, will instruct the jury as follows:

"No. 2. If the jury find for the plaintiff, they will award her such damages as they believe will fairly compensate her for the diminution in value of the use of said property resulting from the pollution of the spring during the time of such pollution up to July 10, 1907, the date of filing this action.

"No. 3. If, however, you believe from the evidence that the plaintiff, by the use of or-

inary care and at a reasonable cost, could have cleaned out the spring and removed the cause of pollution, you will, in case you find for her, award her such damages only as will fairly compensate her for the diminution in the value of the use of the property up to the time when she might have so cleaned out the spring, together with the reasonable cost of so cleaning it out."

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

LOUISVILLE RY. CO. v. BUCKNER'S ADM'R.

(Court of Appeals of Kentucky. Nov. 4, 1908.)

1. TRIAL (§ 139*)—SUBMISSION OF ISSUE TO JURY—EVIDENCE.

Where there is more than a scintilla of evidence to sustain the theory of plaintiff in an action for negligence, the case is properly submitted to the jury, though the weight of the evidence is in defendant's favor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

2. STREET RAILROADS (§ 114*)—INJURIES TO PERSONS ON TRACK—NEGLIGENCE—EVIDENCE.

In an action against a street railway company for the death of a person struck by a car, evidence held to support a finding of negligence by defendant.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-247; Dec. Dig. § 114.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action for the death of a person struck by a car, the petition charged those in charge of the car with gross negligence in running it at a high speed, and there was evidence that decedent was knocked down on the track in front of the car by a passing wagon, and that the car could not have been stopped in time to avoid the accident after he fell on the track, an instruction that the jury, if finding that decedent was thrown on the track in front of the car, and if finding that the motorman could have prevented the collision by the exercise of ordinary care, should find for plaintiff was prejudicial, because it submitted an issue not supported by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

4. STREET RAILROADS (§ 102*)—COLLISIONS—ACTIONS—EVIDENCE—NEGLIGENCE.

Where a pedestrian was struck by a lumber wagon and thrown in front of an approaching car, and the motorman could have prevented a collision with him, except for his negligence in running the car at a dangerous rate of speed, the company was liable for the injuries sustained.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 200; Dec. Dig. § 102.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.
"Not to be officially reported."

Action by R. E. Buckner's administrator, against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

R. L. Greene, Fairleigh, Straus & Fairleigh, and Forcht & Field, for appellant. Geo. Weissinger Smith, A. T. Burgevin, and C. R. Dinwiddie, for appellee.

SETTLE, J. The appellee, A. M. Sea, administrator of the estate of R. E. Buckner, deceased, recovered in the Jefferson Circuit Court, Common Pleas Branch, Third Division, a verdict and judgment against the appellant, the Louisville Railway Company, of \$2,500 damages, for the death of his intestate caused, as alleged, by the negligence of appellant's agents and servants in running a car against and over him which they were at the time operating at an unusual and dangerous rate of speed. The refusal of the court to grant appellant a new trial gave occasion for this appeal.

While numerous grounds were urged for a new trial, only two of them are relied on for the reversal asked of this court, viz.: First, that there was not sufficient proof of negligence to authorize the verdict; second, that the court erred in instructing the jury.

The intestate was 72 years of age at the time of his death. He was in the employ of the city of Louisville as a street sweeper; and it is the contention of appellee that, while standing on the south track of appellant's railway in Chestnut street at its intersection with Sixth street, looking eastwardly and engaged at work, he was struck, knocked down, and so injured by one of appellant's street cars, which was approaching him from the rear and rapidly running eastwardly, as to cause his death, which occurred about three months after the accident. On the other hand, it is appellant's contention that, just before the car struck the intestate, he was knocked in front of it by lumber, which projected from a passing wagon, and that the car could not be stopped in time to prevent its striking him.

There was evidence to support appellee's contention. Appellee's principal witness was Clara Pena, a negro woman. Her testimony was, in substance, that at the time of the collision she was on the west side of Sixth street and the north side of Chestnut, between the curbing and the south track on which the car was running; that the car was running rapidly, and so near her that she stepped back out of its way and stopped to let it pass. At that time she said she saw the intestate standing in the middle of Chestnut street at the crossing sweeping, with his back toward the car; that she heard no bell, and saw the car strike him twice; that he was knocked down by the first collision, and fell on the track a few feet in front of the car, and it then struck him the second time, fastening his body as it lay on the track under the front guard; that the car was checked by the motorman when it struck the intestate, but not enough to stop it before it struck the fallen man the second time. The witness said he was not

struck by a wagon or by lumber projecting from a wagon. It seems clear from the testimony of the negro woman that she was standing immediately at the point of the accident so situated as to see the whole of it, and that no other person, except the motorman, had the same opportunity to see what happened. Furthermore, if she told the truth, the car gave no signal of its approach, and was running at such a high rate of speed that she had to suddenly step back out of its way, and the intestate was standing upon the track, and did not fall thereon until struck by the car, which was not stopped after striking him before it ran against him the second time. The negro woman was in some measure corroborated by E. E. Roebuck, a letter carrier, who testified that he did not see the accident because in the rear of the car, but that he got to the injured man immediately after it happened, and saw no lumber wagon. Roebuck also noticed that the glass of the headlight on the car was broken, and that pieces of the glass were lying on the guard or fender in front of the car, which tends to support the testimony of the colored woman that the car struck the intestate twice; the first collision knocking him off his feet and causing him to be thrown against the headlight, and then to the street a few feet in front of the car, the second occurring after he was thrown to the street. If he was thrown against the headlight with sufficient force to break the glass, the car must have been going at a high rate of speed when it struck him. J. A. Atkins, another of appellee's witnesses, lives at the place of the accident. He testified that he heard a commotion, and looked in the direction of the car, and as he did so the intestate was in the act of falling on the track in front of it, and that after he fell to the track the car ran up to and against him, but then seemed to be running slow. This testimony also somewhat supports that of the colored woman to the effect that, after the car struck the intestate, its speed was checked, but not enough to prevent its striking him the second time. Atkins did not see a wagon, but he saw the intestate in the act of falling on the track in front of the car. If the fall was caused by his coming in contact with the wagon, it would seem improbable that the wagon could have gotten out of view without his seeing it. A. A. Gordon, also a witness for appellant, was about 50 feet away when the accident occurred. He did not see the car strike the intestate, but heard a shout or loud exclamation, and, turning, saw him being rolled under the guard of the car, and then taken out. He heard some one say the intestate had been knocked on the track by a wagon. He then looked, and saw no wagon anywhere near the point of the accident, but discovered one between Seventh and Eighth streets, a square and a half away. If the intestate was knocked in front of the car by this wagon, it is

improbable that it would have gotten that distance in so short a time.

The appellant introduced seven witnesses, including the conductor and motorman. The latter and three other witnesses, two of whom were passengers on the car, testified that the intestate was knocked down on the track in front of the car by a passing wagon loaded with lumber; that as the driver of the wagon attempted to get it off the car track, there was such a sliding of its hind wheels upon the rail, that the lumber projecting from the rear end of the wagon struck the intestate, causing him to fall. The conductor and remaining two witnesses did not see the lumber strike him, but claimed to have seen the wagon at that point just before or immediately after he fell upon the track. The conductor and motorman and two other witnesses testified that the car was running slowly at the time of the accident, that it could not have been stopped in time to avoid striking the decedent after he fell on the track, and that in approaching the intestate it gave the usual signals with the gong.

Manifestly the evidence was conflicting, and perhaps it would not be wide of the mark to say that the weight of it was in appellant's favor; but, while this is true, there was some evidence, and more than a scintilla, to sustain appellee's theory of the manner in which the intestate received his injuries. The case was therefore properly submitted to the jury. It was their duty to weigh the evidence and decide the issues of fact. The question is not what this court would have decided upon the same state of facts, but whether there was such an absence or want of evidence as would authorize it to set aside the verdict of the jury. Upon the whole case we are of opinion that we have not the right to disturb it on the ground that it is not supported by the evidence. It is not contended by appellant that the case should not have gone to the jury, for its counsel concede that there was a scintilla of evidence which authorized its submission to them, but it is insisted that they would nevertheless have found for the appellant but for an error committed by the trial court in giving instruction No. 4, which, it is claimed, conflicts with the other instructions given, to which no objection is made.

In addition to instructions predicated upon the petition, and defining the measure of damages, the court by instruction No. 3 in substance told the jury that, if the decedent was struck by a lumber wagon and thrown in front of the car, so close to it that the motorman in charge of the car by the exercise of ordinary care could not have prevented its coming in collision with the intestate, the law was for the defendant; but instruction No. 4, the only one to which appellant objects, reads as follows: "But although the jury may believe from the evidence that the decedent was struck by the lumber wagon, or by the lumber on the wagon, and thrown upon the track in front of the car, neverthe-

less, if the jury shall also believe from the evidence that the defendant's motorman in charge of the car could, by the exercise of ordinary care, have prevented the car from coming in collision with the intestate and injuring him, so that he died in consequence, then the law is for the plaintiff, and the jury should so find." This instruction was misleading and prejudicial, because it submitted to the jury a false issue, which there was no evidence to support. The thing complained of in the petition is the running of the car at a very high rate of speed, and that those in charge of it, with "gross negligence and carelessness," ran said car on and against plaintiff's decedent, knocking him down and mashing him under the front guard. If appellee was entitled to recover it was upon the theory that the fast running or dangerous speed of the car caused the decedent's death, and if this manner of operating the car put it out of the power of appellant's motorman to stop it in time to avoid its striking the decedent as he stood upon the track, or after he was knocked down on the track, appellant would be liable. But on the other hand, if while the car was being operated at a rate of speed that was customary and reasonably safe, the lumber wagon suddenly knocked him upon the track in front of the car, and so near it as that the motorman was unable by the use of ordinary care to prevent the car from striking him, appellant would not be liable. There was, however, no testimony that tended to prove that the motorman, between the fall of the decedent upon the track and the striking of his body by the car while lying on the track, could by any sort of care have prevented the car from striking him. Yet instruction No. 4 was calculated to give the jury the impression that there was some evidence to that effect upon which they would be authorized to find against appellant, although they may have believed the decedent was knocked down on the track and in front of the car by the wagon, and that the car, previous to his being knocked down on the track, was not running at a dangerous rate of speed. When the case is retried the court should give instruction No. 4 so modified as to read as follows: "But although the jury may believe from the evidence that the decedent was struck by the lumber wagon, or by the lumber on the wagon, and thrown upon the track in front of the car, nevertheless if they further believe from the evidence that the defendant's motorman in charge of the car could, by the exercise of ordinary care, have prevented it from coming in collision with the decedent but for the negligence, if any, of the said motorman in running said car, at the time the decedent was knocked on the track by the wagon, at a high and dangerous rate of speed, if he did so run it, they should find for the plaintiff."

On account of the error of the circuit court

In giving instruction No. 4, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

CRESS et al. v. BELKNAP HARDWARE & MFG. CO.

(Court of Appeals of Kentucky. Nov. 4, 1908.)

1. FRAUDULENT CONVEYANCES (§ 241*)—SUIT TO AVOID—RETURN OF NULLA BONA.

Under Ky. St. 1903, § 1907a, providing that any party aggrieved by a fraudulent conveyance of real estate may file a petition in equity against the parties to the conveyance, as though the suit had been on a return of nulla bona, "as has heretofore been required," a creditor, though having a judgment, may bring such suit without obtaining such a return.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 720, 725, 726; Dec. Dig. § 241.*]

2. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR.

Error in admitting a deposition taken by plaintiff for purpose of cross-examination, plaintiff not having been present when the original deposition was taken, was harmless; defendant subsequently, by leave of court, having retaken the deposition of the witness, so that his testimony was fully before the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4161; Dec. Dig. § 1051.*]

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Action by the Belknap Hardware & Manufacturing Company against Lucinda Cress and another. From a judgment for plaintiff, said defendant Lucinda Cress appeals. Affirmed.

J. B. Mainard, for appellant. Cleon K. Calvert, for appellee.

HOBSON, J. William Cress, a merchant in Leslie county, bought goods of the Belknap Hardware & Manufacturing Company. He failed to pay for the goods, and the company in October, 1906, brought suit against him on the account and took out an attachment, which was levied on a mill. Judgment was recovered in the action for the debt, the attachment was sustained, and the attached property was ordered to be sold; but no sale was made for the reason that the commissioner was unable to get any one to bid for the property, as it was claimed by third persons. Thereupon the company brought this action against William Cress and Lucinda Cress, alleging that the judgment was unpaid; that Cress was insolvent; that nothing could be made out of him by execution, all his property having been attached in other actions; but that on May 2, 1906, and after the indebtedness to the plaintiff was incurred, he had bought of Marion Boggs a tract of land for \$350 and had it conveyed to his wife, Lucinda Cress, to hinder and defraud his creditors; that he had paid for the land and that his wife had taken the deed with knowledge of the fraudulent pur-

pose in which she participated with her husband. No answer was filed by William Cress, and as to him the petition was taken as confessed. Lucinda Cress filed an answer denying the allegations of the petition. Proof was taken, and on final hearing the court adjudged the plaintiffs the relief prayed; they having taken out an attachment, which was levied on the land. From the judgment Mrs. Cress appeals.

The proof satisfies us that the circuit court properly held the deed fraudulent; but it is insisted that the plaintiff cannot maintain the action, because there had not been a return of "No property" upon the judgment in the first action and it is urged that an action under section 439 of the Civil Code of Practice, is the only action which can be brought in this state to enforce the satisfaction of a judgment. There was a dictum to this effect in *Davidson v. Simmons*, 11 Bush, 330, which was referred to in *Ritchey v. Buricke's Adm'r*, 54 S. W. 173, 21 Ky. Law Rep. 1120; but the question was not before the court in either of these cases, and the latter case went off on another ground. At the time that *Davidson v. Simmons* was decided, an action could not be maintained to set aside a fraudulent conveyance until the plaintiff had obtained judgment and a return of "No property found"; but now, by section 1907a, Ky. St. 1903, a petition in equity may be maintained to set aside a fraudulent conveyance by a creditor as though it had been brought on a return of "No property," as was before required. There is no reason why a judgment creditor may not sue under this section, as well as a creditor who has not reduced his claim to judgment. A judgment is a debt of record, and at common law an action for debt lies on a judgment as soon as it is recovered; the remedy by execution being merely cumulative. 2 Black on Judgments, § 958. We do not find it necessary to determine in this case how far the common-law rule has been modified by our statutes; but clearly a judgment creditor may sue to set aside a fraudulent conveyance without obtaining a return of "No property." Otherwise, he might be unable to make his debt; for in a case like this other creditors might attach before he could secure an execution and a return of "No property."

There was no substantial error in overruling the exceptions of the defendant to the deposition of Marion Boggs taken by the plaintiff, for the purpose of cross-examination; the plaintiff not having been present when the original deposition was taken. The defendant subsequently, by leave of court, retaken the deposition of Boggs, and so his testimony was fully before the court. *Burkhart v. Loughridge*, 124 Ky. 50, 98 S. W. 291. Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

WOODS et ux. v. PINE MOUNTAIN R. CO.
(Court of Appeals of Kentucky. Nov. 4, 1908.)

CANCELLATION OF INSTRUMENTS (§ 47*)—PROCEEDINGS — EVIDENCE — MISREPRESENTATION.

In a suit to cancel a deed to a railroad right of way, evidence *held* not to show fraudulent misrepresentations of defendant's agent as to the location of the right of way, authorizing cancellation.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 47.*]

Appeal from Circuit Court, Whitley County.

“Not to be officially reported.”

Suit by Ceberry Woods and wife against the Pine Mountain Railroad Company to cancel a deed. Judgment for defendant, and plaintiffs appeal. Affirmed.

L. L. Peace and R. L. Pope, for appellants.
Benjamin D. Warfield, J. W. Alcorn, and H. H. Tye, for appellee.

HOBSON, J. Ceberry Woods and wife brought this suit against the Pine Mountain Railroad Company to cancel a deed which they had made to the company for the right of way through their farm, on the ground that E. L. Stevens, who was the agent of the company and obtained the deed, falsely and fraudulently represented to them that the right of way ran on the west side of their house as it was then staked off by the company; that they relied upon the statements made to them by Stevens, and believed them to be true, when in fact the right of way ran on the east side of the house, and if they had known the facts they would not have signed or acknowledged the deed. The allegations of the petition were traversed by the answer.

Ceberry Woods gave his deposition, in which he stated that the engineer of the company who surveyed the right of way pointed out to him that the right of way lay on the west side of the house, and that when he signed the deed he in good faith believed that the right of way was located there. But he does not state that Stevens made him any representations at all, or show that the engineer who told him where the right of way was located, had any authority from the company to bind it by any statements he might make as to where the right of way would be located. The plaintiffs also introduced two other witnesses as to what occurred when Stevens was at the house; but their testimony is not sufficient to show any misrepresentations by Stevens as to where the right of way was located. On the contrary, Stevens testified that he did not know where it was located and made no statement about it; that he was furnished by the company simply with the courses and distances, and did not in fact know where the lines were located on the ground. There is, therefore, a total failure to show any fraudulent

conduct on the part of Stevens, and the circuit court properly so held.

It appears from the evidence that Woods had given the company a title bond for the right of way; that it had run two lines, one on the east of the house and one on the west; that the one on the west of the house damaged him the most, and it was agreed that if the road ran there the company should pay him \$90 an acre for the land, and if it ran on the east side of the house it was to pay him \$80 an acre for the land; the right of way through the farm including something over 10 acres. It also appears from the proof that Woods, at the time the deed was made, thought the railroad would run west of the house and claimed \$90 an acre, which was paid to him; but he said at the time that he hoped Stevens could get them to use the other line. The road was in fact built on the other line, which had been surveyed before; and from all the proof we are satisfied that the location of the road where it is is not so injurious to Woods as it would be if located on the west line.

Judgment affirmed.

CONWAY et al. v. CONWAY et al.

(Court of Appeals of Kentucky. Nov. 5, 1908.)

1. WORK AND LABOR (§ 7*) — SERVICES BETWEEN PERSONS IN FAMILY RELATION—IMPLIED CONTRACTS.

Where the relationship of persons raises the presumption that they lived together for mutual convenience, the law will not imply a promise to pay for their services rendered each other, but will require stricter proof to establish such a contract than is required in ordinary cases.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 11½–22; Dec. Dig. § 7.*]

2. EXECUTORS AND ADMINISTRATORS (§ 221*)—PAYMENT OF CLAIMS — PERSONAL SERVICES OF SON—NECESSITY FOR EXPRESS CONTRACT.

There is a natural obligation owing from a son to an invalid mother; and, to recover from her estate for services rendered her, he must show an actual contract for compensation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 901; Dec. Dig. § 221.*]

3. EXECUTORS AND ADMINISTRATORS (§ 221*)—PAYMENT OF CLAIMS — PERSONAL SERVICES OF SON—EVIDENCE OF CONTRACT.

Evidence *held* not to show a contract between a mother and her sons for payment for their services in caring for her.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 903½; Dec. Dig. § 221.*]

Appeal from Circuit Court, Nicholas County.

“To be officially reported.”

Action by Henry Conway and another against William Conway and others for the settlement of the estate of their mother, in which the plaintiffs filed claims with the commissioner, who reported favorably. Fannie Perrine and another excepted to the report, and plaintiffs moved for and obtained a trial out of chancery. There was a direct-

ed verdict for defendants, and plaintiffs appeal. Affirmed.

William Conley, for appellants. Morgan & Darragh, for appellees.

CLAY, C. Appellants, Henry Conway and Johnson Conway, seek in this action to recover for alleged services rendered their mother in nursing and taking care of her for a period of several months prior to her death. Their claims were first filed with the master commissioner in a suit brought by them and the administrator of their mother's estate for a settlement thereof. The commissioner reported in favor of the claims. Appellees, Fannie Perrine and Ben Conway, filed exceptions to this report. Thereupon counsel for appellants moved for a trial out of chancery. This was granted. Upon the conclusion of the testimony for appellants, the court gave a peremptory instruction for appellees.*

The evidence in the case shows that the appellants, Henry and Johnson Conway, resided with their mother for a period of about 2½ years prior to her death. During that time their mother was frequently confined to bed, and needed constant attention. This attention was given by appellants. Indeed, it seems that they did most of the work about the house, such as cooking, washing, etc. They also managed the place upon which they all lived. Two or three witnesses testified that the mother of appellants said she wanted them paid out of the money she had left. She also spoke of having a written contract drawn up. One of the witnesses testified that she said she wanted all her children who waited on her to have something extra. There can be no doubt that appellants performed valuable and efficient services in nursing and taking care of their mother. Now and then a considerable portion of their time was taken up by the attention which she demanded; but there is absolutely nothing in the record to show that any contract was made between appellants and their mother that they should be paid for their services. Even the expressions which she is said to have used to others were not made in appellants' presence. In a long line of decisions this court has held that, where the relationship of the parties was sufficient to raise the presumption that they lived together as a matter of mutual convenience, the law will not imply a promise to pay for the services so rendered. To establish a contract for such compensation requires stricter proof than to establish an ordinary contract. There is a natural obligation owing from a son to an invalid mother. Filial duty, to say nothing of love and affection, should prompt him to do everything in his power for her comfort and welfare. Where he afterwards makes a claim against his mother's estate for such services, he should be entitled

to recover only where there is proof of an actual contract that he should be paid. The expressions alleged to have been used by Mrs. Conway were not sufficient to establish such a contract. *Foley v. Dillon*, etc., 105 S. W. 481, 32 Ky. Law Rep. 222; *Wallace v. Denney's Adm'r*, 90 S. W. 1046, 28 Ky. Law Rep. 978; *Reynolds' Adm'r v. Reynolds*, 92 Ky. 556, 18 S. W. 517.

Judgment affirmed.

BOYD v. PERKINS.

(Court of Appeals of Kentucky. Oct. 23, 1908.)

WILLS (§ 502*)—CONSTRUCTION—PRIMA FACIE MEANING OF WORDS "KIN," "RELATIVE."

With the exception of a few special bequests, and a provision for the erection of a monument and a direction that any note owing him by any of his "kin" should be canceled and the amount given to such "relative," a will provided for the distribution of the estate among testator's relatives "equally as provided by statute, as if no will had been made," thus embracing only blood relatives. *Held*, that the words "kin," "relative," and "relatives" referred prima facie to blood connections only, so that the husband of testator's niece was still liable on notes given to the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1070; Dec. Dig. § 502.*

For other definitions, see Words and Phrases, vol. 5, p. 3931; vol. 7, pp. 6054-6058; vol. 8, p. 7783.]

Appeal from Circuit Court, Whitley County.

"To be officially reported."

Action by Robert Boyd, Junior, executor of Robert Boyd, Senior, against K. D. Perkins. Judgment of dismissal and plaintiff appeals. Reversed and remanded.

H. C. Clay, for appellant. H. H. Tye, for appellee.

SETTLE, J. The appellant, Robert Boyd, Jr., as executor of the will of Robert Boyd, Sr., sued the appellee, K. D. Perkins, in the court below upon five notes of \$500 each, which the latter had executed to Robert Boyd, Sr., before his death. The notes were given for and were secured by a lien upon real estate in the city of Williamsburg, Whitley county. Appellee filed answer, admitting the execution of the notes, but alleging affirmatively that they were canceled and bequeathed to him by the will of the testator. A demurrer was filed to the answer, which the court overruled, and, appellant failing to plead further, judgment was rendered dismissing the action. Hence this appeal.

The will being copied into the answer, and that pleading presenting all the facts necessary to the determination of the controversy, we must look to the provisions of the will to ascertain whether the defense presented by the answer should have pre-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vailed. The will contains, among others, this provision: "That at my death any note or obligation that any of my kin may owe me is hereby cancelled, and the amount is given and bequeathed to such relative." The testator died childless, and by the terms of his will the large estate of which he was the owner, with the exception of two small bequests to personal friends, went at his death to blood relatives named or referred to in that instrument. Appellee does not claim to have been related by blood to the testator, but avers in his answer that he married Malinda Boyd, who was a niece of the testator. Malinda Boyd died several years before the testator died. Appellee was, therefore, only a nephew by marriage of the testator; so the question is: Was he one of the kin or relatives to whom was bequeathed by the clause of the will mentioned notes owing to the testator?

Appellee filed with his answer two letters written him by the testator about nine years before the execution of the will, and shortly after the death of his (appellee's) wife, in which he was treated or recognized by the testator as his nephew. We cannot see that these letters throw any light upon the intention of the testator as expressed by his will. They were merely business letters, and it was but natural that the writer should have addressed them to appellee as "Dear Nephew," without meaning thereby to attach any more importance to their relationship than would result from a mere desire to avoid formality. Webster's Dictionary defines the word "nephew" as "the son of a brother, or a sister; or of the brother-in-law, or a sister-in-law." By Bouvier's Law Dictionary it is defined thus: "'Nephew' the son of a brother or sister. But in a bequest would not include, without special mention, nephews and nieces by marriage." Schouler on Wills (2d Ed.) § 536, says: "'Nephew' means in English law the son and niece, the daughter, of a brother or sister; and greatnephews or greatnieces are not embraced by the terms, and, as a gift is naturally to blood relatives, a nephew or niece by marriage—that is, the nephew or niece of the testator's husband or wife—is prima facie excluded, as also would be the wives or widows of a blood nephew." In the first edition of Am. & Eng. Ency. of Law (volume 12, p. 521), the word "kindred" is thus defined: "A man's 'kindred,' in the proper signification of the word, means such persons as are related to him by blood." In Bouvier's Law Dictionary the word "kin"

is defined thus: "Legal relationship"; and the word "kindred," "Relations by blood. A husband or wife of the deceased is therefore not his or her kindred." In 20 Am. & Eng. Ency. of Law, p. 738, we find the following definitions of the word "relation": "The definition commonly given of 'relation' is a person connected with another by consanguinity or affinity, but, in view of the decisions, it would seem that the word has not technically so extensive a meaning as this, and is more properly confined to connections by consanguinity alone."

In Supreme Council v. Bennett, 47 N. J. Eq. 39, 19 Atl. 785, it is said: "The phrases 'related to,' 'relations,' and 'next of kin,' whether used in a statute, will, or contract, have, by a perfectly uniform course of decisions, been held to include only relations by blood, and not connections by marriage, not even a husband and wife." Huling v. Fenner, 9 R. I. 411; 2 Jarman on Wills, 661; Schouler on Wills, § 537.

From the foregoing definitions of the terms "kin," "kindred," "relative," and "relation," we are led to conclude that the words "kin," "relative," and "relatives" used in the will in question will not prima facie include a mere nephew by marriage, and we will not assume that it was the intention of the testator to include appellee among those to whom was bequeathed "any note or obligation that any of my kin may owe me." Furthermore, there is nothing else in the language of the will to indicate that appellee was to be made one of its beneficiaries. On the contrary, it is evident from its language as a whole that the terms "kin" and "relatives" as used in the will were applied by the testator to blood kin alone. With the exception of special bequests to J. W. Alcorn and J. A. Craft of \$500 each, that to Robert Boyd, Jr., the provision with respect to the notes on relatives, and that for the erection of a monument at the testator's grave, the will gives the remainder of the testator's estate to his blood relatives, for its language is, "I will and bequeath that the remainder of my estate be distributed among my relatives * * * equally as provided by statute, as if no will had been made"—and the estate under the statute would have gone only to blood relations. It is our opinion, therefore, that the lower court erred in overruling the demurrer to the answer and dismissing the action.

Wherefore the judgment is reversed and cause remanded for further proceedings consistent with the opinion.

SYMMES v. ROSE et al.

(Court of Appeals of Kentucky. Nov. 12, 1908.)

1. PLEADING (§ 252*)—AMENDMENT—PETITION—ABANDONMENT OF PRIOR PETITION.

Where the first cause of action alleged was for breach of defendant's agreement to buy land on which plaintiff held an option, plat and sell it, and divide profits with plaintiff, and, on demurrer being sustained to the petition, plaintiff amended the petition and alleged facts to show an implied promise to pay him for services as agent in buying the land, by his amendment plaintiff elected to abandon the cause of action alleged in the original petition by asserting another cause of action inconsistent therewith.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 737½; Dec. Dig. § 252.*]

2. PLEADING (§ 369*)—PETITION—SEPARATE CAUSES OF ACTION—ELECTION.

A cause of action for breach of defendant's agreement to buy land on which plaintiff held an option, plat and sell it, and divide the profits with plaintiff, being inconsistent with allegations of an implied promise to pay plaintiff for his services as agent in buying the land, if the two causes of action were asserted in the same petition, or one of them was asserted by amendment, the trial court should have required plaintiff to elect on which he would stand.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1199; Dec. Dig. § 369.*]

3. PLEADING (§ 417*)—RULING ON DEMURRER—OBJECTIONS—WAIVER BY AMENDMENT.

Where, upon a demurrer to the petition being sustained, plaintiff amended and went to trial on his amended petition, he cannot complain, on appeal, of error in sustaining the demurrer, or assert that the original petition was his real cause of action; that petition having been abandoned by his amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1401; Dec. Dig. § 417.*]

4. PLEADING (§ 252*)—VARIANCE—EVIDENCE ADMISSIBLE—CONFORMITY TO PLEADINGS.

Where, though evidence might have been admissible under the original petition, that petition having been abandoned by amendment, and the evidence being irrelevant under the amended petition, it was properly excluded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 736; Dec. Dig. § 252.*]

Appeal from Circuit Court, Daviess County.
"Not to be officially reported."

Action by H. H. Symmes against R. E. Rose and others. From a judgment for defendants, plaintiff appealed. Affirmed.

R. G. Hill, for appellant. Sweeney, Ellis & Sweeney, for appellees.

O'REAR, C. J. Appellant claims that he held an option on a valuable piece of land near Owensboro, and contracted by parol agreement with appellee R. E. Rose that the latter would furnish the money to buy it and when it was platted into town lots, put on the market, and sold, the profits would be divided between the two. He sued appellee for a breach of the contract, alleged the foregoing agreement, and that appellee had wrongfully taken the title to his wife and refused to comply with the agreement. A demurrer was sustained to the petition. By various amendments appellant set out facts showing his employment by appellee as a real

estate agent or broker to buy the land for the latter, upon which an implied promise to pay for the services was predicated. Upon an issue joined upon the latter allegations the case went to trial before the circuit judge without a jury. The court found the fact to be that appellant was not representing appellee in the matter, but was representing other interests. We think the evidence sustains the finding.

Appellant complains on this appeal that the trial court erred in sustaining the demurrer to his original petition. However that might be, we are of opinion that by his subsequent amendment appellant elected to abandon the ground of suit asserted in the original petition, and elected to try out his case on the claim of employment and for compensation as buying agent for appellee. If it be conceded that he stated a cause of action against appellee in the original petition, and that the circuit court erred in sustaining the demurrer to it, appellant voluntarily abandoned that cause by asserting in the same action another cause of action inconsistent with the first. If both had been asserted in the original petition (as may in fact have been the purpose of the pleader), or if both had been asserted in the same action, one in the petition and the other in the amended petition, being inconsistent one with the other, the trial court should have required appellant to elect which of them he would prosecute. He did elect, by the practice he pursued, to stand upon the latter. Having lost that on the trial on the merits, he will not, on appeal, be heard to complain that the one he abandoned was his real cause of action, and that the court erred in its interlocutory rulings on the sufficiency of the pleading.

Appellant complains, also, that the trial court erred in rejecting certain evidence offered by him on the trial. The rejected evidence might have been relevant upon an issue joined upon the first cause of action attempted to be asserted, but was not relevant upon the one which was being tried, and for that reason was properly rejected.

Perceiving no prejudicial error, the judgment is affirmed.

CITY OF BARDWELL v. SOUTHERN ENGINE & BOILER WORKS.

(Court of Appeals of Kentucky. Nov. 5, 1908.)

1. SALES (§ 286*)—WARRANTY—RIGHT TO RECOVER PRICES.

Under a contract of sale of an engine, with guaranty that the material and workmanship entering into it shall be first class, and that any defective part will be replaced without charge, the existence of defects not preventing the operation of the machinery, but which could be cured by supplying other pieces of machinery in place of the defective ones, will not prevent recovery of the purchase price, the purchaser, though having a report of its expert as to defects, failing, on demand, to give the seller in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

formation as to the defects claimed, and refusing to give opportunity to make needed repairs, seeking a rescission; and the seller, as it informed the buyer, having been ready and willing to supply any deficiencies, which was all that the contract obliged it to do, and all that the buyer could demand.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 809; Dec. Dig. § 286.*]

2. **MANDAMUS (§ 112*)—CITY DEBT—COMPULSORY TAX LEVY—CONSTITUTIONAL LIMIT.**

A city having contracted a debt, which, under Const. § 158, it had no power to contract, because its indebtedness already exceeded the limit fixed therein, its officers cannot be required to levy a tax to pay the debt.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 244; Dec. Dig. § 112.*]

3. **MUNICIPAL CORPORATIONS (§ 254*)—CONTRACTS—REMEDIES OF CONTRACTOR.**

Where a city has bought an engine which it had the power to purchase, except that its debt already exceeded the limit fixed by Const. § 158, and as between it and the seller the latter, under its contract, has a lien on the engine for the deferred payment, the city, which will not, and cannot be compelled to, pay, may not, though using the engine as part of its electric light plant, retain it, and give the seller the option merely to rescind the contract, and return the partial payment made; but the seller may enforce his lien by sale.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 254.*]

Appeal from Circuit Court, Carlisle County.

"To be officially reported."

Action by the Southern Engine & Boiler Works against the city of Bardwell. Judgment for plaintiff. Defendant appeals. Affirmed.

J. M. Nichols & Son, for appellant. John E. Kane and W. H. Biggs, for appellee.

CARROLL, J. In June, 1905, the appellant city of Bardwell purchased from appellee an engine to be used in operating its electric light plant. It contracted to pay for the engine \$1,550. Six hundred dollars of this amount was paid in cash, \$450 in an old engine, and for the remaining \$500 the city executed its note due in June, 1906. The note, as well as the contract, contained the stipulation that the city had received the engine from the Southern Engine & Boiler Works "with the express agreement and understanding that the title of said machinery is now and shall remain in the said Southern Engine & Boiler Works until the note is paid in full; and it shall have the right in case of nonpayment at maturity of said note, or at any time it deems itself insecure, or if the property is sold or removed from the district where located, to enter and retake immediate possession of said property wherever it may be and remove the same." The contract also contained the following guaranty: "The material and workmanship entering into the construction of this engine shall be first class in every respect, and any defective part will be replaced by us without charge. We also guarantee this engine

to run smoothly with close regulation under varying loads and steam pressure and to be as economical in the use of steam as any engine of its class." Failing to pay the note at maturity, the appellee instituted this action against the city. It asked for judgment for its debt, interest, and costs, and that it be adjudged a lien on the engine to secure the payment of the same. To this petition the city answered that the engine was not constructed of first-class material, but that much of the material entering into its construction was defective in many respects, and also alleged that the workmanship was inferior, and that, by reason of these defects, the engine was not worth over \$500 when delivered to the city. It made its answer a counterclaim, and asked that the note sued on be canceled, and that it have judgment over against the company for \$550. To this pleading the engine company replied that it had repeatedly offered to fully perform its guaranty by replacing without charge any defective or inferior parts, but that the city had refused to permit it to do so, and it renewed its offer to fully perform its contract obligation. A rejoinder was filed by the city, in which it stated that it was willing to accept such an engine as the company warranted the engine purchased to be, but that, if the company would not do this, then it offered to rescind the contract, providing the company would return to it the \$1,050 paid on the purchase price and surrender the note sued on. Subsequently the city filed an answer, setting out that at the time the contract was entered into, and the note sued on executed, it was indebted largely in excess of the constitutional limit as fixed in sections 157 and 158 of the Constitution, and that the indebtedness assumed in the purchase of the engine was unauthorized and the note executed as evidence of it void. The case, after being prepared for trial, was submitted to the court, and a judgment rendered in favor of the engine company for the amount of its note and interest; and it was further adjudged that, to secure the payment of the same, it had a lien upon the engine. Of this judgment the city complains.

In respect to the question that the city had no authority to purchase the engine because its indebtedness at the time exceeded the limitation provided in the Constitution, we may say that the evidence indicates that the contention of the city upon this point is correct. So that we will consider the case as if the city had no authority to buy the engine or create any indebtedness for that purpose.

Upon the issue presented as to whether or not the engine fulfilled the guaranty, the evidence is conflicting. Indeed, the weight of it tends to support the conclusion that the engine in some particulars, especially in material, was not what it was guaranteed

to be. The engine was installed as a part of the electric plant in July, 1905, and the evidence shows that it operated the plant continuously from the time it was installed until the last depositions in the case were taken in the summer of 1907. Presumably the city as it superseded the judgment is yet using the engine for the purpose for which it was bought. Soon after the engine was installed, the city notified the engine company that the engine was not rendering satisfactory service, and pointed out several defects in its material and construction. In response to this letter, the company sent one of its agents to inspect the engine. After making an inspection, he reported to the company that the engine fully came up to the stipulations contained in the contract, and that he found no defects either in material or construction, although a number of witnesses who testified for the city, some of them being experienced machinists, were able to discover defects in both these particulars. It may, however, be here remarked that the defects in material or construction, although causing some inconvenience and annoyance, as well as additional expense, did not seriously interfere with the running of the engine, or prevent it from performing the work it was desired it should do. Subsequent to this, and before the institution of this action, in October, 1906, considerable correspondence passed between the city and the company in respect to other indebtedness of the city to the company, and also concerning the engine. Finally, in June, 1906, for the purpose of definitely ascertaining whether or not the engine fulfilled the contract, it was agreed between the city and the engine company that two experts, one to be selected by each of the parties, should examine the engine and report the result of their inspection. The correspondence between the parties leading up to the selection of these experts clearly shows the attitude of the engine company. In July, 1906, it wrote to the city that it was perfectly willing to make good any defects that existed in the engine, and offered to send an experienced and competent machinist to examine it and supply any defects, and stay with it until the city was satisfied that it was the kind of an engine the city bought. It further wrote that it sold the Coylliss engine to be in first-class condition, and that was the kind it proposed to make it if it was not such. In reply to this, the city wrote that it wished to have a competent man go over the machinery with the expert from the company, and agreed to abide by what this man reported. In July, 1906, these experts met and inspected the engine. At this time it had been in use by the city for about one year.

The expert selected by the city reported to it as follows: "As requested by Mr. Ponder, a member of your board, I made an examination of the Coylliss engine at electric light

plant at Bardwell, Ky. I found it running smoothly and a steady light from lamp spoke well for speed regulation. The cylinder head and two of valve bonnets are honeycombed, and should be replaced by better castings. Your engineer said that (the engine was running and I could not examine it) the cross-heads come so close or strikes the gland when the stuffing box is full. This should be remedied by the builders before engine is accepted. He also complained that the stuffing box was back so deep in the frame that he could not get to it while running. This, of course, is annoying to the man running the engine, and may cause him to stop sometimes to adjust the glands; but I can see no remedy for this. Aside from the defective casting and the closeness of the cross-heads to the cylinder head, I consider it a well-built, substantial engine." The expert selected by the company made the following report to it: "Met Mr. Harrison, their expert from Cairo, this evening, and, after going over the engine into details, could only find a few minor faults as to defective castings. The only one we found was a cylinder head which had a spongy place in it about the size of a dime right in the fillett, which was disclosed by oil seeping through. Found the crank end stem broken across lower half of housing, would not say it broke from defective casting from nature of break. I would say was broken by being caught in some manner or dash pot rod had been lengthened out which would cause it. Found grab claws had been taken off and set crews put in, which makes them look very bad. The only other fault he had to find, and that was in the design, was piston rod nut ran too close to stuffing box. He suggested that we replace cylinder head, also face off piston rod nut, and stuffing box gland, which would give more clearance, and that he would make written report to board to that effect. In his opinion that would make engine first-class job; and I would suggest we furnish new pair of grab claws to replace those that have been ruined. Also set of die plates."

Immediately upon receiving the report from its expert, the company wrote the city the following letter: "The machinist sent by Southern Engine & Boiler Works to examine the engine sold you some time ago has returned, and made his report to the company. He reports that he found the engine in comparatively good condition, and for all practical purposes no defects in same that would in any way impair its usefulness. He reports that there is a defective casting in the cylinder head which will permit oil to ooze through; that he found that the grab claws had been taken off, and some set screws put in their place; and also the end of the crank where grab claws had been broken. I now write to say that a new cylinder head will be replaced and a new pair of grab claws put on, as well as a new crank end for

Appeal from Circuit Court, Greenup County.

"To be officially reported."

Action by M. B. Wilson against the Chesapeake & Ohio Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. J. A. Rardin, A. D. Cole, and W. T. Cole, for appellant. W. D. Cochran, Le Wright Browning, and J. G. Wadsworth, for appellee.

BARKER, J. The appellant, M. B. Wilson, instituted this action to recover from the appellee, the Chesapeake & Ohio Railway Company, damages for injuries accruing to him by his inadvertently stepping into a hole filled with hot water, by which he severely scalded his leg. His cause of action is based upon the alleged negligence of the corporation in leaving the pool exposed without guards to prevent the unwary from falling into it. Issue was made upon the alleged negligence of the defendant, and the contributory negligence of the plaintiff was pleaded in bar of his right to recover. The issues were completed by reply controverting the allegation of contributory negligence, and, the case coming on for trial before a jury, after the plaintiff's evidence was all in, the trial court sustained the motion of defendant for a peremptory instruction to the jury to find a verdict in its favor. To review this ruling, the plaintiff has appealed.

The appellant, M. B. Wilson, was employed by the Chesapeake & Ohio Railway Company as a watchman and engine tender at its roundhouse in Russell, Greenup county, Ky. The duties of his employment required his presence at the roundhouse from 6 o'clock in the evening until the same hour in the morning. At about 3 o'clock on the morning of December 31, 1906, Wilson left his place of work, and started to a restaurant outside of appellee's yard, for the purpose of getting something to eat. The restaurant to which he was going was not on appellee's property, nor owned or controlled by it. When at some distance from the roundhouse, and while crossing the railroad tracks in the yard, the appellant stepped into the hot water, with the result that his left leg was scalded and burned. The testimony shows that at the point where appellant was injured the water had accumulated into a pool having collected there by reason of leakage from a pipe which was used to carry steam from the engine room to the place in question, from whence it was conveyed by rubber hose to passenger coaches standing in the yard in order to warm them. Upon the night in question a Pullman car was standing upon the track, and from four to six feet away an engine was standing. Appellant attempted to go through the passageway between them, and while so doing stepped into the pool, and was injured as above set forth. The evidence for the appellant showed that the em-

ployees of the corporation were permitted, and did frequently go to the restaurant in question and get meals during the night. It will be observed that, while the relation of master and servant still existed between the corporation and the plaintiff, yet he was not in the active discharge of any duty he owed to the corporation when he left the roundhouse and went to the restaurant. He was going because he was hungry and desired a meal. The master was therefore at the time under no duty to watch over and guard him against any danger he might encounter on his way to and from the restaurant.

In principle this case is very similar to that of *Smith v. Trimble*, 111 Ky. 861, 64 S. W. 915, where it is said: "Appellant, a workman of a contractor preparing certain rooms of appellee's house, was injured by stepping onto a balcony leading from an upper porch to an adjacent room, when the balcony fell, precipitating him to the ground, and injuring him. It was not necessary to use this balcony in going to and from the rooms upon which he was at work, but he did use it, without the knowledge or consent of appellee, for his (appellant's) greater convenience in calling to a workman below. The falling of the balcony was primarily caused by its unsafe and weakened condition, unknown to appellee. * * * The question presented here is: What was appellee's duty to appellant under the circumstances? We are of the opinion, and so hold, that appellant while engaged in that work in using such parts of appellee's premises as were reasonably necessary to enable him to do his work was on the premises under the assurance in law by appellee that such parts so necessarily used were reasonably safe for the purposes of such use. But beyond that appellee owed appellant no duty greater than to a stranger or trespasser. And when appellant, without invitation or knowledge of the owner, went into or upon other parts of the premises not necessary for the performance of his labor, he assumed all the risks of doing so. He was neither required, expected, nor allured to be at the place where he was injured, and consequently appellee was under no duty to him to provide there a place of safety." In *Louisville & Nashville R. R. Co. v. Hocker*, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119, it appears that the plaintiff, a telegraph operator in the employment of the railroad company, left his office and went out into the company's yard upon a call of nature, and while there was injured by the alleged negligence of the corporation in backing a train of freight cars upon him without giving any warning of its approach. In reversing the case, and directing that a peremptory instruction be given, the following language was used by the court: "In this case appellee had no other duties to discharge than to receive and dispatch telegrams at his place in the telegraph office. No duty to the company called him to its

yard; and the fact that he had the right to cross the tracks at one place to go to the closet did not give him the right to cross where he was injured, or to use the track as a place to urinate, and did not impose upon the servants of appellant in charge of the switch train the duty to keep a lookout for him at that point. * * * It seems to us from the undisputed facts of this case that as appellee was not in his place of business, or in the discharge of any duty imposed upon him by his employment, the appellant company owed him no duty except to avoid injuring him after it had discovered his perilous position." In the case of *Mitchell-Tranter Co. v. Ehmett*, 65 S. W. 835, 23 Ky. Law Rep. 1788, 55 L. R. A. 710, the following facts appear: The plaintiff went upon the roof of the building in which the defendant operated its rolling mills for the purpose of making certain repairs there. He went at the request of a fellow servant during the noon hour. When he went upon the roof, he fell through a hole therein which had negligently been left open by other servants of the corporation. This court held that, although the general relation of master and servant was in existence at the time of the injury, yet, inasmuch as the plaintiff was not at a place where his duty called him, the corporation owed him no duty, and he could not recover for the injury sustained. In the case of *Shadoan's Adm'r v. C., N. O. & T. P. R. R. Co.*, 82 S. W. 567, 28 Ky. Law Rep. 828, the facts were as follows: Two of the appellee's trains were standing facing each other and from 30 to 50 yards apart. Appellant's intestate, a brakeman upon one of the trains, had gone forward to throw a switch, and after doing so had climbed into the engine cab of the train to which he did not belong to get a drink of water, and while there was injured by the collision of the two trains. They, owing to some defect in the setting of the brakes, and being upon a rather steep grade, ran together. In that case we said: "Assuming that the collision of the trains was the result of the negligence of appellee's servants, we think the trial court ruled correctly in granting the peremptory instruction complained of. Appellant's decedent was on train No. 35 for his own convenience, and not in the discharge of any duty to appellee. In the case of the *L. & N. R. R. Co. v. Hocker*, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119, one of the employes of the railroad company, for his own convenience, had gone between cars in its yard, where he was injured (it is alleged) by the gross negligence of its employes in backing a train against the cars between which he was standing. In the opinion it is said: 'It seems to us from the undisputed facts of this case that as appellee was not in his place of business, or in the discharge of any duty imposed upon him by his employment, the appellant company owed him no duty except to avoid injuring him after it had discovered his

perilous position.' " In the case of *L. & N. R. R. Co. v. Pendleton's Adm'r*, 104 S. W. 382, 31 Ky. Law Rep. 1025, the following state of facts existed: The intestate was a young man in the employment of the railroad corporation in the car repair department. Being anxious to qualify himself for the position of brakeman, he voluntarily undertook to assist the yard crew in doing switching, and while so engaged was killed when riding upon a moving car which came in contact with another car which had been negligently left on an adjacent track. In the opinion rendered in that case, it was expressly assumed that the decedent, at the time he was killed, was assisting the switching crew by permission, and that he had often done so before with the consent of the foreman of the switching crew. It was also expressly assumed that, if the decedent had been in the discharge of a duty owed by him to the company, the negligence of the company was such that his administrator would have had a cause of action for the death of the decedent. In reversing the judgment, and denying the right of the plaintiff to recover for the injury, Judge Carroll, in writing for the court, among other things, said: "The trespasser or the volunteer who is injured in or about the performance of labor that he undertakes cannot look to the owner of the premises to compensate him for the injury or damage, unless it is inflicted after his peril is discovered. And when a person employed to perform certain services goes entirely without the line of his duty, and assumes the performance of other labors for his master, without his direction or authority, he occupies no better position than if the relation of master and servant did not exist in respect to any employment between them, as, when the master engages a servant to perform specified service, he is only responsible to him for some breach of duty committed within the scope or limits of the employment for which the servant has been engaged. Thus in *Thompson on the Law of Negligence*, § 4677, it is said: 'An employé who undertakes without the order or request of his employer, or the representative of the employer or contrary to his orders, or in compliance with the orders or requests of another employé who has no authority from the employer to give such orders or to make such a request, to perform work outside the scope of his employment or upon dangerous premises, where the terms of his employment do not require him to do or be, * * * is deemed to assume the risk attendant upon his voluntary undertaking, and cannot recover for injuries occasioned by any defect in the premises, machinery, or tools to which he thus voluntarily exposes himself. The reason of the rule is obvious. The master undertakes to exercise reasonable care to the end of keeping his premises, his machinery, his tools, and his appliances in a reasonable condition of

J. M. Collins, for appellants. M. Hargett, for appellee.

SETTLE, J. This suit was brought on four promissory notes of \$500 each, executed by Mary A. Foley and William Foley, her husband, May 25, 1895, payable one, two, three, and four years from date, respectively, and each bearing interest at the rate of 6 per cent. per annum from date, "payable annually until paid." These notes were secured by mortgage upon real estate, and the petition sought the enforcement of the mortgage lien for their satisfaction. Mary A. Foley died before the institution of the action, and her infant children were made defendants therein, all duly brought before the court, and a guardian ad litem appointed to defend for them, who filed his report, showing that they had no defense to the action. Judgment was rendered in conformity to the prayer of the petition; and, as directed therein, the real estate covered by the mortgage lien was sold by a commissioner in satisfaction of the several notes referred to, the aggregate amount of which and costs of the action were \$3,376.90. Exceptions were filed to the report of sale, but they were overruled, and the sale confirmed. The infant defendants prosecuted an appeal from the judgment confirming the sale, but this court affirmed the judgment of the lower court. Nearly a year after the filing of the mandate of this court in the circuit court, but before there was any distribution of the proceeds of sale, the guardian of the infant defendants appeared in court, and offered to file an amended answer and counterclaim, in which it was alleged that the judgment under which the real estate was sold contained usury to the amount of \$248.04, and asked that the judgment be purged of this usury. The lower court, upon the objection of the appellee, refused to allow the amended answer and counterclaim to be filed, to which the guardian of the infants excepted; hence the present appeal, which presents two questions for consideration: First, did the court err in refusing to allow the amended answer and counterclaim to be filed? Second, does the judgment contain usury?

If the second question is answered in the negative, an answer to the first will be unnecessary. It is the contention of appellants that no installment of interest, which fell due after appellee had the right to enforce the collection of the note on which it was computed, should bear any interest; in other words, that only such installments of interest as fell due before the maturity of each note should bear interest. The notes sued on in this case provide that the interest shall be payable annually until paid. This provision in each of the notes fixes the rights of the parties, and authorized the court below to compute, as was done, the interest allowed

by the judgment; that is, to allow simple interest, not only upon the principal, but also interest on each installment of interest for each year from May 25, 1896, until the date of distribution. *Mastin v. Cochran*, 76 S. W. 343, 25 Ky. Law Rep. 712.
Judgment affirmed.

RIFFE v. LIDDELL'S TRUSTEE et al.
(Court of Appeals of Kentucky. Nov. 10, 1908.)
TRUSTS (§ 189*)—EXPRESS TRUSTS—RIGHT OF TRUSTEE TO SELL.

Premises were conveyed to a son in trust, on condition that his mother have a life estate, and at her death the premises to be sold and the proceeds equally divided among the four children, including the son. Thereafter the mother and son sold the premises and joined in a deed thereof, and it did not appear but that the price was adequate. *Held*, that the purchaser was not justified in refusing to accept the deed on the ground that the mother was still living, and the son had no power to sell.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 189.*]

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by Ann Liddell's trustee and others against Margaret Riffe. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. W. Hawkins, Jr., for appellant. S. W. Adams, for appellees.

NUNN, J. On the 26th day of December, 1901, Ann Liddell and her husband, Andrew Liddell, conveyed a certain parcel of real estate situated in the town of Erlanger, Kenton county, Ky., to their son, Andrew J. Liddell, in trust, on the following conditions: "To permit his mother, Ann Liddell, to occupy the said home and lot, free of rent during the remaining years of her life, at the end of her life to sell and divide the proceeds of the sale into four (4) equal shares, to wit, one share to Mrs. Anna L. Crozier, one share to Mrs. Clara J. Peal, one share to my son, Charles Liddell, and one share to my son, Andrew J. Liddell, all of which I depend upon my dutiful son, Andrew J. Liddell, to perform." On January 7, 1908, Andrew J. Liddell and his mother, Ann Liddell, sold this piece of real estate to appellant for the price of \$2,680, and tendered to her a deed of conveyance in fee simple for the property, which she refused to accept on account of the condition contained in the deed copied above; that is because Ann Liddell had the right to occupy the house and lot free of rent during the remainder of her life; that she was still living, and the trustee, Andrew J. Liddell, had no power to sell it during her life. The lower court determined that the deed tendered to her passed a good title, and she has appealed from that judgment.

The conveyance to Andrew J. Liddell, trustee, placed in him the title to the property subject only to the right of his mother to

occupy it as a home as long as she lived. His brothers and sisters had no title, either in fee or in remainder. They were only to have certain shares in the proceeds when it was sold. Ann Liddell, the mother of Andrew J. Liddell, joined him in this conveyance to appellant; and the deed contains the following language: "The said Ann Liddell joins in this deed for the purpose of conveying and releasing all interest she may have in said real estate and for the further purpose of releasing and waiving her right to occupy said property or lot as a home or otherwise during her lifetime as provided in the deed above referred to herein." We cannot see any reason why she cannot surrender her home which is provided in the conveyance referred to, and join in the conveyance; and it will certainly be to the interest of the brothers and sisters of Andrew J. Liddell, the trustee, to receive their interest in the proceeds of the sale at this time rather than to wait until their mother dies. There is no intimation in the record that the price to be paid for the property by appellant is not sufficient.

For these reasons, the judgment of the lower court is affirmed.

UNITED STATES TRUST CO. v. POUTCH et al.

(Court of Appeals of Kentucky. Nov. 10, 1908.)

TRUSTS (§ 191*) — CONSTRUCTION OF DEED — POWER OF SALE.

Under a deed to decedent as trustee for his wife and children, with full power of control, covering land paid for by him, and providing that he and "any successor appointed by him" could sell the property, on decedent's death without appointing a successor, the court could appoint a trustee to exercise the general power to control the property for the wife and children, but not to exercise the power of sale; that being a personal power vested in decedent and his appointees.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 243; *Dec. Dig.* § 191; * *Powers*, Cent. Dig. § 83.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action by the United States Trust Company, trustee, against Elizabeth Poutch and others. From the judgment, plaintiff appeals. Affirmed.

O'Neal & O'Neal, for appellant. Wm. J. Steinert, for appellees.

NUNN, J. Prior to the year 1900 Marcus Doerhoefer resided in the city of Louisville, Ky., with his family, consisting of a wife and several minor children. It appears that he purchased 19 parcels of real estate and caused the conveyances for same to be made to himself as trustee. The habendum clause of each of the deeds is in substance the

same. We copy one of them, to wit: "To have and to hold unto the party of the second part the aforesaid tract or parcel of land, with the improvements thereon and appurtenances thereunto belonging, with covenant of general warranty and on the following trust, namely: The party of the second part shall take possession of and control of all the aforesaid property, collect the rents thereof, and after paying taxes and all other necessary charges against the same, including repairs, he shall pay the net income thereof to Mary Doerhoefer, wife of Marcus Doerhoefer, for and during her natural life, for the support and maintenance of herself and second party's children, and after the death of said Mary Doerhoefer said trustee shall use and expend the net income of said property, for the support and maintenance of her children; but said children shall not have the right to require or compel the second party to render or make any account or settlement of moneys received by him or expended by him, as such expenditures are left to his discretion, and the second party is hereby given full and complete power to sell said property, or any part thereof, or any of the investments, and reinvest the proceeds in any other property to be held on the foregoing trust, and has full power to sell any of the same for reinvestment, and the proceeds shall be reinvested in the foregoing trust, and the purchaser shall not be required in any event to look to the application of the purchase money. In the event of the death of the said second party and his wife and children without leaving issue, then the property herein conveyed shall revert to and become a part of the estate of said Marcus Doerhoefer, and the second party shall have the right by deed or will to appoint his successor in this trust, with all the powers herein given said trustee, and, in the event said wife should die before said Marcus Doerhoefer, then the property herein conveyed shall revert to and become the estate of said Marcus Doerhoefer, the said second party, and any successor appointed by him is given full, complete, and perfect power to sell and convey in fee simple said tract or parcel of land above described, or make any reinvestment, and the purchaser need not look to the application of the purchase money." Marcus Doerhoefer died intestate without naming any one to succeed him as trustee. His widow, for herself and children, filed an *ex parte* action requesting the court to appoint a trustee with the same powers as had the original trustee. The court granted this request and appointed appellant. Soon after its appointment it became doubtful of its power to sell the real estate and reinvest the proceeds, and of other powers and duties in connection therewith. It therefore filed this action to obtain the advice of the chancellor with reference thereto. The

court appointed a guardian ad litem to represent the interest of the infant children, and he filed an answer controverting the power of the court to give appellant, the trustee, the right to sell and dispose of this real estate. The lower court sustained his contention, and appellant appeals.

The only question to be determined is: Is the power of sale and reinvestment given Marcus Doerhoefer, the original trustee, a personal power conferred upon him by reason of some special confidence reposed in him and to be exercised by him alone; or is it a power annexed to the office of trustee, and as such to be exercised by any one who might be appointed by the court to discharge the duty of the trust? To help elucidate this question it is necessary to consider how it happened that Marcus Doerhoefer was made the trustee with the powers named in the deed. It appears the vendors in the deeds were strangers to Doerhoefer's wife and children. They had no special interest in them. Marcus Doerhoefer paid the purchase price of the property and caused the deeds to be made with the language recited. He settled this property upon himself as trustee, with full power to manage, control, rent, and receive the rents for the benefit of his wife and children. This was a general power conferred upon himself, which the court could appoint another to perform at his death; but with reference to a sale of the property and a reinvestment of the proceeds the deeds contain this language: "The second party [meaning Marcus Doerhoefer] and any successor appointed by him is given full, complete, and perfect power to sell and convey in fee simple all or any part of said property." We construe this language as giving a personal power and discretion to Doerhoefer to make the sale, or to any one appointed by him, and in our opinion the court has no power to give the trustee appointed by it the right to sell this real estate, for the reason, as we understand it, the language of the deed in effect reserves this right to Doerhoefer, or to some one appointed by him as his successor in office. It is evident that, when he settled upon himself this property as trustee, he never intended that it should be sold, except by himself or some one appointed by him. See *Berry on Trusts* (5th Ed.) vol. 1, § 20.

The authorities presented by counsel for appellant do not militate against the conclusion reached. The opinion that seemingly comes nearest supporting his position is the case of *Price v. Swager's Trustee*, 4 S. W. 34, 9 Ky. Law Rep. 89. In that case, by the last will of Joseph Swager, O'Leary was appointed his executor and trustee, with direction to lay off certain lots and streets in a tract of 13 acres of land on a certain road in Jefferson county, and to sell and convey such portion or parts or the whole of said

lots as may be considered beneficial to his estate, and reinvest the proceeds in improving the lots unsold, etc. O'Leary refused to accept the trust. One Hobbs was then appointed by the court to take the place of O'Leary, and was, by an order of court, given the power given in the will to O'Leary. Hobbs proceeded to divide the property and make sales of the lots; but one of the purchasers refused to accept his deed. This court determined that the deed was valid. Swager directed his trustee to do certain things. It is true that the trustee had some discretion about the details; but by the will he was given general powers and directions to do certain things. The other cases referred to by appellant are somewhat similar to the Swager Case. In the case at bar Doerhoefer retained in himself the power and discretion of selling the property, and stated, in effect, that no one else should have that power except the person be appointed by him.

For these reasons, the judgment of the lower court is affirmed.

HARNEY v. FAYETTE COUNTY FISCAL COURT et al.

(Court of Appeals of Kentucky. Nov. 10, 1908.)

APPEAL AND ERROR (§ 780*)—PERSONS ENTITLED TO REVIEW—INTEREST IN SUBJECT-MATTER—DISMISSAL.

Under Civ. Code Prac. § 757, providing that, if it appear that appellant's right to prosecute the appeal has ceased, the appeal shall be dismissed, where, pending appeal in a suit by a taxpayer and resident of a county against the county fiscal court and the county jailer to enjoin the court from appropriating county funds for certain purposes, and compel the jailer to take charge of the courthouse and perform the acts required of him by law, such taxpayer became a nonresident of the county and no longer paid taxes there, the appeal must be dismissed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3121; Dec. Dig. § 780.*]

Appeal from Circuit Court, Fayette County.
"To be officially reported."

Action by L. D. Harney against the Fayette county fiscal court and others. Judgment for defendants, and plaintiff appeals. Defendants move to dismiss the appeal. Appeal dismissed.

R. S. Crawford, for appellant. Geo. R. Hunt, for appellees.

HOBSON, J. L. D. Harney, suing for himself and other taxpayers of Fayette county, brought this suit against the Fayette fiscal court, the members of the court personally, and the jailer of Fayette county, stating in effect in his petition that he was a taxpayer and resident of the county, and that the fiscal court was paying out annually a large sum of money for fuel, light, water, and other attention to the offices in the courthouse, without authority of law. He prayed that the fiscal court be enjoined from appropriat-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing any of the funds of the county for these purposes, and that the jailer be required by mandamus to take charge of the courthouse and perform the acts required of him by law. The defendants filed an answer, in which they set out what they had done, pleading a special act of the General Assembly as their authority. The plaintiff filed a reply to the answer, the defendants demurred to the reply, the court sustained the demurrer, and, the plaintiff declining to plead further, the petition was dismissed, and Harney appealed to this court. After the record was filed in this court, J. T. Jones filed in this court his petition, in which he stated that since the appeal was granted Harney had become a citizen and resident of Lincoln county, Ky., that Jones was a resident and taxpayer of Fayette county, and that Harney had become a nonresident of Fayette county since the rendition of the judgment in the circuit court. Jones asked that he be made a party appellant, and that the appeal should stand for hearing as though prosecuted by Harney. This motion the court overruled. Thereafter the appellee entered a motion that the appeal be dismissed on the ground that Harney has no further interest in the matters litigated and has ceased to be a representative of the class of persons for whom he seeks redress. The case has been submitted upon this motion and on the merits.

An action under the Code must be prosecuted by the real party in interest, and where one person sues as the representative of a class he must be a fair representative of the class. As Harney no longer lives in Fayette county, and is no longer a taxpayer there, he is in no sense a fair representative of the taxpayers of Fayette county, whom he proposed to represent. He was a taxpayer of the county and a fair representative of the class when he brought the action; but, his right to represent the class having ceased pending the appeal, to allow him to prosecute the appeal would be to allow him to litigate a matter in which he has no interest. By section 757 of the Civil Code of Practice it is provided that, if it appear that the appellant's right to prosecute it further has ceased, the appeal shall be dismissed. As Harney's right to prosecute the appeal ceased upon his becoming a nonresident of Fayette county, the appeal, under this section, cannot be maintained.

We therefore conclude that the appeal must be dismissed, and it is so ordered.

CAWOOD v. HOWARD.

(Court of Appeals of Kentucky. Oct. 30, 1908.)

1. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR—DISMISSAL OF COUNTERCLAIM.

In an action to quiet title, where it appeared that plaintiff's grantor, after conveying the land to plaintiff who did not record his deed,

again conveyed it to defendant whose deed was of record, defendant alleged an unrecorded title bond obtained from the grantor prior to plaintiff's deed, and that defendant's deed was given in pursuance thereof. Both parties proceeded upon the theory that plaintiff, to recover, must show fraud of defendant and his grantor because defendant's deed was recorded before plaintiff's, and the whole case was developed on that issue. *Held*, that the dismissal of a counterclaim claiming defendant's ownership and asking judgment therefor, relying on the bond for title, was not prejudicial, since it was not necessary to plead the bond and deed to defeat plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4110; Dec. Dig. § 1042.*]

2. CANCELLATION OF INSTRUMENTS (§ 27*)—SUIT TO VACATE FRAUDULENT DEED—NATURE OF "ACTION"—STATUTORY PROVISIONS.

An action to set aside a fraudulent deed as a cloud upon plaintiff's title is not an action under Ky. St. 1903, § 11, authorizing a person owning and in possession of land to bring an equitable action to quiet his title, though the object is the same, and plaintiff's possession is not a prerequisite.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 42; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, vol. 1, pp. 128-140; vol. 8, p. 7563.]

3. CANCELLATION OF INSTRUMENTS (§ 1*)—EQUITY JURISDICTION.

Equity has power to set aside a fraudulent deed as a cloud upon the title of the owner of land independent of statute.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. FRAUDULENT CONVEYANCES (§ 300*)—DEED OF LAND ALREADY CONVEYED—EVIDENCE.

Evidence *held* to support a finding that a deed by a father to his son of land theretofore conveyed by the father to another was fraudulent, and without real consideration.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 898-903; Dec. Dig. § 300.*]

Appeal from Circuit Court, Harlan County.
"Not to be officially reported."

Action by Nathan Howard against John Cawood to set aside a deed as a cloud on title. Defendant interposed the deed and a bond for title as a defense, and counterclaimed, alleging ownership and asking that his title be quieted. The counterclaim was dismissed, and judgment rendered for plaintiff. Defendant appeals. Affirmed.

W. F. Hall, for appellant. J. G. and J. S. Forester, for appellee.

BARKER, J. This action was instituted by the appellee in the Harlan circuit court for the purpose of obtaining a judgment vacating a deed from Hiram Cawood to John Cawood, which was dated and recorded January 7, 1907, because it cast a cloud on his title to land described in his petition, and of which he claimed to be the owner. The facts are these: On the 25th day of August, 1902, Hiram Cawood, who was the owner of the land in question, conveyed it by deed to Nathan Howard, the appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

This deed the appellee did not record until after January 7, 1907. Having ascertained that his grantor, Hiram Cawood, had conveyed the same land to his son, John Cawood, the appellee, as said before, instituted this action to remove the cloud from his title occasioned by the putting to record the deed from the father to the son. The defendant, John Cawood, answered, denying ownership of the property in plaintiff (appellee) and alleging that he had, for a valuable consideration, purchased the land from his father in 1901, and obtained a title bond thereto; that the consideration for the purchase was \$250; that he did not at the time record the title bond, but, having paid the consideration, he subsequently obtained the deed dated and recorded January 7, 1907. Having interposed his deed and bond for title as a defense to plaintiff's action, he also alleged in the form of a counterclaim ownership of the land in question, and prayed that the property be adjudged to be his, and that his title be quieted. In this counterclaim he relied upon the bond for title, but did not make it an exhibit. The plaintiff took out a rule requiring the defendant to file the bond in question. The defendant filed a response which set forth that the bond was lost and could not be found. This response was adjudged insufficient by the court, and thereupon an order was entered dismissing the counterclaim. Afterwards the case came on for trial on the issues between the plaintiff and defendant as to the title of the former, with the result that the chancellor held the conveyance of Hiram Cawood to his son to be void, and that the property belonged to the plaintiff. From this judgment, John Cawood has appealed.

We do not find it necessary to enter into a discussion of the merits of the judgment of the court in dismissing the counterclaim because of the failure of defendant to file the bond mentioned in his pleading. The whole question of the relative merits of the two titles was necessarily tried out on the issue as to whether or not the plaintiff had a title to the land under his deed from Hiram Cawood, the common vendor. In order to establish his title to the land, the plaintiff was bound to show the fraud of the father and son in the conveyance of the land to the latter, because the son's deed was recorded prior to the recording of plaintiff's deed. Both parties acted upon this theory, and the whole case was developed on the issues joined, with the result, as before said, of a judgment in favor of the plaintiff. We are of opinion, therefore, that the court did not prejudice the defendant's position, even conceding that he wrongfully dismissed the counterclaim, as it was not at all necessary for the defendant to plead the bond and deed from his father to him as a counterclaim in order to defeat the plain-

tiff, assuming these documents to be without fraud and valid. In other words, we will consider the record as if the court had not dismissed the counterclaim, which is certainly all the appellant could demand on this branch of the case.

The question, then, remains whether or not the judgment of the court was correct in sustaining the validity of the deed from Hiram Cawood to the appellee, Howard. The defendant (appellant) insists that the petition was insufficient on demurrer because it failed to allege that the appellee (plaintiff) was in possession of the land at the time he instituted the action. This objection to the petition is based upon the theory that the plaintiff's action is brought under section 11, Ky. St. 1903, which authorizes a party owning and in possession of land to institute an equitable action to quiet his title. If the action is based on section 11, the objection is well taken, because the petition does not allege that the plaintiff was in possession of the land at the time he instituted the action. But the defendant is in error as to the action being instituted under section 11. The allegations of the petition show that the plaintiff's action is for a vacation of the deed from Hiram Cawood to his son, and to thereby remove a cloud from plaintiff's title. This is different from the action under section 11 to quiet title, although the effect is the same. The land in question seems to be wild, mountain land, which is in the actual possession of neither party; and therefore the plaintiff could not bring an action to quiet his title under section 11, Ky. St. 1903, nor could he bring a suit in ejectment against the defendant, because the latter was not in possession; and yet here is a deed duly recorded, the effect of which is to prevent the plaintiff from selling his land, and makes it valueless for that reason. Appellant's position, if sound, would present a wrong without a remedy. But it is not sound. The chancellor always had jurisdiction to vacate and set aside a fraudulent deed, and thus remove a cloud from the title of the rightful owner of land. And this is entirely independent of the statute, being a part of the well-known and firmly settled jurisdiction of equity. While this results in quieting plaintiff's title, it is not technically within the purview of the statute. This principle has been settled by this court in many cases, and is now quite beyond question. *Fox v. Cornett*, 124 Ky. 139, 92 S. W. 959; *Asher, etc., v. Uhl*, 122 Ky. 114, 87 S. W. 307, 93 S. W. 29; *Herr v. Martin*, 90 Ky. 377, 14 S. W. 356; *Magowan v. Branham*, 95 Ky. 581, 26 S. W. 803.

As to the merits of the case, we think the chancellor rightfully reached the conclusion that the transaction between Hiram Cawood and his son was fraudulent. The old man stands confessedly in a most un-

envious light, because he has either defrauded his son or the appellee on his own statement; he having conveyed the same land to both parties for a valuable consideration from each. The original title bond was not produced, and the deed from the father to the son was drawn up several years subsequent to that of appellee. Appellee had no notice of the existence of the bond or the deed. On the other hand, we think the evidence that the son knew of the conveyance to appellee is sufficient to uphold the judgment. Appellee shows that the son lived only a half mile from the land in dispute; that after he purchased it he placed men upon it to cut the merchantable timber therefrom, and they were constantly engaged in the business of cutting and hauling the timber for some two years. It is impossible to believe that the son, living thus near, did not see and know what was going on; and, if he did, it is not believable that he allowed the plaintiff to cut off and carry away the timber, which was at that time, perhaps, the most valuable part of the land, in derogation of his right as the real owner thereof. The plaintiff testified that, before the defendant placed his deed on record, he tried several times to buy the property in question from him (plaintiff), and, this testimony is corroborated by another witness. Plaintiff also testified that Hiram Cawood, the common vendor, several times made propositions to purchase the land from him. We think it worthy of notice that John Cawood had the bond for title and the deed from his father to him recorded on the same day, and withdrew the bond at once, and that it was immediately afterwards lost. Both the witnesses to the bond were dead, and it can therefore be seen, if the defendant was seeking to defraud the plaintiff, he completely covered up detection arising from any obvious defect in the bond. The recording enabled him to produce a certified copy of the bond, in the handwriting of the clerk, and this could be used, as far as his purposes were concerned, with all the effect of the original bond; but it would entirely deprive the plaintiff of the opportunity to show that the names of the dead witnesses signed to it were forged, if such was the fact. On the other hand, if the transaction was fair and free from fraud, there was no necessity for placing the bond for title on record after the deed, which was the consummation of the bond, was duly recorded. The bond gave no notice that the deed did not give; and the fact that the son kept the bond, as he says, in his trunk during the several years prior to the day it was recorded, during all of which time it was extremely necessary to his interest to have it recorded, accentuates the fact that he deliberately recorded it at a time when it was not necessary that this should be done. The recording of the

bond, however, was necessary on the hypothesis that a fraud was to be committed, and the original bond was to be lost to prevent inspection; for, as said before, it enabled the defendant to use a certified copy, which in the handwriting of the clerk, would present no defects, if such existed, which would appear on the face of a fraudulent bond. The fair face of the copy in the clerk's handwriting would tell no tale, and yet it would avail defendant to establish his case as well as the original.

Considering the intimacy of the relation of father and son, the extreme youth of the son at the time the bond was said to have been made, and all the facts and circumstances surrounding the transaction, we are not willing to say that the chancellor erred as to the facts in reaching the conclusion that the transaction between the father and son was fraudulent and without real consideration. It follows, therefore, that his judgment vacating the deed from Hiram Cawood to John Cawood as fraudulent and void is affirmed.

JONES v. YANTIS.

(Court of Appeals of Kentucky. Nov. 10, 1908.)

1. APPEAL AND ERROR (§ 148*)—RIGHT OF REVIEW—PARTIES—PROPER PARTIES—ONE NOT A PARTY BELOW.

One not a party to an action below cannot appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 925; Dec. Dig. § 148.*]

2. MORTGAGES (§ 439*)—FORECLOSURE—SALE—EFFECT.

Appellant deeded property to a creditor, he agreeing by a separate writing to reconvey if she paid him a certain sum, with interest. Appellant thereafter was committed as a lunatic, and the amount of the debt not being paid within the agreed time, the mortgagee conveyed to another, who brought ejectment against appellant's sister, who had possession and had been appointed as committee for appellant; her defense being that the deed was in effect a mortgage, that the notes secured were usurious, that she had furnished half the purchase price of the mortgaged property, and that appellant held it in trust for herself and her sister, which the purchaser from the mortgagee knew. The action was afterwards transferred to the equity docket, and a sale of the property was directed to pay the mortgagee's debt. Appellant was not a party to either proceeding below. *Held*, that the sale did not deprive appellant of her title in the house and lot.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 439.*]

Appeal from Circuit Court, Fayette County. "Not to be officially reported."

Action by Margaret Thurman and husband against Maggie Jones and others to foreclose a mortgage. From a judgment for S. S. Yantis, directing a sale of the property, Lizzie Jones, who was not a party below, appealed. Appeal dismissed.

Henry C. Hazelwood, for appellant. B. T. Southgate and Chas. Kerr, for appellee.

NUNN, J. Appellant, Lizzie Jones, was indebted to several persons; S. S. Yantis being one of them. She obtained money from him with which to pay her other creditors. The whole amount of her indebtedness, including what she owed appellee, amounted to something over \$1,500. She executed a conveyance to appellee of her house and lot in the city of Lexington, expressing the amount named as the consideration. At the same time appellee executed to her a separate writing, in which appellee agreed that if she repaid to him the sum named, with its interest, by a certain date, he bound himself to reconvey the property to her. Some time after this she was adjudged a lunatic and sent to the asylum. She left her sister and some other relatives in the house. The time named in the separate writing in which she was permitted to redeem the property lapsed, and Yantis conveyed the house and lot to Margaret Thurman and her husband, and they instituted this action in ejectment against Maggie Jones, the sister of Lizzie Jones, and the other parties in possession of the house and lot. Maggie Jones was appointed as committee for her sister, appellant, and she answered, setting up the writing executed simultaneously with the deed, showing in effect that Yantis only held a mortgage on the house and lot, and alleged that the note executed to Yantis contained usury, and also alleged that she had furnished one-half of the purchase money with which to buy the house and lot, and that Lizzie Jones, her sister held the title to one-half of the house and lot for herself, and held the other half as trustee for her, and further alleged that Mrs. Thurman and her husband, knew of this fact when they accepted the conveyance of the property from Yantis. The parties to the action, by agreement, had the action transferred to the equity docket, and a judgment was rendered in effect declaring the deed from Lizzie Jones to Yantis a mortgage and directing a sale of the property for the payment of Yantis' debt and interest.

Lizzie Jones, appellant, recovered her sanity, and returned from the asylum, and is prosecuting this appeal. She was not a party to the action in the lower court. Her first appearance is in this appeal. It is a well-established rule that one not a party to an action cannot appeal from a judgment rendered therein. We are of the opinion that the sale made under the judgment could not deprive her of the title to the house and lot.

For these reasons, the appeal is dismissed.

GEORGETOWN WATER, GAS, ELECTRIC & POWER CO. v. FORWOOD.

(Court of Appeals of Kentucky. Nov. 6, 1908.)

1. MASTER AND SERVANT (§ 285*)—INJURY TO SERVANT—ACTION—EVIDENCE.

In an action by a servant for injuries alleged to have been caused in escaping from the

master's telephone booth in which he was imprisoned, evidence held sufficient to go to the jury on the question whether his injuries were received as alleged.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.*]

2. MASTER AND SERVANT (§ 102*)—DUTY TO FURNISH SAFE PREMISES.

While the master is not an insurer, he must use ordinary care to make the premises reasonably safe for the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 171, 173; Dec. Dig. § 102.*]

3. MASTER AND SERVANT (§ 107*)—DUTY TO FURNISH SAFE APPLIANCE—TELEPHONE BOOTH.

A telephone booth so constructed that the door cannot be opened from the inside is not a reasonably safe appliance for the use of a servant.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 107.*]

4. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—ACTION—QUESTION FOR JURY—ORDINARY CARE.

Whether a servant imprisoned in a telephone booth which could not be opened from the inside used such care in escaping as might be expected of an ordinarily prudent person under the circumstances is a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

5. MASTER AND SERVANT (§ 233*)—INJURY TO SERVANT—ACTION—NEGLIGENCE.

A servant imprisoned in a telephone booth negligently maintained by the master, so that it could not be opened from the inside, may use reasonable effort to get out, exercising such care as might be reasonably expected of an ordinarily prudent person.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 233.*]

6. DAMAGES (§ 132*)—INJURIES TO SERVANT—ACTIONS—EXCESSIVE DAMAGES.

Where a bookkeeper's forefinger on the left hand was injured resulting in a permanent stiffening of the finger, affecting somewhat the use of the hand, and he suffered intensely for several weeks, but continued to work for his employer two or three weeks after the accident, and the hand was healed and gave little trouble after 60 days, a recovery of \$4,500 was excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 379; Dec. Dig. § 132.*]

7. WITNESSES (§ 383*)—CONTRADICTION.

A witness may be contradicted by proof of his statements inconsistent with his testimony, but he cannot be contradicted by proof of statements as to collateral or immaterial matters, and hence testimony in a personal injury case that a witness for defendant had made a statement that the suit was nothing but blackmail was inadmissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.*]

Nunn, J., dissenting.

Appeal from Circuit Court, Scott County.
"Not to be officially reported."

Personal injury action by William H. Forwood, by his next friend, against the Georgetown Water, Gas, Electric & Power Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Jas. F. Asken and Bradley & Bradley, for appellant. John W. Ray, for appellee.

HOBSON, J. The Georgetown Water, Gas, Electric & Power Company has its machinery on the first floor of its building and its office on the second floor. In October, 1906, William H. Forwood was the bookkeeper. His place of business was in the office, on the second floor. There was a telephone in the office, and it was a part of his duty to answer the telephone when the general manager was out of the office. He left at 6 o'clock in the evening. There was a telephone in the machinery room, and, when he left, it was his duty to cut off the telephone in the office and turn on the phone in the machinery room, so that the engineer could answer calls on the phone during the night. The phone in the machinery room was placed in a booth, so that a person using the phone could close the door and not be interrupted by the noise of the machinery. The door to this booth had an ordinary lock on it, but the engineer had taken off the knob on the inside of the door, and had put it on another lock in the room. This left no knob on the inside of the door to be turned in opening the door. Things had been in this condition for some months; the employees in the engine room when they had finished with the phone using a screwdriver or some instrument of that sort to open the door when they got through using the phone. Forwood had never used this phone, but on October 30th, after he had finished his day's work, and had started down through the engine room, he heard the bell in this booth ring. He went to answer the call. Somebody asked for a young lady who worked in the office. He said that she had left. He then rang off, and turned to go out, and could not get out. There was no knob on the door which he had shut in order to hear the person talking to him over the phone. He then rang the telephone, thinking that he could ring the bell on the outside, but it did not ring. He then called to the engineer, but could not make him hear. He tried to get the door open and could not do it. He rattled the door and tried to burst it open, and could not. Finally he got the booth loose from the wall and got out at the back. This he did by pushing for some time against the wall. After he got out of the booth, his left hand was hurting him a little, but he did not think much about it. He returned to his work as usual the next day. The bone in the finger began to ache, and the finger swelled, and about the 6th or 7th of November he went to a doctor about it. For some days before this he had been applying a liniment to the finger. On the 10th or 11th of November the doctor lanced the finger, and scraped the bone. He had suffered very intensely for several days before this operation, but he was somewhat relieved by it; but the trou-

ble in the finger was not cured, and later the doctor took out two small pieces of bone, and two other small pieces worked out. The injury was to the left forefinger at the joint, and by reason of it the finger became stiff. He continued to be treated by the doctor until some time in February, when the trouble was healed, and he was left with a stiff finger. He brought this suit to recover for his injury; and, upon a trial of the case before a jury, a verdict and judgment was rendered in his favor, fixing the damages at \$4,500, and the water company appeals.

The booth was a box something like three feet square and eight feet high, made of flooring plank; the door being made of the same material as the box. It was set against the wall, and set upon the floor with no bottom to it. The proof is conflicting as to whether or not the booth set up close against the wall, the proof for the defendant tending to show that there was a space between the edge of the box and the wall. The plaintiff testified that he did not think of calling the exchange, and asking that some one be sent to open the door, and that it got hot in the box before he pushed it out from the wall and got out. The defendant proved by a number of witnesses that the plaintiff said on different occasions that he did not know how he hurt his hand. The doctor who treated him also testified to this, but the plaintiff himself testified on the trial that he did not know how he hurt his hand in the box, but that he knew that he hurt it in there. We cannot say on this proof that there is no evidence that the injury was received by the plaintiff in getting out of the box. It is true the plaintiff in his direct examination did not say positively that he hurt his hand in the box, but he did make this statement on the cross-examination. It is also true that, when he was asked why he did not tell Dr. Lewis how he was injured, he said: "I didn't know for sure; no, sir." Taking the witness' testimony as a whole, there was a scintilla of evidence to go to the jury; for he testified that he noticed his hand hurting him when he got out of the box. The doctor found a small splinter in the finger which had been healthy before the injury. We cannot say on the evidence that there was no evidence of negligence on the part of the defendant. If the box fit close to the wall, and fresh air could not get into it as fast as a man could breathe it, it was not a safe place for a man to be shut up in; and the evidence for the plaintiff tended to show these facts, and also to show that in a short time a man would become unconscious if the box was close. The master is not an insurer, but he is required to use ordinary care to make the premises reasonably safe for the use of the servant. Under this rule a telephone booth should not be so constructed that it cannot be opened from the inside. The purpose of having the door was mani-

festly to shut out the noise of the machinery, and the plaintiff, therefore, properly shut the door that he might hear the person talking over the phone. When he found himself shut up in the box with no means of opening it, it was a question for the jury whether he used such care as might be expected of an ordinarily prudent person under the circumstances.

It is insisted, however, that the causal connection between the negligent act of the master in furnishing an insufficient booth and the injury received in getting out of it is broken by the intervention of the act of the party injured. In other words, it is insisted that his own act is the direct and immediate cause of his injury, and not the condition of the booth. If the plaintiff was fastened up in the booth he had a right to try to get out. His effort to get out was but the effort to escape from the box in which he was temporarily fastened up. He had a right to use reasonable effort to get out of the box, exercising such care as may be reasonably expected of an ordinarily prudent person. If the plaintiff's testimony is true, the primary negligence was that of the master; and the master cannot escape liability for any injury resulting from this negligence if the plaintiff used ordinary care.

The damages assessed are palpably excessive. The only permanent injury which the plaintiff received is the stiffening of the forefinger of the left hand, and, while this affects somewhat the use of that hand, a verdict for \$4,500 is palpably excessive. It is true that he suffered very intensely for several weeks, but he continued to work for the water company for two or three weeks after November 1st; and the hand was healed and gave him little trouble after say 60 days. In *N. & N. V. Co. v. Walker*, 14 Ky. Law Rep. 175, a verdict for \$1,250 was held excessive where one joint of the right thumb had been mashed off. In *L. & N. R. R. Co. v. Law*, 21 S. W. 648, 14 Ky. Law Rep. 850, \$2,000 was held excessive for an injury to the left thumb making amputation necessary. In *L. & N. R. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866, \$5,000 was held excessive for the loss of two fingers. Many other similar cases have been decided; and in a number of cases verdicts for less than \$1,500 have been rendered in cases before this court for injuries more serious.

On another trial the court will omit from its instruction to the jury all reference to future pain and suffering, as there is nothing in the evidence to warrant the conclusion that future pain and suffering will be endured. The court will also on another trial exclude the evidence of J. P. Jackson as to what the witness Hauss said to him to the effect that the suit was nothing but blackmail. A witness may be contradicted by proof of statements that he has made inconsistent with his testimony on the trial, but he cannot be contradicted as to statements about collateral

or immaterial matters. The statement of Hauss to which Jackson testified was but an expression of an opinion based on the information he had received, and it was no more competent to prove that Hauss expressed this opinion to Jackson than it would have been to have asked Hauss, when on the witness stand, if he did not then entertain that opinion. The opinions of witnesses are not material. They are to testify to the facts which they know. *Loving v. Commonwealth*, 80 Ky. 507; *Kennedy v. Commonwealth*, 14 Bush, 340; *Ross v. Commonwealth*, 55 S. W. 4, 21 Ky. Law Rep. 1344.

There was evidence that it was not in the line of Forwood's duty to answer calls on the phone in the engine room, but that this duty devolved on the engineer; and on another trial the second instruction will be modified so as to read as follows: "Unless the jury believe from the evidence that the injury to the plaintiff's hand was received in the booth, and was the result of the booth not being reasonably safe as defined in No. 1, and it was a part of his duty under his employment to answer calls on this phone, the jury should find for the defendant." In instruction No. 1 the court will omit the words "and built the same very tight," also the words "and was in fact almost air tight." In lieu of the words "and that such imprisonment was dangerous to his life or health," the court will use the words "and that such booth was not reasonably safe for the purpose for which it was intended." The court will also omit at the conclusion of No. 1 these words, "unless they believe that the plaintiff contributed to the accident by his own negligence as described in another instruction"; for this idea is expressed in the foregoing part of the instruction, and need not be repeated. In lieu of instruction 4, the court will tell the jury that, although the booth was not reasonably safe for the purpose for which it was intended, as defined in No. 1, yet if they believe from the evidence that the plaintiff, when he found himself shut up in the booth, did not use such care as may be reasonably expected of a person of ordinary prudence under the circumstances, and but for this would not have been injured, they should find for the defendant.

Judgment reversed and cause remanded for a new trial.

NUNN, J. (dissenting). The evidence of J. P. Jackson as to what witness Hauss said was not introduced for the purpose of showing Hauss' opinion with reference to appellee's case, but it was for the purpose of showing the feeling and bias entertained by Hauss against appellee; and in my opinion it was competent for that purpose. Hauss had given damaging testimony against appellee, and appellee had the right to show that the witness entertained such bias to go to the credit of Hauss as a witness. To say of a party to a suit that he is engaged in blackmailing, is,

at least, some evidence of a bias and ill feeling against the party, and the jury had the right to hear this evidence that it might understand what weight and credit to give the statements of Hauss.

Wherefore, I dissent from the opinion of the court.

HARNEY v. CITY OF LEXINGTON.

(Court of Appeals of Kentucky. Nov. 10, 1908.)

1. PLEADING (§ 84*)—CONSTRUCTION.

A pleading must be read against the pleader. [Ed. Note.—For other cases, see Pleading, Cent. Dig. § 66; Dec. Dig. § 34.*]

2. MUNICIPAL CORPORATIONS (§ 757*)—STREETS—IMPROVEMENTS—LIABILITY OF MUNICIPALITY.

A city must determine when and in what manner its streets shall be improved, and is not liable merely for failing to improve a street, or for suffering it to remain in the condition in which it found it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1591-1594; Dec. Dig. § 757.*]

3. MUNICIPAL CORPORATIONS (§ 845*)—STREETS—IMPROVEMENTS—LIABILITY OF MUNICIPALITY.

A petition in an action against a city for flooding plaintiff's premises, which does not show that the city made the drain complained of, or that it did any act as to it, and which permits the conclusion that the drain may have been a natural drain which took off the water until it became filled up with debris washed into it, states no cause of action.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1797; Dec. Dig. § 845.*]

Appeal from Circuit Court, Fayette County.
"To be officially reported."

Action by L. D. Harney against the city of Lexington. From a judgment of dismissal, plaintiff appeals. Affirmed.

R. S. Crawford, for appellant. J. Embury Allen, for appellee.

HOBSON, J. L. D. Harney brought this action against the city of Lexington to recover damages in the sum of \$2,000 for the flooding of his property with water. The circuit court sustained a demurrer to the petition. He declined to plead further, and the action having been dismissed, he appeals.

The material allegations of the petition are as follows: "Plaintiff says that he is the owner of three lots located on Carlisle avenue, in said city, and that on each of said lots is erected frame cottages. He says that he resides in one of said cottages and leases the other two. He says prior to the injuries hereinafter complained of said lots were dry and not subject to overflow of water, and were well drained by the natural surface and the ditches along said avenue. The plaintiff says it is the duty of the defendant to provide drains and means of carrying away the surface water and waters from

rains and melting snow that may be and are collected into the ditches along the streets, and to prevent the same from being thrown onto the property of persons fronting and abutting on its streets. Plaintiff says that during the years 1907 and 1908 the said Carlisle avenue was, and now is, one of the streets in charge and under control of the defendant, the city of Lexington. The plaintiff says that during the latter part of the year 1907, and up to and including the present time, the defendant, through and by its agents, servants, and representatives, had neglected and failed to keep open the ditch or drain in front of plaintiff's property and adjacent thereto along said Carlisle avenue, but have allowed and permitted same to become filled and obstructed with earth, rock, and other debris whereby said drain or ditch was and became obstructed, and was not of sufficient capacity to convey and carry off the water and other substances conveyed and thrown into said ditch, and by reason thereof the surface water collected in said ditch was thrown onto plaintiff's property in and about his dwelling and tenement houses, and conveying thereon earth, mud, rocks, brush, and other filth and debris collected by the surface waters and thrown into said ditch or drain from the intersecting streets and property of others, covering up the grass, flowers, and his garden, overflowing his cisterns, injuring and damaging the gardens, coal and wood houses, and other outbuildings, leaving the ground wet and muddy, and creating foul and disagreeable odors poisoning the air in and about his residence, causing sickness to himself and his family, and rendering his tenement houses untenable and greatly affecting the market value of his property."

In *Thoman v. Covington*, 62 S. W. 721, 23 Ky. Law Rep. 117, this court said: "If the surface water accumulated at the point in question and overflowed her premises independent of any act of the city, she could not maintain an action against it therefor. The city must do some act which produces the injury to enable the injured party to recover against it. The sewers may have been inadequate to carry off the surface water which accumulated, still may not have had anything to do with it collecting at the point in question. To maintain an action, it was incumbent upon her to show that the sewers, not only failed to carry off the surface water so as to relieve her premises from it, but that they were the cause of it accumulating there." Again in *Campbell v. Vanceburg*, 101 S. W. 345, 30 Ky. Law Rep. 1343, the court said: "When territory within a city is permitted by the authorities to remain in the condition it was when annexed—in other words, if the city does not undertake to make improvements or changes or alterations in existing improvements, or to

build streets, sidewalks, drains or gutters, or reconstruct old ones—it will not be liable for any damage caused by the overflowing of the premises, because, if it has not interfered in any way with the natural condition of affairs, the overflow cannot be attributed to its act. A city is not liable for its failure to make new improvements or alter or reconstruct old ones. It may leave things just as it found them."

It will be observed that the petition does not show that the city made the drain complained of, or that it did any act in relation to it. For all that appears in the petition which must be read against the pleader, the drain may have been simply a natural drain or slope of the surface of the ground, which took off the water until it became filled up with debris washed down into it. The city must determine when and in what manner its streets shall be improved, and, while it is responsible to the property owner for the damages done by insufficient improvements which it makes, it is not liable merely for failing to improve the street or for suffering it to remain in the condition in which it found it. The circuit court therefore properly sustained the demurrer to the petition.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. PEDIGO.

(Court of Appeals of Kentucky. Oct. 1, 1908.)

1. APPEAL AND ERROR (§ 1004*)—VERDICT—AMOUNT OF RECOVERY.

Where a verdict appears to be the result of the jury's honest judgment, and not of passion or prejudice, it will not be disturbed on appeal as allowing an excessive recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

2. CARRIERS (§ 228*)—TRANSPORTATION OF HORSES—ACTION OF INJURIES—NEGLIGENCE—EVIDENCE.

Evidence held to show that horses were injured during transportation by the carrier's negligent handling of the car in its switching yard.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.*]

3. CARRIERS (§ 205*)—CARRIAGE OF LIVE STOCK—LIABILITY OF CARRIER.

A carrier undertaking to transport live stock becomes an insurer of its safe delivery, except where injury or loss results from the act of God or the public enemy, or from the inherent nature, propensities, or viciousness of the animals.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 923; Dec. Dig. § 205.*]

4. CONTINUANCE (§ 26*)—ABSENCE OF WITNESS—DISCRETION OF COURT—DILIGENCE.

Where an affidavit in support of a motion for a continuance on the principal ground of defendant's lack of time to prepare its defense named a witness who would testify to facts which were admitted in evidence in a deposition, and stated that there were other witnesses who would testify for defendant, without naming them or stating what they would testify to, and it appeared that plaintiff's claim was known to defendant several days before suit was brought

and two weeks prior to the beginning of the trial term of court, and it did not appear that defendant had taken any steps to procure the attendance of witnesses, the affidavit did not sufficiently show diligence, and the court acted within its discretion in denying the continuance.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 74-93; Dec. Dig. § 26.*]

Appeal from Circuit Court, Barren County.
"To be officially reported."

Action by A. W. Pedigo against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. H. Moorman, Benjamin D. Warfield, and Sims, Du Bose & Rodes, for appellant. Baird & Richardson, for appellee.

SETTLE, J. Appellee recovered of appellant in the court below a verdict and judgment for \$365 damages for injuries inflicted upon several horses, of which he was the owner, while in one of appellant's cars and being transported by it from Glasgow to Louisville for sale at that place. It was, in substance, alleged in the petition that the injuries received by the horses resulted from the negligence of appellant's agents and servants in charge of the car and train of which it was a part, and that its agents and servants "so negligently and carelessly operated and managed the car and line of railroad as to injure, lacerate, tear, bruise, scar, and damage said horses"; the amount of damages claimed being \$500. The answer merely traversed the material averments of the petition.

There were but two issues made by the pleadings. (1) Were the horses or any of them injured, and to what extent, while in appellant's car and under its control? (2) If injured, were such injuries caused by the negligence of appellant's agents and servants charged with the duty of operating the car and train in transporting them from Glasgow to Louisville, and delivering them to the consignee in the last-named city? As to these issues, the evidence was all one way. It clearly established appellee's contention that at least four or five of the nine horses were injured after the arrival of the train in Louisville, and while they were still in appellant's charge.

Appellant insists it should have been granted a new trial, and that it is entitled to a reversal, because the recovery was excessive. The injuries consisted of cuts, bruises, and other wounds upon the legs, breasts, and heads of the horses, which were sufficiently serious and permanent to disfigure and lame some of them, prevent the sale of two of them, and compel the appellee to sell others at considerably less than they would have brought if uninjured. If a jury had been waived and the law and facts submitted to the trial judge for decision, he would probably have limited the recovery to a sum

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

less in amount than was allowed by the verdict of the jury, but, while the amount of damages allowed by the jury was liberal, we are not prepared to say that it was so excessive as to indicate passion or prejudice on the part of the jury. On the contrary, in view of the evidence, we regard the verdict as the result of the exercise of an honest judgment upon their part. Hence we are not at liberty to disturb it upon the ground urged. *Ky. & Ind. B. & R. Co. v. Nuttall*, 96 S. W. 1131, 29 Ky. Law Rep. 1169; *L. & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; *L. & N. R. Co. v. Smith*, 84 S. W. 755, 27 Ky. Law Rep. 257. The manner in which appellee's horses received their injuries seems to be clearly shown by the evidence. Shirley, who was in charge of four horses of Warder, shipped in the same car with appellee's horses, testified that he rode to Louisville in the car with them, and that appellee's horses were injured after the train reached Louisville by the negligent and reckless handling or "kicking" of the car by appellant's servants in the switching yard after dark. He was strongly corroborated by Olliver and Phillips, both of whom were then present; Olliver being in charge of appellee's stock. According to the statements of all these witnesses, the car was "kicked" so hard that it knocked it several feet, jarred a man off a box in the car, threw Phillips and Shirley against each other, turned over a lantern, and broke an iron guy rod supporting the car. Shirley further testified that, when the car was "kicked," he heard a clattering among the horses, and that the injury to the car from the kicking was such that some repairing of it had to be done by appellant's servants before it could be removed to the proper place for unloading the horses, and not until they were unloaded did he, Olliver, and Phillips discover that they had been injured. It is manifest, therefore, that appellee's horses were injured by the kicking of the car at Louisville, and the evidence as to the manner in which it was done by appellant's servants amply justified the conclusion reached by the jury that in so striking the car they were guilty of negligence. So, in view of the evidence, appellant's contention that it does not support the verdict cannot be sustained. It is equally patent from the evidence that injury to the horses did not result from the causes for which the contract of shipment provides appellant shall not be liable, for it clearly demonstrates that the injuries they sustained were not caused by the inherent viciousness of the animals or any of them.

In *Stiles, Gaddle & Stiles v. L. & N. R. R. Co.*, 110 S. W. 820, 33 Ky. Law Rep. 625, this court, quoting with approval from the opinion in *C. N. O. & T. P. Ry. Co. v. Sanders & Russell*, 118 Ky. 115, 80 S. W. 488, said: "And the rule as now established by the great weight of modern authority is that railroad companies are common carriers of

live stock with substantially the same duties and responsibilities that existed at common law with respect to the carriage of goods, except that they are not liable as insurers against loss and injury resulting from the inherent nature, propensities, or proper vices of the animals themselves." So in Kentucky the rule is, as at the common law, that a railroad company or other common carrier undertaking to transport live stock becomes an insurer of its safe delivery, except where injury to or the loss of such live stock results from the act of God or the public enemy, or from the inherent nature, propensities, or viciousness of the animals themselves. In *C. N. O. & T. P. Ry. Co. v. Sanders & Russell*, supra, it was held that: "By section 196 of the Constitution of Kentucky they [common carriers] are prohibited from contracting for relief from any liability imposed upon them by common law. The provisions of the bill of lading relied on in the second paragraph of appellant's answer, that appellee should water and attend the stock at their own risk while in transit, and that they should send a man along to look after them, does not relieve the carrier from the duties imposed upon it by law to look after the stock. Their only effect is to shift the burden of proving negligence from the railroad company to the shipper." *Ray's Negligence*, 241; *L. & N. R. R. Co. v. Hawley*, 10 Ky. Law Rep. 117; *C. N. O. & T. P. Ry. Co. v. Grover*, 11 Ky. Rep. Law 236. And we may add that the provisions of the bill of lading or contract relied on by appellant in this case as exempting it from liability did not relieve it of the duty imposed upon it by law to safely transport and deliver appellee's stock, in view of the evidence that the injuries they sustained were caused by its negligent manner of operating the train, and not from the inherent nature, propensities, or viciousness of the animals themselves.

We cannot safely say that the trial court abused its discretion in overruling appellant's motion for a continuance. The affidavit filed in support of the motion names only one witness, Hudson, the consignee of appellee's stock, and the statements attributed to that witness were permitted to be read as a deposition. The statement was made in the affidavit that there were other witnesses who would furnish testimony in behalf of appellant; but their names were not mentioned, or statement made as to what facts beneficial to appellant were in their possession. Appellant's chief complaint in the affidavit is that it had not been given sufficient time to investigate appellee's claim, or to prepare its defense. It appears, however, that appellee's claim was made known to it several days before suit was instituted, and fully two weeks before the beginning of the term of court at which the case was tried, but it does not appear that appellant took any steps, by the issue of subpoenas or otherwise, to procure the attendance of witness-

es. It is not wide of the mark to say that appellant's counsel or agents ought at least to have been able to see the train crew or yard switchmen by whom the car containing appellee's horses was handled after its arrival at Louisville. They were doubtless in possession of such facts with respect to the operation of the car and condition of the horses as would have acquainted appellant with everything that was done in operating the car and delivering the horses to the consignee, yet the affidavit did not advise the court whether they were seen, or an effort made to see them. In brief, the affidavit was not sufficiently specific in its showing of diligence to justify us in holding that the trial court abused its discretion in refusing the continuance.

There were but two instructions given by the court. The first advised the jury in what state of case they might find for the plaintiff. The second defined the measure of damages. Both are substantially correct, though the first might have been made to present the law in more elaborate form.

Finding no cause of reversal, the judgment is affirmed.

THAXTON'S GUARDIAN et al. v. WALTERS' ADM'R.

(Court of Appeals of Kentucky. Nov. 6, 1908).

EXECUTORS AND ADMINISTRATORS (§ 180*)—ALLOWANCE TO SURVIVING WIFE, HUSBAND, OR CHILDREN—"WIDOW"—"MOTHER"—PERSONS ENTITLED—STATUTES.

The exemption allowed by Ky. St. 1903, § 1403, subsec. 5, to be set apart to "the widow or infant child" from the estate of an intestate, to the infant child, if no "mother" survives, and to the "widow" if there be no infant children, or if none reside in the family with the "widow," does not apply to the husband and children of the intestate wife.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 672; Dec. Dig. § 180.*

For other definitions, see Words and Phrases, vol. 5, p. 4609; vol. 8, pp. 7457-7459.]

O'Rear, C. J., and Nunn, J., dissenting.

Appeal from Circuit Court, Bath County.
"To be officially reported."

Proceedings between A. J. Thaxton's guardian and another and Ella Walters' administrator. From an adverse judgment, the former parties appeal. Affirmed.

McMillan & Talbott, for appellants. C. W. Goodpastor, for appellee.

SETTLE, J. Mrs. Ella Walters died June 5, 1907, in Bath county, Ky., intestate. F. S. Allen, by an order of the Bath county court, was appointed and duly qualified as administrator of her estate. She owned at the time of her death real estate worth \$1,500, personal property of the value of \$5,000, and was indebted to various persons amounting

in the aggregate to \$1,200. The intestate was twice married, and was survived by her second husband, Richard Walters, and also by a son born of the first marriage A. J. Thaxton. The latter being an infant, E. M. Ingle was appointed and duly qualified as his statutory guardian. In this case the infant, A. J. Thaxton, and his statutory guardian, assert against the administrator of the estate of Ella Walters, deceased, for the use of the former, claim to the articles of personal property declared by subsection 5, § 1403, Ky. St. 1903, exempt from distribution and sale, and directed to be "set apart to the widow or infant child or children by the appraisers of the estate of an intestate. * * *" The same subsection provides: "If there is an infant child or children, and no mother surviving, there shall be set apart for the support of such infant child or children, the articles aforesaid; and if such articles are not on hand, then other articles or money shall be set apart in lieu thereof; but in no case shall appraisers set apart to either widow, child or children, property or money in lieu of the articles allowed by law, of greater value in the aggregate than \$750.00. Widows without children shall have the property aforesaid set apart to them, the same as if they had infant children residing in the family, except there shall not be anything set apart for the support of infant children, if there be none residing in the family with the widow. * * *" The administrator denies the right of the infant to the property claimed, and upon the issue thus formed, and a written agreement presenting the facts relating to the controversy, the case was submitted for the circuit court's decision. By the judgment rendered that court rejected the claim of the infant, and awarded the administrator his costs against the guardian; and from that judgment this appeal is prosecuted.

The question presented has never been passed on by this court, and, while the construction given the statute by appellants' counsel is plausible, we are forced to concur in the conclusion reached by the circuit court as to its meaning and effect, viz., that its sole object was to make an allowance to the widow and infant child or children of the intestate husband and father out of his property in addition to what they otherwise receive. Howland's Adm'r v. Harr, etc., 123 Ky. 732, 97 S. W. 358. When the statute in question was enacted, the husband, upon the death of the wife, became the owner of her entire surplus personal estate, regardless of whether she left issue; while she as the survivor took one-half of the husband's surplus personal estate, if he died without issue, but only a third of such surplus if he left issue. Perhaps this advantage given the husband and his presumed ability as the head of the family and legal custodian of his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

children to protect and support them caused the Legislature to omit from the statute the same special allowance out of the wife's personal estate to him and her children provided for the widow and children out of his property. The wife upon the death of the husband becomes the head of the family, and the duty that had previously rested upon the husband to provide a support for her and children falls upon her; but the deprivation to her and them by the death of the husband and father of the protection and support which he, as the head of the family, had been wont to provide them, and her presumed inexperience and consequent inability to perform as he had done the duties of which while living he had relieved her, doubtless gave occasion for the special provision made by the statute for her as widow, or, in case of her not surviving the husband, for his child or children. It will be observed, too, that the special provision made by the statute for the benefit of the widow and child or children applies to the exclusion of the husband's creditors, when his personal estate is insufficient to pay his debts. Since the enactment of the statute, *supra*, the law of this state with respect to the property rights of husband and wife have been so amended as to give the husband upon the death of the wife one-half of her surplus personal estate, and to her as the survivor one-half of his surplus personal estate. Section 2132, Ky. St. 1903. But this change does not repeal or conflict with subsection 5 of section 1403, which contains the provision setting apart certain property therein enumerated to the widow of an intestate, if living, or, if not, to his child or children. Whether the Legislature acted wisely in excluding the husband and children of the intestate wife from the benefits conferred by subsection 5, § 1403, Ky. St. 1903, is a matter we are not called upon to determine. The proper construction of the statute is all that concerns us, and we think its language allows of no other meaning than that we have given it.

If we were to construe the statute as counsel for appellants contend—that is, so enlarge its meaning as to hold that its provisions apply to the surviving husband, as well as the surviving wife of an intestate—such a construction would defeat the infant appellant's claim in this case; for the statute plainly directs that the property exempt from distribution or sale shall be set apart to the widow where there are no infant children of the intestate, or if there are children, and they do not reside with her. The property cannot be set apart to the infant child or children of the intestate where there is a "mother surviving." So if, for the purpose of arriving at the construction demanded by appellants, we were to substitute the word "widower" or "surviving husband" wherever the word "widow" occurs in the

statute, and the word "father" where the word "mother" occurs, the construction would result in giving the property in question to Richard Walters, the surviving husband of the intestate and stepfather of the infant appellant, to the exclusion of the latter. An illustration of our meaning is furnished by the case of *Alexander's Guardian v. Alexander's Adm'r*, 86 Ky. 688, 7 S. W. 156. Lucien Alexander died, leaving his widow and a child five years old by a former wife surviving him. The child lived with its grandparents, and, when the appraisers were called on to set apart the exempt property, the circuit court required them to give one half of it to the widow and the other half to the infant. Upon the appeal this court held that the widow was entitled to the whole of the exempt property; and that, as the infant did not reside with her, it was not entitled to the property thus set apart or any interest therein, although it was but a stepchild of the widow, and she was under no obligation to support it.

After all, the question of whether or not the infant appellant would, if the mother had died a widow, be entitled to the exemption claimed, as against her creditors, is not here directly involved; but the main and direct question is whether the exemption allowed by the statute should be made to apply to the husband and children of the intestate wife, as it does to the widow and children of an intestate husband. To this question we have, and we think correctly, given a negative answer; but, as previously stated, had an affirmative answer been given to it, the infant appellant would not thereby be benefited as under the authority of *Alexander's Guardian v. Alexander's Adm'r*, *supra*, his stepfather would in that event be entitled to the exemption.

Finding no error in the judgment complained of, it is hereby affirmed.

O'REAR, C. J., and NUNN, J., dissenting.

JACKSON BAPTIST CHURCH v. COMBS' EX'R.

(Court of Appeals of Kentucky. Nov. 10, 1908.)

1. GIFTS (§ 49*)—EVIDENCE—WEIGHT.

Evidence held to show that expenditures by decedent upon a church building were gifts, and not loans.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.*]

2. EVIDENCE (§ 271*)—SELF-SERVING DECLARATIONS—ADMISSIBILITY.

In a suit to recover a loan claimed to have been made by decedent, testimony that he stated to witnesses that the money was a loan, and not a gift, was inadmissible; such self-serving declarations, unless made in the presence of the opposite parties, being as incompetent in the executor's behalf as they would be in decedent's behalf if living.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1064; Dec. Dig. § 271.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appel from Circuit Court, Breathitt County.

"To be officially reported."

Action by William M. Combs' executor against the Jackson Baptist Church. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to dismiss.

A. H. Patton and J. M. Stevenson, for appellant. Kash & Kash, J. J. C. Bach, and W. W. McGuire, for appellee.

SETTLE, J. The appellee, Breck Combs, executor of the will of Wm. M. Combs, deceased, by an action instituted in the Breathitt circuit court against appellant, the Jackson Baptist Church, its trustees and congregation, sought to recover of the church a claim of \$150 owing by it to the estate of the testator secured by a lien upon the church lot and building, and the further sum of \$2,204.05, alleged to be due upon account for moneys loaned appellant by the testator, and all of which was expended in the erection of the church building. Judgment was asked against the church for both debts, and also for the enforcement of the lien upon the lot and church building in satisfaction of the demand of \$150. Shortly after the institution of the action appellant paid and satisfied the lien debt of \$150, and thereupon filed an answer denying liability upon the account of \$2,204.05, and averring that the whole thereof was a gift or contribution from Wm. M. Combs to appellant for the erection of the church building. Depositions were taken by the parties, and the case otherwise prepared for trial in all respects as an action in equity, although the payment by appellant of the \$150 lien debt eliminated from the case the only matter of equitable jurisdiction. Upon the hearing the circuit court gave appellee judgment against appellant for \$1,712.29, with 6 per cent. interest from August 8, 1903, until paid, and costs, thereby in effect deciding that the difference between that sum and the amount of the account sued on had been donated by Wm. Combs to the church. Appellant complains of so much of the judgment as requires it to pay \$1,712.29, interest, and costs; hence this appeal.

It appears from the record that the Baptists of the city of Jackson who were prior to the summer of 1902 without a house of worship then undertook the work of erecting a suitable brick church. Not being people of wealth, they found it necessary to yield to the very proper custom of accepting financial assistance from members of other churches and persons not connected with any church. Among those rendering such assistance was Wm. M. Combs, an aged and wealthy resident of Jackson, who, though not then a member, was a strong believer in the doctrines of the Baptist Church and a generous contributor to its various enterprises, particularly church erection. Mr. Combs became quite active in urging the building of the Jackson Baptist

Church. At the beginning he, by deed, conveyed the church a lot for its house of worship valued at \$300, donating to it one-half of this sum and retaining in the deed a lien upon the lot for the remaining \$150. He was elected a member of the building committee, and, as the work of building the church progressed, dictated the policy of the committee, and practically controlled the arrangement of the building, its material, and cost. At such times as the committee was without funds he would pay the bills out of his private means, often telling them he intended the amounts thus paid as donations to the church. Before the building was fully completed, a series of revival meetings were held in it, following which the old man was received by baptism into the church, and his name enrolled as a member of the congregation. At one time he paid to a Cincinnati firm a bill of \$300 for pews supplied the church, and at the same time also paid the cost of putting in the building two extra windows near the pulpit. Combs kept an itemized account of his expenditures on and for the church, interest being calculated on each item; and this account he delivered after the completion of the building to J. S. Head, cashier of the Jackson Deposit Bank, also a member of the building committee, without explanation of his purpose in so doing, or any direction as to the disposition to be made of it. The statement remained in the possession of Head for more than a year after the death of Wm. M. Combs, and until it was taken in possession by his son and executor, the appellee, Breck Combs, who brought suit upon it as previously stated.

The question for decision is: Were the various expenditures made by Wm. M. Combs upon the church building contained in the statement referred to donations or gifts to the Jackson Baptist Church, or merely loans it was expected to repay? We must, of course, look to the evidence for an answer to this question. The only competent evidence furnished by the record strongly conduced to prove that all the expenditures made by Wm. M. Combs upon the church building in question were intended by him as donations or gifts to the Jackson Baptist Church. Several witnesses testified that he more than once, in substance, declared during the work of erection that the expenditures were gifts from him. Some of these declarations accompanied payments of money expended by him on the building, while others did not; but practically all were made while the building was under way and in conversations with respect to such matters as the cost of it, where the money was to be obtained to complete it, or how much had been or would be contributed by him. A notable instance of such declaration of a gift was made by the donor when he paid for the pews and extra windows. His attorney of years' standing, McGuire, in his deposition admits this payment was a gift.

Besides, several of appellant's witnesses, who were present when the pews were paid for, so testified. Indeed, the circuit court refused to give appellee judgment against appellant for the amounts expended by Combs upon the pews and extra windows upon the ground that they were gifts. Yet we find these items with all other expenditures made by Combs to the church building charged upon the statement left by him with Head. If the sums expended upon the pews and extra windows, appearing as charges on the account against appellant, were nevertheless, as proved and admitted, gifts, what reason is there for concluding that the other items of charge contained in the account were not also gifts?

In addition to the evidence referred to, such witnesses as Revs. J. B. Bow, A. S. Patry, and G. W. Argabright, all ministers of high standing in the Baptist Church, testified that in conversations with Mr. Combs shortly before and just after the completion of the church he, in substance, told them that what he had expended thereon had been donated, or that the church would not be called on to pay it. To Mr. Argabright he explained that he had to make his children believe he had loaned the church the money he expended on the building, but that he was in fact giving it to the church. With Dr. Bow, his intimate friend Bailey, who served with him upon the building committee, and his nephew, G. P. Combs, a deacon of the Jackson Baptist Church, Wm. M. Combs agreed that he would make a gift to the church of what he had expended and would expend upon it, if they would erect a marble slab upon its wall containing the words: "Wm. M. Combs Baptist Church." They promised to do this, and did in fact afterwards place the marble slab in the wall containing the indicated inscription. To W. H. Whittaker, a barber into whose shop Wm. M. Combs went with a bundle of papers in his hand, he said he had just been to the bank to discount some notes that were outstanding against the Baptist Church; that the people were afraid they were going to lose the church, but that they need not be afraid, (for) he intended giving it to them; that he built one small meetinghouse in the country named for him, and wanted a larger one in town. It appears from the evidence that Combs had several years previously helped to build a country Baptist church which contains a tablet with an inscription similar to that on the tablet placed in the wall of the Jackson church; and that in erecting the country church he had kept, as in the building of the Jackson church, an itemized account of the sums contributed by him to the work, which was all given the church. It is a singular fact that, though Mr. Combs kept a ledger or account book in which entries were made of his many business transactions, no entries were ever made therein of the sums he expended upon the

Jackson Baptist Church. They seemed to have been kept wholly upon the sheet of paper he handed Head of the building committee. Why was this amount kept upon a sheet of paper, and not upon his books, and why was the sheet of paper containing the account handed to Head with them, or in whose bank he had no other papers? There is some force in the argument advanced by counsel for appellant that the statement was simply to show the church the amount he had put in the building, and that it was never entered upon his ledger because he did not wish his executor upon coming into possession of the ledger to find it there, and think it his duty to collect it. The only evidence introduced by appellee that tends in any way to show that the sums expended by Wm. M. Combs upon the Jackson church were loans, instead of gifts, were the statements found in the depositions of some of his children and those of McGuire and Snowden, to the effect that the decedent had in conversations with them declared them loans. The purpose of these declarations was explained by the deposition of Minister Argabright to whom the decedent said that he had, in order to satisfy his children, allowed them to think the sums he had given the church loans. The lower court very properly sustained exceptions to what the witnesses named said as to these declarations of decedent for such self-serving declarations, unless made in the presence of the opposite parties, were no more competent in behalf of the executor than they would be in behalf of the decedent, if living. *Civ. Code Prac. § 606; N. Y. Life Ins. Co. v. Johnson's Adm'r*, 72 S. W. 762, 24 Ky. Law Rep. 1867, and cases there cited. In view of the exclusion of the evidence of these declarations of the decedent, we are at a loss to know upon what the lower court based its judgment; for all other evidence in the case authorized a judgment in behalf of appellant, as it clearly manifested such acts and declarations on the part of the decedent, accompanying and following the expenditures upon the Jackson church, as proved that they were gifts and were accepted by the church as such. In addition, it was not unreasonable that the decedent should have made so generous a contribution to the erection of the Jackson Baptist Church. He had reached a ripe old age, accumulated a large estate, liberally provided for his children, and had still more to leave them; and having lived out of the church until the last year of his life, it was but natural that he should have desired to do large things for the church of his choice before being overtaken by death. According to the evidence, he felt great pride in what he had done for the church, and was gratified beyond measure that the congregation placed in the wall of the church a tablet of marble that would perpetuate the memory of his generosity as

long as the Jackson Baptist Church may exist.

Being of the opinion that the judgment of the lower court is against the weight of the evidence, it is hereby reversed and cause remanded, with directions to dismiss the petition.

CONNOR v. NATIONAL ROOFING & SUPPLY CO.

(Court of Appeals of Kentucky. Nov. 11, 1908.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT—CONFLICTING EVIDENCE—CONSTRUCTION OF CONTRACT.

A verdict on conflicting evidence as to the meaning of an ambiguous phrase in a contract, introduced without objection of appellant, and on proper instructions, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

2. PLEADING (§ 146*)—ACTIONS FOR BREACH OF CONTRACT—COUNTERCLAIM—ALLEGATION OF DAMAGE.

In an action on a building contract by a subcontractor against a general contractor, a counterclaim, merely alleging that plaintiff did not do its work according to the contract, and that defendant was damaged thereby in a certain sum, without alleging how he was damaged, does not state a cause of action, since under the rule that every intendment in a pleading is taken against the pleader, it must be assumed that the one for whom the work was done accepted and paid defendant for it without requiring him to make good the defects, in view of which defendant would sustain no damage.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 294-296; Dec. Dig. § 146.*]

3. PLEADING (§ 8*)—CONCLUSIONS.

An allegation that plaintiff was damaged in a stated sum is a mere conclusion.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 8.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by the National Roofing & Supply Company against J. W. Connor. Judgment for plaintiff, and defendant appeals. Affirmed.

Morton K. Yonts, for appellant. William W. Crawford, for appellee.

BARKER, J. This action was instituted by the National Roofing & Supply Company, a corporation engaged in the business of roofing and concrete construction work, against J. W. Connor, for a balance of \$1,504.98, alleged to be due it from him under a written contract. Connor is a general contractor, who had obtained the contract for building the West Louisville Brewery. In the summer of 1905 he requested bids of appellee on certain portions of his work, with the result that the following contract in writing was entered into between the parties litigant: "Louisville, Ky., Aug. 18/05. Mr. J. W. Connor, City—Dear Sir: Revised Bid for the West Louisville Brewery. We propose,

confirming our conversation and verbal contract of this morning, to erect the Hollow Tile on Floors and Insulation Walls, to emplace a 1" thickness of pitch over same, to plaster the walls, construct concrete foundation walls, concrete walls for machinery, cinder concrete floors, reinforced concrete walls, reinforced concrete floors with asphalt top and gravel concrete floor, according to the plans and specifications prepared for the same, for the sum of five thousand and seventy-eight dollars and eighty cents (\$5,078.80). It is further agreed that if the sand and concrete gravel can be purchased for a less sum than \$1.10 for sand and \$1.25 for gravel per cubic yard, the difference is to be credited to Mr. J. W. Connor. Respectfully submitted, National Roofing & Supply Co., per R. M. Turpin." Appellee alleged in its petition that it had performed all of its contract with appellant, and that the latter had paid it all of the contract price except the sum of \$1,504.98, which he refused to pay, and which it alleged was due and unpaid. Appellant in his answer denied the full completion of the contract by appellee, and traversed the indebtedness as alleged in the petition. In the second paragraph he alleged that the work done by appellee was so unskillfully performed that the asphalt and cement work cracked and leaked, and the floors were not laid with the proper pitch so as to carry off the water to the drain pipes, and that by reason of this defect the water stood in pools upon the floor. Several other defects were minutely pointed out, by all of which he alleged that he had been damaged in the sum of \$3,000, which he set up as a counterclaim, and for which he prayed judgment. The appellee placed in issue the affirmative allegations of the answer, and a trial before a jury resulted in a judgment in favor of the appellee for \$1,504.98, credited by \$500 allowed as damages on the counterclaim.

The appellant's defense that the appellee did not complete its contract according to the terms of the writing sued on is based upon a difference of construction of the paper by the respective parties to it. The following words of the contract contain the matter of contention: "To erect the hollow tile on floors and insulation walls." Appellee construes these words to mean that he was to erect the hollow tile on the floors and the hollow tile on the insulation walls; whereas the appellant contends that the words mean that appellee was to erect the hollow tile on the floors and to erect the insulation walls. If the appellee's construction is correct, then it is not seriously denied that it has fulfilled its part of the contract in so far as the completion of the work is concerned; but if the appellant's construction is correct, then it is admitted that the appellee has not completed the contract according to its terms. While we think it would be difficult for appellant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to show that the words in question do not plainly mean what the appellee contends for, we need not stop here to investigate that question. Evidence for and against the respective contentions was introduced without objection, certainly not from the appellant, and the court instructed the jury correctly, as is expressly admitted by appellant in his brief, and they found in favor of the contention of appellee. We think their verdict is clearly right; but, if we were less sure of the soundness of that position, we would not feel at liberty to invade the province of the jury, who were properly instructed, as is admitted, and who found adversely to appellant.

On the subject of the counterclaim the appellant obtained a judgment for \$500. He was not entitled, under his pleading, to recover anything, as his counterclaim clearly fails to state a cause of action against appellee, and the court should not have submitted his right to recover to the jury; but, as appellee is not complaining of this error, we need not linger upon it. The allegations as to the counterclaim are as follows: "The defendant states that pursuant to said contract of date August 18, 1905, the plaintiff undertook to do the work of construction of the hollow tile on the floors of the West Louisville Brewery, but has failed and refused to construct and build the said hollow tile in said floors in accordance with the terms of said specifications and plans, and has failed to construct the said hollow tile in said floors in a skillful and workmanlike manner, and has so constructed the said hollow tile in said floors that the floors have cracked and become uneven, and large fissures have appeared in the said floor; that the said floors have no fall to the drainage, but in many places conduct the water away from the drains, thereby forming cesspools instead of conducting the water toward the drain, and the plaintiff has failed and refused to place any coves around the walls of said building, as required by the plans and specifications, and has failed to erect the cove around the columns, as required by said plans and specifications, to prevent the water running through the same, and has failed and refused to construct the foundation in the way and manner required by said plans and specifications, and has so laid and constructed the said foundation in such an unskillful and unworkmanlike manner that the same are badly cracked, and has damaged the said building thereby, and defendant states that the plaintiff has broken the terms of his contract and agreement in the failure to carry out the said contract in the way and manner and in the details above mentioned, and has thereby damaged the defendant in the sum of \$3,000, and defendant states that this claim arises out of the said original contract, by reason of the unskill-

ful and unworkmanlike and improper manner of carrying out the terms of said contract, which he has lately discovered, and is now able for the first time to show in pleading and proof, and that defendant has been damaged thereby in the sum of \$3,000, and defendant makes this answer his counterclaim over against the plaintiff in the sum of \$3,000, and prays that plaintiff's petition be dismissed, and for judgment over against it in the sum of \$3,000, for his costs herein, and for all other proper relief."

Now, bearing in mind that the appellant, Connor, was the general contractor, and the appellee, the roofing company, was a subcontractor for a part of the work, it is perfectly plain that the foregoing allegations do not state a cause of action against the appellee. It is true he alleges certain defects in the work, which he specifically points out, and also alleges that this defective work has damaged him in the sum of \$3,000. But how has it damaged him? He does not allege that the West Louisville Brewery Company did not accept the defective work and pay him for it; and, for ought that appears to the contrary, the brewery company may not have considered the work defective at all, and it may have paid the general contractor, Connor, every dollar of the contract price, and yet every word of the counterclaim may be true. Under the well-settled rule of pleading that every intendment is taken against the pleader we must assume that the brewery company has received and paid for the work, because of the failure of the appellant to allege that it has not done so. There is no allegation in the pleading tending to show that the appellant has been called on to make good the bad work of the roofing company, or that he will be called on so to do. The allegation, that the defendant has been damaged in the sum of \$3,000 is a mere conclusion of the pleader, and avails him nothing on this issue. The appellant got \$500 more than he deserved, and has nothing of which to complain.

Judgment affirmed.

TUCKER v. WITHERBEE et al.

(Court of Appeals of Kentucky. Nov. 11, 1908.)

1. MORTGAGES (§ 6*)—DEED AS MORTGAGE—"MORTGAGE"—"CONDITIONAL SALE."

A deed was a mortgage, and not a conditional sale, where it was given to secure payment for a horse, recited a consideration of "\$110 cash or its equivalent," a horse, describing it, contained the ordinary recitals of a warranty deed, and recited that the grantee should hold the land for 1½ years and reconvey on payment of \$118.60 "being purchase price hereof and necessary recording fee."

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 5; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4596-4607; vol. 8, p. 7725; vol. 2, pp. 1408-1410.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. MORTGAGES (§ 6*)—DEED AS MORTGAGE.

While parties competent to contract can agree upon terms that will amount to a conditional sale, where a deed is intended to secure a debt, and the relation of debtor and creditor exists between the parties, the legal inference is that a mortgage and not a conditional sale was intended; courts being inclined in doubtful cases to treat a transaction as a mortgage rather than a conditional sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 5; Dec. Dig. § 6.*]

3. MORTGAGES (§ 608½*)—DEED AS MORTGAGE—ESTOPPEL.

Though a deed was given in 1893 and provided for a reconveyance within 1½ years, the grantor was not estopped by laches in 1907 to sue to have the deed adjudged to be a mortgage, his failure to tender the debt and demand a reconveyance being no more important than the grantee's laches in failing to sue to enforce his lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

4. MORTGAGES (§ 608½*)—DEED AS MORTGAGE—TENDER OF DEBT—NECESSITY FOR.

In suing to have a deed adjudged to be a mortgage, grantor need not tender the amount of the debt, since the grantee has a lien as security for his debt, and may look to that if grantor is insolvent.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815; Dec. Dig. § 608½.*]

5. QUIETING TITLE (§ 12*)—POSSESSION OF LAND—NECESSITY FOR.

That plaintiff is not in possession of the land does not prevent him from suing to have a deed adjudged to be a mortgage, to cancel a deed by the grantee to a third party, and to quiet plaintiff's title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 8; Dec. Dig. § 12.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action by Ed. Tucker against S. O. Witherbee and another. From a judgment dismissing the petition, plaintiff appeals. Reversed and remanded, with directions.

Kinney & Thomas, for appellant. O'Neal & O'Neal, Helm & Helm, and Benjamin D. Warfield, for appellees.

CARROLL, J. In 1893 Tucker purchased a horse from Witherbee for \$110. To secure the payment of this sum, he executed to Witherbee a deed, conveying to him a small parcel of land. The deed recites: "The said party of the first part for and in consideration of \$110.00, cash, or its equivalent, to wit: one sorrell mare blazed face and both hind feet white, the receipt of which is hereby acknowledged, does hereby sell, grant and convey to the party of the second part, his heirs and assigns forever, the following described property, to wit: * * * To have and to hold the same with all the appurtenances thereunto belonging unto the party of the second part, his heirs and assigns forever; and the said party of the first part hereby warrants the title to the property hereby conveyed unto the said second party, his heirs and assigns forever. It is further

agreed by the parties hereto that said Tucker is to pay taxes due on said land for 1892, 1893, 1894, and recording fee of this deed. The said Witherbee hereby agrees to hold said land for one year and a half, and to sell same to Tucker at the end thereof, provided he shall then pay him cash \$118.60, being purchase price hereof and necessary recording fee." This instrument was in due time put to record in the proper office. In 1904 Witherbee sold a part of this land to the Louisville & Nashville Railroad Company. In 1907 Tucker brought this action against Witherbee and the railroad company, setting up that he was the owner of the land and entitled to the possession of it, and asking that the deed made to the railroad company be canceled, that his title be quieted, and that Witherbee be required to answer and assert any lien he had against the land.

At the time Tucker executed the deed to Witherbee the land was uninclosed, and no person resided on it. Nor was any of it inclosed at any time until the railroad company inclosed the part purchased by it. A general demurrer was sustained to the petition, and, declining to plead further, judgment was rendered dismissing it.

The appellant Tucker insists that the writing was a mortgage, and that Witherbee's remedy was the same as that of any other mortgagee; that if he wished to collect his debt, he should have brought suit to enforce his lien upon the land. The contention of appellees is that the writing was a conditional sale, with the privilege upon the part of Witherbee to redeem the land at any time before the expiration of 18 months from the date of the writing, and, having failed to redeem it within that time, the title vested in Witherbee. The relation of debtor and creditor existed between the parties at the time the writing was executed. It shows on its face that it was intended merely as security for the purchase price of the horse, and that it was contemplated by the parties that this price should be paid within the time named. The paper has many of the distinguishing features of a mortgage, and we think it was in fact so intended to be. In doubtful cases the inclination of the courts is to consider the transaction a mortgage rather than a conditional sale, because such construction will more frequently attain the ends of justice and prevent oppression. It is safer to say that a paper having the characteristics of a mortgage is in fact a mortgage than to say it is a conditional sale; and the courts will not look around for reasons in case of doubt to construe a paper to be a conditional sale, when it can with as much, if not more, propriety be said to be a mortgage. The question is in many cases a very narrow one, and often the line between conditional sales and mortgages is not well defined. There is no doubt that parties com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

petent to contract can agree upon terms that will amount to a conditional sale, as is illustrated by the case of *Prince v. Bearden*, 1 A. K. Marsh. 169, and *Conway v. Alexander*, 7 Cranch (U. S.) 218, 3 L. Ed. 821. But, where the instrument is intended as security for the payment of a debt, and the relation of debtor and creditor exists between the parties, the legal inference is that a mortgage, and not a conditional sale, was intended. The rule is very well stated in *Boone on Mortgages*, § 39: "A court of equity will often pronounce that to be an equitable mortgage which at law would be considered a conditional sale, and in all doubtful cases a contract will be construed to be a mortgage rather than a sale, because such a construction would be most apt to attain the ends of justice and prevent fraud and oppression. As a general rule, a deed absolute in form, if intended to secure the payment of money, and the relation of debtor and creditor exists between the grantor and the grantee at the time of its execution, will be treated as a mortgage. But, where no such relation exists, and the grantor and grantee at the time of the execution of the deed agree in writing that the grantor shall have the option to repurchase in a given time at a certain price, the transaction will be deemed a conditional sale. Each case of this character must, however, be decided in view of the peculiar circumstances which belong to it, since the only safe criterion is the intention of the parties." And so in *Jones on Mortgages*, § 258, it is said: "Whether a conveyance is a mortgage or a conditional sale must be determined by a consideration of the peculiar circumstances of each case. A glance at the numerous adjudications in controversies of this kind will suffice to show that each case must be decided in view of the peculiar circumstances which belong to it and marks its character, and the only safe criterion is the intention of the parties to be ascertained by considering their situation and the surrounding facts, as well as the written memorials of the transaction." In *Honore v. Hutchings*, 8 Bush, 687, the court used this language: "The distinction between a conditional sale and a mortgage as drawn by *Greenleaf* is that 'where the debt forming the consideration of the conveyance still subsists, or the money is advanced by way of a loan, with a personal liability on the part of the borrower to repay it, and by the terms of the agreement the land is to be reconveyed on payment of the money, it will be regarded as a mortgage; but, where the relation of debtor and creditor is extinguished, or never existed, there a similar agreement will be considered as merely a conditional sale.'" In *Tygret v. Potter*, 97 Ky. 54, 29 S. W. 976, in considering the question whether a writing evidenced a conditional sale or a mortgage, the court said: "It is often difficult to

determine the intent of the parties with reference to conveyances of this character. It is a well-settled rule of equity that, when doubt arises as to whether the writing is a sale or mortgage, that doubt is resolved in favor of the debtor and the writing construed to be a mortgage." To the same effect is *Edrington v. Harper*, 3 J. J. Marsh. 353, 20 Am. Dec. 145; *Sebree v. Thompson*, 104 S. W. 781, 31 Ky. Law Rep. 1146.

It is also urged in support of the judgment below that Tucker was guilty of such laches as amounts to an estoppel or waiver upon his part of the right to insist that the paper shall be construed to be a mortgage. It is true that Tucker might at any time have tendered the money which the conveyance secured and demanded a reconveyance, but his failure to do this does not estop him. His laches was not any greater than that of *Witherbee*, who might at any time have brought suit to enforce his lien and obtained a sale of the land to satisfy his debt.

Nor was it necessary that Tucker in bringing this suit or before should have tendered the amount due *Witherbee*. *Witherbee* has a lien as security for his debt, and may look to that if Tucker is insolvent. Nor is the point well taken that the action cannot be maintained, because Tucker, although suing in part to quiet his title, was not in possession of the land. The relief sought in part is a cancellation of the deed made by *Witherbee* to the railroad company, and upon this point we deem it sufficient to cite the cases of *Herr v. Martin*, 90 Ky. 377, 14 S. W. 356; *Packard v. Beaver Valley L. & M. Co.*, 96 Ky. 249, 28 S. W. 779; *Eversole v. Virginia Iron, Coal & Coke Co.*, 122 Ky. 649, 92 S. W. 593; *Fox v. Cornett*, 92 S. W. 959, 29 Ky. Law Rep. 246.

Wherefore the judgment is reversed, with directions to overrule the demurrer to the petition, and for further proceedings in conformity with this opinion.

COMLEY et al. v. AMERICAN STANDARD ASPHALT CO.

(Court of Appeals of Kentucky. Nov. 10, 1908.)

1. MUNICIPAL CORPORATIONS (§ 487*)—STREET IMPROVEMENTS—ASSESSMENTS—REAPPORTIONMENT—PURCHASERS—LIABILITY.

Purchasers of land, after payment of a street assessment against it cannot complain of a reapportionment, resulting in an additional assessment, because at the time of assessment neither they nor their vendor were parties to the action involving the proceeding, since, if the reapportionment was made according to a former opinion of the Court of Appeals, and equally upon all the property on both sides of the street, it is immaterial when it was made; the purchasers not claiming that the assessment was erroneous, but they are not precluded by the assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1146; Dec. Dig. § 487.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. MUNICIPAL CORPORATIONS (§ 487*)—STREET IMPROVEMENTS — ASSESSMENTS — REAPPORTIONMENT—PURCHASERS—LIABILITY.

Under Ky. St. 1903, §§ 2834, 2839, providing that a street assessment lien shall exist from the date of the apportionment warrant, where an apportionment was adjudged a nullity, the statutory lien for additional assessments existed when the second apportionment was made, and collection of a warrant under the first apportionment did not release the lien as to purchasers of land after the first assessment was paid and before the reapportionment, since they knew that the street had been improved, and that there was a lien against the abutting lots to secure payment of the cost, and they were presumed to know that it was a lien until legal assessment of the cost and payment thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1146; Dec. Dig. § 487.*]

3. COVENANTS (§ 100*)—WARRANTY—BREACH—STREET ASSESSMENTS—REMEDY OF PURCHASER.

If purchasers are required to pay an additional street assessment on a reapportionment after their purchase and after payment of the purchase price, they have recourse against their vendor on her warranty.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 148; Dec. Dig. § 100.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by the American Standard Asphalt Company against J. E. Comley and others. From a judgment sustaining a demurrer to their answer, defendants Comley and wife appeal. Affirmed.

E. L. McDonald, for appellants. Wm. Furlong and John L. Woodbury, for appellee.

NUNN, J. In the year 1904 the city of Louisville by appropriate proceedings caused the original construction of the carriage-way of Rosewood avenue, from Baxter avenue to Von Borries avenue. The ordinance provided for the improvement to be made at the cost of the owners of the abutting land as provided by law. After the completion of the improvement and the acceptance of the work by the city of Louisville, the board of public works of that city apportioned the cost of the improvement pursuant to their idea of what the term "according to law" shown in the ordinance meant. Their construction of this term resulted in an assessment against the property on the West side of Rosewood avenue, from Baxter avenue to Von Borries avenue, extending back westwardly to a line half way to Beechwood avenue, and on the east side of Rosewood avenue, from Baxter avenue to Von Borries avenue, extending back to a line midway to Edenside avenue. This court, in an opinion delivered in the case of the City of Louisville v. American Standard Asphalt Co., 102 S. W. 806, 31 Ky. Law Rep. 133, reached the conclusion that the territory on the east side of Rosewood avenue, which was assessed for

the cost of the improvement, was so large that it could not be considered a square, within the meaning of the charter of cities of the first class, and the court directed a reapportionment over a new district, comprised of the same territory on the west side of Rosewood avenue and an equal distance on the east side of that avenue. On a return of the case to the lower court this reapportionment was made, as a result of which the Schusters, on the east side, were released from a considerable portion of the cost of the improvement, and consequently the amount from which they were released was placed proportionately upon the property on the west side, which increased the assessment for the cost of the improvement to that extent. The warrants issued by the board of public works for the cost of the improvement, as first assessed, were delivered to the asphalt company, and the persons owning property on the west side paid their assessments and had a release of the liens on their property entered on the record in the office of the board of public works. After this, and before the second assessment was made under the opinion of this court, one Emma Detrich, an owner of one of the lots on the west side of Rosewood avenue, sold and conveyed the lot for a valuable consideration to appellants in this appeal. After this second assessment and apportionment was made, appellee, American Standard Asphalt Company, filed an amended petition, making all the property owners on the west side parties defendant to the action, and asked for an enforcement of their liens upon their property for the additional assessment. Appellants, Comley and wife, resisted the payment of this assessment, and in substance claimed in their answer that they purchased the property after the first assessment and before the second; that they were innocent purchasers of the property; that the first assessment had been made upon the property and paid by their vendor, and the lien was released on the record in the office of the board of public works; that they had no knowledge or information of any claim against their property; that by the exercise of reasonable, ordinary care and diligence they could not have learned of such a claim as has been asserted herein; that they paid a full and valuable consideration for the property, and received the conveyance of the property without any knowledge or notice, either expressed or constructive, of the claim that appellee asserted; and also alleged that by reason of these matters the appellee was estopped from asserting or claiming any lien against their property. The court sustained a demurrer to their answer, and they have appealed.

Appellants present many reasons for a reversal, but we deem it unnecessary to refer to but two of them, as the others were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

settled by the former opinion of this court in the case referred to. The first reason that we will notice is their claim that the second apportionment of the cost of the improvement of Rosewood avenue was not binding upon them, for the reason that neither they nor their vendor, Emma Deltrich, were parties to the action at the time of this assessment, nor were they made parties until some time after that. It is true that they are not bound or precluded by that assessment; but they fail to state, in their answer, that this assessment was erroneous in any respect. If the reapportionment of the cost of the improvement of the avenue was made according to the former opinion of this court, and made equal upon all the property owners on each side of the avenue, it is immaterial to appellants when it was made, and their complaint with reference thereto is without merit.

The only other question presented for reversal is a question of estoppel of appellee from asserting a lien upon the property of appellants; they being innocent purchasers for value. By section 2834, Ky. St. 1903, it is provided that a lien shall exist for the cost of original improvement of public ways against the respective lots abutting thereon, and by section 2839 this lien shall exist from the date of the apportionment warrant. Appellants contend, however, that appellee is estopped from asserting this lien against their property, for the reason that it collected the amount first apportioned and assessed against their property and caused the lien to be released. This court, in its former opinion, determined that the first apportionment of the cost of the improvement of Rosewood avenue was a nullity, and directed another apportionment to be made. It follows, therefore, that the statutory lien existed when the second apportionment was made, and the collection of the first apportionment warrant did not have the effect to release the lien. Appellants knew that Rosewood avenue had been improved by original construction, and that there was lien against the abutting lots to secure the payment of the cost, and they were presumed to know that it was a lien upon the property until the cost was legally assessed against it and paid by the owner thereof.

If appellants have paid the purchase price for this property, they have recourse for the amount of the assessment against their vendor on her warranty.

For these reasons, the judgment is affirmed.

SPIESS' ADM'X v. BARTLEY.

(Court of Appeals of Kentucky. Nov. 11, 1908.)

1. PLEADING (§ 180*)—REPLY—NEW CAUSE OF ACTION.

Civ. Code Prac. § 90, requires the petition to state facts constituting a cause of action. Section 98 permits a reply to contain only a

traverse, facts constituting an estoppel against, or avoidance of, a set-off, etc., or of defenses stated in the answer, a counterclaim against a set-off, or a cross-petition. The petition sought to recover the rent of an engine, and the answer denied the indebtedness, and pleaded an award of arbitrators allowing plaintiff a certain amount for the hire of the engine, and the reply admitted that the matters alleged in the petition were submitted to arbitrators and that their award covered the entire controversy, and sought to recover on the award a certain sum, for which judgment was allowed by default. *Held*, that the reply was a departure from the petition, and set up a new and independent cause of action, which was not permissible under the statutes.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358, 359; Dec. Dig. § 180.*]

2. ARBITRATION AND AWARD (§ 74*)—AWARD—REPUDIATION.

Both parties to an award of arbitrators may repudiate it, and litigate the controversy on the basis of the contract claimed by them.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 342; Dec. Dig. § 74.*]

3. PLEADING (§ 180*)—REPLY—DEPARTURE—ACTION ON AWARD—PLEADING.

After having submitted their contract rights to arbitrators and a valid award was made, plaintiff should have sued on the award unless both he and defendant repudiated it, and, where defendant relied on the award in his answer, plaintiff should have set it up in an amended petition, and not by reply.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 180.*]

4. ARBITRATION AND AWARD (§ 81*)—AWARD—MERGER OF ACTION.

Upon the submission of the contract rights of the parties to arbitrators and a valid award being made by them, the controversy was merged in the award.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 428-439; Dec. Dig. § 81.*]

5. JUDGMENT (§ 101*)—DEFAULT—PLEADINGS TO SUSTAIN JUDGMENT—DEPARTURE.

A cause of action set up for the first time in the reply, which was a departure from that alleged in the petition, cannot sustain a default judgment thereon.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 101.*]

Appeal from Circuit Court, Nelson County.

"To be officially reported."

Action by Benjamin Bartley against Charles Spiess' administratrix. From a default judgment for plaintiff, defendant appealed. Reversed, with directions.

S. M. Payton, for appellant. C. T. Atkinson, for appellee.

CARROLL, J. Charles Spiess and Benjamin Bartley, having a controversy about the hire of a traction engine owned by Bartley and rented by Spiess, submitted the case in December, 1905, to Edward Bell and Ed C. Dawson, arbitrators, and, in the event they could not agree, to William J. Dawson, umpire. The arbitrators and the umpire in December, 1905, made the following award in writing: "Said Spiess shall pay Bartley \$1.75 per day from the 6th day of November, 1905, until the engine is returned to said

Bartley at New Haven, Ky., this being a concession of \$1.00 per day from the contract price. Said Spiess is to return said engine to New Haven, Ky., and replace main cog-wheel which is broken with a new one; said Spiess to have five days after engine is returned to New Haven in which to replace said wheel." In January, 1908, Bartley, ignoring the submission and award, brought suit against Spiess to recover from him rent for the engine at \$2.75 per day, amounting to \$195.25, and \$35 damages for breakage. To this petition Spiess answered, denying the indebtedness, and in a separate paragraph pleading the award in bar of Bartley's right to maintain an action independent of the award. In February, 1907, the death of Spiess was suggested, and in October, 1907, the action was duly revived against the administratrix. On February 11, 1908, Bartley filed a reply, in which he admitted that the matters and things sued upon in his petition were submitted to arbitrators and an umpire, who in December, 1905, made their award, copies of which he filed with his reply. He averred that the award covered all points in controversy, and settled all matters in dispute, and sought to recover on the award the sum of \$217.51, the amount found to be due him under the award according to his method of calculation; and for this amount he asked judgment. On February 14, 1908, the following order was made: "This cause having been heretofore revived against Amelia Spiess, as administratrix of Charles Spiess, and being called for trial, the allegations of the reply, not being controverted, are taken for confessed, and it is adjudged that plaintiff recover of Amelia Spiess, as administratrix, the sum of \$217.51, with 6 per cent. interest."

It will thus be seen that in the petition filed appellee sought to recover upon a contract, and that in a reply he abandoned the contract, and sought to and did recover upon the award. There was a departure from the original cause of action—in fact, a new and independent cause of action was set up in the reply. Both of the parties to the controversy might have ignored the award, but they did not do this. Spiess in his answer expressly relied upon it as a bar to a recovery upon the contract. As the submission covered all the matters in dispute between the parties, Bartley should in his original petition have sued on the award, but, failing in this, should have set it up in an amended petition. The controversies between the parties were merged in the award.

The plaintiff cannot in a reply depart from the cause of action stated in his petition, or obtain a judgment by default upon a cause of action set up for the first time in a reply. Under Civ. Code Prac. the cause of action upon which a plaintiff relies to obtain judgment must be set up in a petition, or an

amended petition, section 90 providing that "the petition must state facts which constitute a cause of action in favor of the plaintiff against the defendant"; whilst under section 98 a reply may contain only "(1) a traverse, (2) a statement of facts which constitute an estoppel against or avoidance of a set-off and counterclaim, or defenses stated in the answer, (3) a counterclaim against the set-off, and (4) a cross-petition." The established rules of pleading are not as generally observed as they should be by either the bench or bar, but it would be an unusual departure to permit a judgment by default to be rendered upon a cause of action stated in a reply. *Spaulding v. Alexander*, 6 Bush, 100.

Wherefore the judgment is reversed, with directions to set aside the judgment and permit Bartley, if he desires to do so, to file an amended petition, and the parties may then tender other pleadings necessary to complete the issues.

KENTUCKY WAGON MFG. CO. v. DUGANICS.

(Court of Appeals of Kentucky. Nov. 11, 1908.)

1. MASTER AND SERVANT (§ 117*)—PLACE OF WORK—FREIGHT ELEVATORS—SAFETY.

A freight elevator was not a reasonably safe place of work, where there was a hole about 4 inches wide and 12 to 16 inches long in the floor, to the knowledge of the foreman, who placed an insufficient patch over it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 208; Dec. Dig. § 117.*]

2. MASTER AND SERVANT (§ 235*)—PLACE OF WORK—INSPECTION.

An employé required to use a freight elevator, but not having the duty of inspection, was not bound to examine the floor of the elevator to determine whether a patch placed over a hole therein was sufficient, but might assume it was sufficient.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

3. MASTER AND SERVANT (§ 289*)—INJURY TO FREIGHT ELEVATOR EMPLOYÉ—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether a hole in a freight elevator floor was so obvious that, by ordinary care, an employé injured thereby could have discovered it, held a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1113-1118; Dec. Dig. § 289.*]

4. APPEAL AND ERROR (§ 688*)—QUESTIONS PRESENTED FOR REVIEW—CONDUCT OF COUNSEL—EXCEPTIONS, BILL OF.

Remarks of counsel in the jury's presence cannot be complained of on appeal, where they are not part of the bill of exceptions appearing only by appellant's counsel's affidavit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2896; Dec. Dig. § 688.*]

5. APPEAL AND ERROR (§ 1060*)—HARMLESS ERROR—MISCONDUCT OF COUNSEL.

Judgment for plaintiff in a personal injury action will not be reversed for misconduct of his counsel in stating, when plaintiff was asked as to what doctor waited upon him, that it might be agreed that it was the "insurance com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pany's doctor," referring to the company in which defendant carried employers' liability insurance, where the court admonished the jury that the remark was improper, and where there was abundant proof to sustain the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

6. TRIAL (§ 127*)—MISCONDUCT OF COUNSEL—IMPROPER ARGUMENT.

In a personal injury action by an employé, it was improper for counsel to tell the jury on their voir dire that a certain company insured employers against accidents to their employés, and to state to the jury a conversation between him and defendant's attorney, wherein the latter said that the way to argue a meritless case was to deceive the jury by making them believe that immaterial matters were material, and not to notice material matters, and that he argued all his cases that way.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 275; Dec. Dig. § 127.*]

7. TRIAL (§ 125*)—CONDUCT OF COUNSEL—ARGUMENT.

Counsel should never attempt to get before the jury matters beyond the record and having no real bearing upon the case, merely to prejudice the jury; and while one act of such impropriety may be overlooked, if the court properly admonishes the jury not to regard it, it should not be overlooked where he persistently attempts to inflame the jurors' minds.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303-307; Dec. Dig. § 125.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"Not to be officially reported."

Action by Joseph Duganics against the Kentucky Wagon Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

O'Neal & O'Neal, for appellant. H. J. Scheirick and Johnson & Heatt, for appellee.

CLAY, C. The plaintiff, Joseph Duganics, instituted this action against the defendant, Kentucky Wagon Manufacturing Company, to recover damages for personal injuries alleged to have resulted from the failure on the part of the defendant to furnish plaintiff a reasonably safe place in which to work. The jury returned a verdict in favor of plaintiff in the sum of \$1,000, and the defendant appeals. A reversal is asked upon two grounds: First, the failure of the trial court to peremptorily instruct the jury to find for the defendant; second, misconduct of counsel.

It appears that appellee is a young German, and unable to speak or understand the English language. In the month of August, 1907, he was employed by appellant as a laborer; his duty being to truck wagon wheels and gear from appellant's paintshop to its warehouse. For this purpose he used a truck 10 feet long and about 2½ feet wide, which ran upon two wheels, placed on either side at the center of same. The truck also had a balance wheel on either end. The truck could be easily turned upon the side wheels, and, while at rest, the heavy end

would drop down on the end wheel. Appellant's paintshop was on the ground floor of its establishment, and its warehouse on the third floor. In hauling the truck loads of wagon wheels appellee was required to use a certain elevator, which was about 8 feet wide and 16 feet long. He had been in appellant's employ only about 10 days. On the day before the injury a hole about 4 inches wide by from 12 to 16 inches long had been broken through the floor of the elevator somewhere on the right side thereof, and near the entrance to it. There is evidence to the effect that the existence of the hole in question was reported to appellant's foreman by appellee, and probably by other employés, and that the foreman undertook to patch the hole by nailing over it two strips of pine lumber which were about 3 inches wide, 16 or 18 inches long, and from one-fourth to one-half inch thick. The boards used to patch the hole were ordinarily used to box up advertising matter. After the hole had been so patched, appellee and others working with him continued to use the elevator. On the day the accident occurred, and some time prior thereto, a loaded truck had been run over this patch, and had caused it to splinter and break through. The accident to appellee occurred as follows: He pushed a loaded truck of wagon wheels onto the elevator, and started it to the third floor. The truck so loaded was somewhat higher than appellee's head. It was, therefore, necessary for him to get immediately behind the loaded truck, and push the same by two standards which run from the bed upward, and so held the wheels in their place. It required the whole of one man's strength to push the truck. After the truck was pushed upon the elevator, there were left from 2½ to 3 feet of space between it and the end of the elevator for the appellee to stand on while the elevator was making its ascent. As the elevator reached the third floor, it was necessary for appellee to walk around one side of the truck to the other end of the elevator, so as to raise the safety gate and enable him to wheel his truck off the elevator to the third floor. With this in view, appellee took a step to the side for the purpose of going around to raise the gate, when his right foot went into the hole. In an effort to avoid falling, appellee endeavored to support himself by taking hold of the truck. This caused the truck to swing around so as to throw appellee's left foot over the floor of the elevator, and his foot was thereby caught between the elevator floor and the beams supporting the third floor of the warehouse. His heel was severely crushed, and his ankle wrenched and sprained. Appellee did not know the patch had been broken through, and did not see the hole. It is admitted by John Lodenkemper, appellant's foreman, that the patch put upon the hole was entirely in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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sufficient. One of the witnesses testified that, after he saw the patch which Lodenkemper had put over the hole, he told Lodenkemper that it was a dangerous place. As the evidence shows there was a hole in the elevator floor, that this fact was known to appellant's foreman, and that he put an insufficient patch over it, there can be no doubt of the fact that appellant failed to furnish appellee a reasonably safe place in which to work.

The only question, then, is: Did appellee know of the existence of the hole, or was it so obvious that he could have known of it by the exercise of ordinary care? Inspection was not in the line of his duty, and it was not, therefore, necessary for him to examine the floor of the elevator for the purpose of determining whether the patch which had been put thereon was sufficient for the purpose. When the foreman undertook to patch it, appellee had the right to assume that it was properly done. It appears that his foot went into the hole as the elevator approached the third floor. It also appears that the elevator was somewhat darker at that time, owing to the fact that the second floor was heavily stocked with gear. Under such circumstances, the hole might have easily escaped the attention of any one; and we are unable to say, as a matter of law, that the hole was so obvious that appellee, by the exercise of ordinary care, could have discovered it. This question was one for the jury, and the court properly refused to instruct the jury to find for appellant.

As to the misconduct of counsel, it appears that appellant carried employers' liability insurance. During the examination of appellee as a witness, and while he was being interrogated as to what doctor waited upon him, the attorney for appellee made the following statement: "I guess it may be agreed that it was the company's doctor, or the insurance company's doctor." This statement was objected to, and the court thereupon said: "I sustain the objection. It is not proper." The above is shown by the bill of exceptions.

Counsel for appellant further complain of misconduct on the part of the attorney for appellee in that, after asking the jury on their voir dire if any of them were connected with an accident insurance company, he told the jury that the Travelers' Insurance Company was one of those companies which insured employers against accidents to their employés; and, in response to said statement, one or more of the jurors said in the presence of their fellow jurors and the court that they carried employers' liability insurance in other companies.

Further complaint is made of misconduct

on the part of appellee's attorney in stating to the jury a certain private conversation between him and appellant's attorney, wherein the latter said to him that the way to do in arguing a case that was weak and without merit before a jury was to deceive the jury by making them, or trying to make them believe that certain matters were material, which were not material, and take no notice of material matters, and that counsel for defendant did that way in the argument of his cases to the jury. The remarks of counsel in the examination of the jury and in his argument before the jury complained of by counsel for appellant are not a part of the bill of exceptions; they appearing only by affidavit of counsel for appellant. Under the uniform ruling of this court, they cannot, therefore, be considered. *Paducah Ry. & Light Co. v. Bell's Adm'r*, 85 S. W. 216, 27 Ky. Law Rep. 428; *George T. Stagg Co. et al. v. Brightwell*, 92 S. W. 8, 28 Ky. Law Rep. 1220; *Louisville Railway Co. v. Samuel Gaar* (opinion delivered October 27, 1908) 112 S. W. 1130. So far, then, as the bill of exceptions shows, the only misconduct complained of is in the action of counsel for appellee in stating that it might be agreed that it was the company's doctor or the insurance company's doctor. To this remark the court sustained an objection, and admonished the jury that it was not proper.

Under the circumstances of this case, it being shown that appellee suffered serious injuries, and there being abundant proof of negligence on the part of appellant, we will not reverse the judgment for the impropriety of the above remark. We will say, however, that if the bill of exceptions had shown the remark alleged to have been made by counsel in his examination of the jury on the voir dire, and had also shown that counsel in his argument to the jury made use of the private conversation had between him and counsel for appellant, we would not have hesitated to reverse the judgment. Trials must be had before impartial juries and upon the facts adduced in evidence. Counsel should never attempt to get before the jury matters outside of the record and which have no real bearing upon the case merely for the purpose of influencing the prejudice and passion of the jurors. One act of impropriety on the part of an attorney in a case may be overlooked if the court properly admonishes the jury not to regard it, but it should not be overlooked where the record shows a persistence on his part in bringing to the attention of the jury matters which only tend to inflame their minds, and thus render them less able to do justice according to the law and the evidence.

Judgment affirmed.

ASHER v. CORNETT.

(Court of Appeals of Kentucky. Nov. 11, 1908.)

1. ACTION (§ 28*) — CONTRACT OR TORT — WAIVER.

One voluntarily waiving the tort and suing on the implied promise to pay for wrongfully cutting and removing timber on his land makes the action one of assumpsit.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 206; Dec. Dig. § 28.*]

2. VENUE (§ 4*)—NATURE OF ACTION—ACTION ON CONTRACTS—TRANSITORY ACTION.

An action of assumpsit for cutting and removing timber is a transitory one, and is governed by Civ. Code Prac. §§ 78, 79, providing for the venue of transitory actions.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 4.*]

3. VENUE (§ 21*)—RESIDENCE OF PARTIES.

Where defendant in assumpsit did not reside in the county in which the action was brought, and he was not summoned in that county, and he made no defense to the action before objecting to the jurisdiction of the court, the court was without jurisdiction, and a default judgment must be set aside.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 34; Dec. Dig. § 21.*]

4. APPEARANCE (§ 8*)—PROCEEDINGS CONSTITUTING APPEARANCE.

A defendant who prosecutes an appeal from the judgment refusing to set aside a default judgment on the ground of want of jurisdiction of the court, because he did not reside in the county in which the action was brought, enters his appearance, and, on the return of the case on the reversal of the judgment he will be before the circuit court.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 41; Dec. Dig. § 8.*]

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Action by A. B. Cornett against A. J. Asher. From a judgment refusing to set aside a default judgment, defendant appeals. Reversed.

N. J. Weller, for appellant. J. H. Jeffries, for appellee.

CLAY, C. The plaintiff, A. B. Cornett, instituted this action against the defendant, A. J. Asher, to recover the value of certain timber taken from lands owned jointly by the plaintiff, defendant, and others. The petition, after describing the tracts of land in question, charged that the defendant wrongfully and unlawfully entered upon said lands, and cut down, removed, carried away, and converted to his own use 2,000 trees of the value of \$3 per tree; that the value of plaintiff's portion thereof was \$500; that the defendant, by his cutting down, carrying away, and conversion of said timber trees, had promised and agreed to pay the plaintiff the reasonable value and worth of same. The petition then concludes with the following paragraph: "Plaintiff hereby waives the tort, and sues as upon an implied contract for the value of said timber trees, and he says that no part of the value of same has ever been paid to him or to any one for him, and that

the value of same has long been due and owing to him." This action was instituted in Leslie county, where the lands from which it is alleged the timber was cut are located. Process was served on the defendant, A. J. Asher, in Bell county. At the first term of the Leslie circuit court after the service of process, judgment by default was rendered against the defendant for the full amount sued for. At the May term of the court the defendant, Asher, moved to vacate and set aside the judgment. This motion was overruled, and the defendant appeals.

For appellant it is urged that this is a transitory action, and, there being nothing in the record showing that he resided in Leslie county when the suit was brought, the circuit court has no jurisdiction. For appellee, it is insisted that this is an action for injury to real property by the cutting and removing of timber therefrom, and, under the rule laid down in *Meehan, etc., v. Edwards, etc.*, 92 Ky. 574, 18 S. W. 519, the venue of the action was properly laid in Leslie county. There can be no doubt that appellee would be right in his contention if he sought merely to recover damages for the cutting and removing of the timber. This he did not do, but voluntarily waived the tort and sued upon appellant's implied promise to pay, thus making the action one of assumpsit. Under the circumstances, therefore, the action was merely a transitory one (*Roberts v. Moss*, 106 S. W. 297, 32 Ky. Law Rep. 525), and is governed by sections 78, 79, Civ. Code Prac.

As it does not appear that appellant resides in Leslie county when the action was brought, or that he made defense to the action before objecting to the jurisdiction of the court, and as he was not summoned in Leslie county, but in Bell county, it necessarily follows that the Leslie circuit court was without jurisdiction. The court, therefore, erred in refusing to set aside the judgment. However, appellant will be before the Leslie circuit court upon the return of this case, for he has entered his appearance by prosecuting this appeal. *Grace v. Taylor*, 1 Bibb, 430; *Chesapeake, Ohio & Southwestern R. R. Co. v. Heath's Adm'r*, 87 Ky. 651, 9 S. W. 832.

Judgment reversed.

KNIGHT v. COLLINS et al.

(Court of Appeals of Kentucky. Nov. 11, 1908.)

WILLS (§ 600*) — CONSTRUCTION — INTEREST GIVEN.

Testator devised land to her husband, with power to sell and to have the proceeds, but charging the land or its proceeds with the maintenance of a nephew, 14 years old when the will was made, and with the expense of preparing him for "any profession he may wish" or testatrix's husband might "think best," and reciting that it was supposed that the charge would take all the land or its proceeds, but

that, if it did not, the remainder was left to the husband to give to the nephew or "to dispose of as he may wish." *Held*, that the husband took a fee-simple title subject only to the charge for the nephew's maintenance and education; that the nephew took no interest in the surplus proceeds; that the "maintenance" contemplated was maintenance during the nephew's minority; and that he, having reached his majority before testatrix's death, is only entitled to such part of the proceeds of the land on the husband's death as may be necessary to educate him for a profession, if he in good faith desires to be so educated.

[Ed. Note.—For other case, see *Wills*, Cent. Dig. §§ 1335, 1336; Dec. Dig. § 600.*]

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by Lewis Dixon Knight against Rosalie Collins and others. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

S. D. Rouse, for appellant. John L. Rich, for appellees.

CLAY, C. Sadie M. Collins died in Kenton county, Ky., in the year 1903, leaving the following will:

"I, Sadie M. Collins, wife of Dr. J. D. Collins, of the city of Covington, county of Kenton, and state of Kentucky, being in ordinarily good health, sound in mind and memory, and being desirous of disposing of my property in a manner different from that prescribed by the laws of descent and distribution of the state of Kentucky, do make, publish and declare the following to be my last will and testament:

"Item I. I do not expect to leave any debts, but if I should, I desire my executor hereinafter named to pay same out of the proceeds of the sale of my personal estate.

"Item II. I give and devise to my beloved husband, Dr. J. D. Collins, the undivided one-half of my residence property, situated in Covington, on the corner of the alley, or Lynn street and Madison avenue, the same conveyed to me by A. R. Mullins and wife by two deeds, and the same conveyed to me by J. M. Collins as my separate estate. This undivided half he is to have in fee simple and without any limitation.

"Item III. I give and devise to my said husband, Dr. J. D. Collins, the other undivided half of my said Madison avenue residence property, for and during his natural life, but with the power to sell and convey the same if he thinks necessary or so desires and he may have the proceeds of sale to use and enjoy in his support and maintenance, if he finds necessary or may so wish. The object of this is to invest him with the fee if so desired. At the death of my said husband if the said property is not sold, or if sold and there is any part of the proceeds of the sale left, I will and devise the same to my niece, Elizabeth Coulter Cosby, wife of Geo. K. Cosby, to be hers in her own right.

"Item IV. I give and devise to my said husband, Dr. J. D. Collins, all of my personal property, including bonds, stocks, money and all kinds of personal property, for and during his natural life, but with the power to sell my stock, bonds and other personal property, and to use and enjoy the proceeds of the sale for his support and maintenance, principal as well as income if he so desires, the object being to invest him with the title if so desired. At his death if there is any of said personal property left in kind or the proceeds as converted, out of the same, I give and devise to my sister, Anna Coulter, wife of Lewis Coulter, to my sister-in-law, Jane McMillin, wife of my brother, Carr McMillin, to my step-daughter, Rosalie A. Collins, daughter of my husband by a former marriage, and to my step-sister, Kittle Yancey, daughter of my step-father, Harlow Yancey, by a former marriage, one thousand dollars each, and if there is not enough left to pay same in full, they are to share the remainder pro rata.

"Item V. I have a farm in Kenton county, Kentucky, the same conveyed to me by Wes D. Wilson, special commissioner of the Kenton circuit court, and J. M. Collins as my separate estate. This farm I will and devise to my said husband, but I charge the same with the maintenance and education of my nephew, Dixon Knight, who now lives with me, and is commonly called Dixon Collins. He is a son of Thomas Knight and my niece, Bessie Knight. This farm my said husband has the right and power to sell and convey, if he wishes, and to have the proceeds of the sale, but he is to maintain and educate the said Dixon Knight and prepare him for any profession he may wish, or Dr. Collins may think best for him. It is supposed that this will measurably take the whole of said farm, or the proceeds of its sale, but if it does not, then the rest is left with my husband to give to him, the said Dixon Knight, or to dispose of as he may wish.

"Item VI. These devises evidence my unlimited confidence in my said husband, and as further expression of my confidence in him, I thereby appoint him, the said Dr. J. D. Collins, executor of this my last will and testament, knowing that he will carry out to the fullest extent my wishes herein expressed, and I request the court in which he is appointed and qualified not to require of him any bond for the discharge of his duties. This embraces all the bequest I now desire to make, and I now publish and declare the foregoing to be my last will and testament, and sign and acknowledge the same as my act and deed.

"Given under my hand this April 5—1893.

"Signed and acknowledged in the presence of G. A. Zwick and A. R. Mullins.

"[Signed] Sadie M. Collins."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The plaintiff, Lewis Dixon Knight, instituted this action against Rosalie Collins in her own right and as executrix of the estate of J. D. Collins, deceased, to recover the proceeds of certain notes which J. D. Collins had devised to Rosalie Collins, and which notes represented a part of the purchase price of the farm referred to in item 5 of the above will. Plaintiff alleged in his petition that under said item J. D. Collins held the title in said farm in trust for the benefit and use of the plaintiff; that upon the death of Sadie M. Collins said J. D. Collins took possession of the farm, and subsequently mortgaged it to secure the payment of a loan of \$800, which sum he received and used for his own benefit; that on the 24th day of April, 1906, said J. D. Collins sold and conveyed said property to C. H. Bramlage for and in consideration of \$2,896, of which \$896 was cash and the balance, \$2,000, was represented by four promissory notes of the vendee, payable on or before 10 years after the date of their execution, with interest at the rate of 6 per cent. from date; that plaintiff at no time received from J. D. Collins anything for his maintenance or education, either from the proceeds of the sale of said farm or otherwise, but that his maintenance and education were paid for by others than the said Collins; that J. D. Collins departed this life in January, 1908, testate; that by the terms of his last will the defendant Rosalie Collins was appointed executrix thereof, and was made legatee and devisee under said will; that she is now holding possession of said notes, and claiming them as her own. The petition concludes with a prayer that the court adjudge that Rosalie Collins holds said notes as trustee for the sole use and benefit of the plaintiff. Thereafter the defendant demurred to the petition, and subsequently filed an answer. The answer, after denying the allegations of the petition, sets forth the fact that Lewis Dixon Knight was 24 years old at the time of the death of Sadie M. Collins; that at that time he had received his education. Plaintiff then demurred to the answer, which demurrer was overruled. The case was then submitted for final judgment, and the petition of plaintiff dismissed. From that judgment the plaintiff appeals.

This case involves a construction of item 5 of the above will. It is the contention of counsel for appellant that the farm in question was given to Dr. J. D. Collins to use for his own benefit, if his necessities so required, after he compiled with and carried out the charge upon said farm, to wit, the maintenance, support, and education of Lewis Dixon Knight; that, having failed to use the proceeds of the farm for that purpose, he was still charged, unless his necessities required him to use the proceeds of the farm himself, to give the same to Lewis Dixon Knight. In support of this contention, counsel cites the case of McCullough's Adm'r v. Anderson, 90 Ky. 126, 18 S. W. 353, 7 L. R. A. 836. That

case involved the construction of the following language in the will of Samuel McCullough: "To my most precious and well beloved wife I give, during her life, all my estate, real and personal, whether in possession or in action, with full and ample authority to dispose of the whole of it as she pleases. At her death, should she not have previously made a testamentary distribution of all remaining undisposed of by her, I desire that such remainder shall be distributed as herein directed." In that case this court held that the wife was given a life estate with power to convert it into a fee by disposing of it as she pleased; but that, not having disposed of all of it and converted it into a fee, what remained undisposed of by her should be distributed as directed in the will. It will be observed, however, that there is no similarity between the language in the McCullough will and the language of item 5 under consideration. In the latter no attempt is made to convey an estate for life to Dr. Collins, with power to convert it into a fee; nor is there any direction that any estate undisposed of by him should be distributed absolutely to certain persons. On the other hand, the language of the will is plain and certain. It is susceptible of only one interpretation. It gives to J. D. Collins the fee-simple title to the property in question, subject only to a charge for the maintenance and education of Lewis Dixon Knight. There is no limitation upon Dr. Collins' title. The language of the will is: "This farm I will and devise to my said husband, but I charge the same with the maintenance and education of my nephew, Dixon Knight, who now lives with me, and is commonly called Dixon Collins." In this language there is no limitation over; there is no intimation that the estate conveyed is a mere life estate. But the will does not even stop at this point. It goes further, and says: "This farm my said husband has the right and power to sell and convey, if he wishes, and to have the proceeds of the sale, but he is to maintain and educate the said Dixon Knight and prepare him for any profession he may wish, or Dr. Collins may think best for him." There is nothing in this language to restrict the estate conveyed by the previous language of the will. It confirms our view of the estate previously granted. After giving Dr. Collins the farm, it shows that the testator intended if he sold it that he should have the proceeds of the sale, subject, however, to the charge in favor of Lewis Dixon Knight.

Nor is there anything in the concluding language of item 5 to support the contention of counsel for appellant. That language is as follows: "It is supposed that this will measurably take the whole of said farm, or the proceeds of its sale, but if it does not, then the rest is left with my husband to give to him, the said Dixon Knight, or to dispose of as he may wish." No estate or interest in the surplus was given to Lewis Dixon

Knight. Counsel contends that, if the language of item 5 be construed to give the farm to Dr. Collins in trust for Lewis Dixon Knight, then the language at the close of the will, "or to dispose of as he may wish," may be interpreted as meaning, "or to dispose of as he may wish for the benefit of Lewis Dixon Knight." This would be to impose a limitation upon the power of Dr. Collins that was not placed in the will itself. After giving her husband the power to give the surplus of the proceeds to Lewis Dixon Knight, it is manifest that the alternative right to dispose of it as he might wish included the power to dispose of the surplus in any manner whatsoever without reference to Lewis Dixon Knight. It will be observed that this is not a suit for maintenance or education, but is a suit to recover the proceeds of the farm devised by Dr. Collins, on the ground that all the proceeds not used by Dr. Collins for the purpose of his own support and maintenance belonged to appellant. Indeed, counsel for appellant, in his brief, states the character of the suit brought as follows: "He [plaintiff] does not contend by the action in question that he is entitled to any part of the proceeds of said farm by way of education or maintenance, or preparation for a profession. It does not appear in the record that he desired to prepare himself for a profession, or that he was preparing for a profession, or that he was not enabled to prepare himself for a profession by reason of the failure of J. D. Collins to furnish the funds, but he does claim that under the will of his aunt, Sadie M. Collins, all of the proceeds of the sale of this farm which were not used by Dr. Collins by way of supporting and maintaining himself belonged to him." At the time Mrs. Collins made her will appellant was about 14 years of age. When she died, he was past his majority. It is evident that the maintenance she contemplated was the maintenance of appellant during his minority. It further appears that he had received an academic education. However, appellant had the right to be educated for a profession. There might be some merit in his suit if he had built his case upon this idea; that is, that he desired to be so educated, and that a certain sum would be necessary for that purpose. In this event, there can be no doubt that such education for a profession would be a charge upon the proceeds of the fund, and that it would be the duty of the chancellor to hear proof and determine what would be a reasonable allowance out of such proceeds to enable appellant to prepare for such profession. Upon proper proceedings, appellant may yet obtain such portions of the proceeds of the notes as may be necessary for his education for a profession, if he in good faith desires to be educated for a profession.

It not appearing that appellant desires to be educated for a profession, and he not be-

ing entitled to the proceeds of the farm upon any other theory, it necessarily follows that the judgment of the lower court must be affirmed; and it is so ordered.

TILTON v. TILTON.

(Court of Appeals of Kentucky. Nov. 11, 1908.)

1. HUSBAND AND WIFE (§ 29*)—ANTENUPTIAL CONTRACTS.

A woman may release her rights in her intended husband's property; but such a contract must be free from fraud or misrepresentation or the practice of deceit on the husband's part, must be reasonable in its provisions, and entered into in good faith by both parties, or it may be set aside.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 165; Dec. Dig. § 29.*]

2. HUSBAND AND WIFE (§ 34*)—ANTENUPTIAL CONTRACTS—BURDEN OF PROVING FAIR PROCUREMENT.

If an antenuptial contract, by which a prospective wife released her rights in her prospective husband's property, shows upon its face that it is unjust or unfair to the wife, the burden is upon the husband or his representatives to show that it was fairly procured, and that the wife was not overreached or deceived in its execution.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 34.*]

3. HUSBAND AND WIFE (§ 34*)—ANTENUPTIAL CONTRACTS—UNJUST CONTRACT.

In determining the reasonableness of an antenuptial contract by which the wife released her rights in her husband's property, the court may consider the adequacy of provision for the wife, the means and ages of the parties, and the wife's understanding of the meaning of the contract.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 34.*]

4. HUSBAND AND WIFE (§ 34*)—ANTENUPTIAL CONTRACTS—REASONABLENESS—BURDEN OF PROOF.

An antenuptial contract between a widow of considerable means and a widow who was poor and uneducated, whereby she released her rights in his property, and agreed that any property she might possess at her death should pass to her husband if living, and if dead to his heirs, was so unreasonable and inequitable as to cast upon the husband's representatives the burden of showing that at its execution she understood the nature and extent of her prospective husband's estate, and the value of her marital rights therein, which she was surrendering.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 34.*]

5. HUSBAND AND WIFE (§ 34*)—ANTENUPTIAL CONTRACTS.

Evidence held not to show that a woman, when she executed an antenuptial contract releasing her rights in her prospective husband's property, and agreeing to give to him or his heirs all her property at her death, fully comprehended and acquiesced in its terms.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 34.*]

Appeal from Circuit Court, Robertson County.

"To be officially reported."

Action by Nancy F. Tilton against M. L. Tilton, executor of Nimrod A. Tilton, to set

aside an antenuptial contract, and to be adjudged the owner of a widow's share in decedent's estate. Judgment of dismissal, and plaintiff appeals. Reversed and remanded, with instructions.

Robert Buckler and John P. McCartney, for appellant. J. J. Osborne, Samuel Holmes, and W. J. Osborne, for appellee.

LASSING, J. In 1875 Nimrod A. Tilton, a widower, and Nancy F. Morand, a widow, both residents of Robertson county, Ky., entered into the following contract: "This indenture made and entered into this third day of July, 1875, by and between Nimrod A. Tilton, and Mrs. Nancy F. Morand, both of the county of Robertson and State of Kentucky: Witnesseth, that for and in consideration of the said Tilton to lawfully marry the said Nancy F. Morand, said marriage as aforesaid to take place during the year 1875, and the further consideration that the said Tilton has this day given to the said Mrs. Nancy F. Morand one Singer sewing machine, of the value of \$80.00, (eighty dollars) and (one black mare, of the value of one hundred and fifty dollars, (\$150.00). Now in consideration of said marriage to take place or happen as aforesaid, and the consideration of said sewing machine and said mare, the receipt of which, that is, said machine and said mare, is hereby acknowledged by the said Mrs. Nancy F. Morand. The said Mrs. Nancy F. Morand for and in consideration of the premises aforesaid, does by these presents release, confirm and forever release and confirm unto the said N. A. Tilton, his heirs and assigns, any dower interest or any other interest whatsoever she may acquire in and to the land or personal property or any insurance policy which the said Tilton may now have upon his life, or any property which he may hereafter acquire in and to which the said Mrs. Nancy F. Morand might be entitled to by reason of said marriage, and it is further understood by the parties hereto that the said N. A. Tilton is in no wise to be responsible for any debts contracted by the said Mrs. Nancy F. Morand after their said marriage or proposed marriage shall have taken place, without the written consent or order of the said Tilton. It is further understood by the parties hereto, that in case there should be no heirs born to the said N. A. Tilton and Mrs. Nancy F. Morand, by reason of said proposed marriage, then whatever property shall remain at the death of Mrs. Nancy F. Morand, shall inure to the said Tilton or his heirs. It is further understood by the parties hereto, that the said Tilton, whenever said marriage shall take place, is to clothe and furnish the necessities of life to the said Mrs. Nancy F. Morand. In testimony whereof the parties hereto have hereunto set their hands, the day and year first above written." At the date of the execution of this contract Nimrod

A. Tilton was living on a farm of some 160 or 170 acres with his four children, the oldest a boy some 17 or 18 years of age, the youngest a girl, possibly 8 or 9 years of age. His wife had died some three months before. Nancy F. Morand had been a widow for some three or four years. She had no children. She had lived in the home of Nimrod A. Tilton, commonly called "Judge" Tilton, for a year or more before the death of his wife, who was quite an invalid. During this time she had attended to the general household duties, in addition to doing the cooking and washing, on a salary of \$1.50 per week. After the death of Mrs. Tilton she continued to live in his home and look after the household duties, etc., as she had done theretofore. In the early part of September following she and Judge Tilton were married. They lived together on his farm from that time until his death in 1906. The marriage contract was recorded in the county court clerk's office in October following their marriage. He left a will by the terms of which he gave to his wife the household goods, kitchen furniture, and about \$200 in money. By another clause of the will provision is made that, if it is contested, the devisee contesting forfeits all right to any portion of his estate. She renounced the will, and filed a suit in the Robertson circuit court, in which she sought to have canceled and set aside the antenuptial contract above set out, on the ground that it was obtained from her through fraud and misrepresentation, and that it was unjust, inequitable, and a fraud upon her rights as a married woman. She asked that she be adjudged the owner of a widow's share in her husband's estate. Issue was joined upon the allegations of the petition, much proof taken, and upon final hearing the chancellor found against her contention, and dismissed her petition. From that finding and judgment she prosecutes this appeal.

Most all of the proof that has been taken relates to the home life of Judge Tilton, especially during the last few years thereof, when he was sick, afflicted with a cancer, and a good part of the time confined to his bed, almost helpless. Further than to show the devoted, untiring, and constant service which Mrs. Tilton rendered her husband in his sad affliction, this evidence has little bearing on the question before us. Mrs. Tilton and Dr. M. S. Brown are the only witnesses who have testified concerning the execution of this marriage contract. The testimony of Mrs. Tilton, under the well-recognized rule, was incompetent, and the trial judge did not err in excluding it from his consideration. The question in issue must therefore be determined by the contract itself, as read in the light of the testimony of Dr. Brown. At the time of the execution of this contract Dr. Brown was engaged in the practice of law at Mt. Olivet, and Judge Kimbrough was associated with him. He testifies that Judge Tilton came to see him

about the preparation of this contract, and talked about the matter over with him, and told him how he wanted it drawn; that he in turn discussed the matter with Judge Kimbrough, his law partner, and had Judge Kimbrough draw up the contract as it now is. After it was prepared, Judge Tilton came to town with Nancy F. Morand, and brought her to his (Brown's) room in the hotel, and there he (Brown) read over the contract to her, and explained it to her, and after this was done, it was signed by Judge Tilton and Nancy F. Morand in his presence. The clerk was caused to come to his room and take their acknowledgments. This done, Judge Tilton and Nancy F. Morand left, and returned to his home. Dr. Brown further testifies that he was at that time a friend of her family. That they were poor people, and he took an interest in her, and on this account was careful to see that she understood what she was doing. That both she and Judge Tilton were, at that time, being criticised in the neighborhood because of her staying at his house and taking care of his home and his children for him after the death of his wife, and in the course of his testimony he said: "There was some necessity for the peace offering in the neighborhood on account of the young people living there, and that she knew of this arrangement. She was going to have a permanent home, and he got a housekeeper, and Mrs. Morand understood these facts from him, and I did from her, and she could not have been mistaken about it." From this testimony of the doctor it is plain that he was undertaking to satisfy Mrs. Morand of the necessity for the execution of the contract. What he meant by "there being some necessity for the peace offering in the neighborhood," is unexplained and unintelligible, unless it is construed to mean that the execution of this contract was to bring about peace and harmony between Mrs. Morand and the children of Judge Tilton. She pleads that she did not comprehend its terms or the effect thereof; that she was overreached and imposed upon.

It is not difficult to understand how, under the circumstances, this could be done. She was a poor, uneducated woman, dealing with a man whom she was shortly to marry. Recognizing that from the force of circumstances by which she was compelled to labor for a living she had been placed in a position where she was being subjected to severe criticism, and, perhaps, more to avoid this criticism than from any sentimental motive, she had agreed to marry Judge Tilton as the only feasible solution of the difficulty in which the situation had placed them. In this way only could the tongue of the scandal monger be silenced. There then arose, as may be inferred from the testimony of Dr. Brown, the objection to the marriage on the part of the children of Judge Tilton. This objection could only be overcome by the execution of a marriage contract. Under these

circumstances we find the judge arranging for a draft of this contract, and, when it is completed, taking the woman with him to a room in the hotel, and there, away from her friends or any one to advise her, in the presence of a lawyer of his own choosing, he had it explained to her from his standpoint by his lawyer in his presence, and, after its execution he has the clerk come to this room in the hotel to take her acknowledgment. What had passed between her and Judge Tilton is not known, but one thing is certain, so far as the record shows, she was not advised in the slightest, at or before the time of the execution of this contract, as to what property he owned, or what her property rights were, or what was the real effect of the execution of this paper. Considering the ages and past experience of the contracting parties, together with the short time since the death of Judge Tilton's first wife, we must conclude that their marriage was not bottomed upon sentimental grounds, and this is especially true when considered in the light of the contract before us, for we find in it no single expression of love, affection, or other kindred sentiment. On the contrary it contains propositions so cold in their terms as to be almost cruel. The gift of the mare and sewing machine cited therein need not be considered, for the reason that upon the consummation of their marriage these articles of personalty, under the then existing law, became at once the property of the husband. Nor need we consider those clauses of the contract which expressly provided that he would not be responsible for any debt which she might contract without his written consent, and that he would clothe and supply her with the necessaries of life after their marriage; for the one is but a limitation upon the privilege and freedom which his future wife might enjoy as to purchases for herself, and the other was a recitation of the assumption by himself of a liability which the law imposed upon him. Had the import of either of these provisions in the contract been understood by his prospective wife, it must have been both embarrassing and humiliating to her. Of neither of these clauses, however, does she complain, but it is of that clause of the contract which provides that she shall have no part in her husband's estate (either that which he then possessed or might thereafter acquire), upon his death, although it expressly provides that any property she may possess at her death shall pass to her husband, if living, and if not living, to his heirs. In other words, under this contract, all of her estate passed to him or his heirs upon her death, whereas upon his death she is to receive no part of his estate whatever. It has been repeatedly held that a woman may release her rights in her intended husband's property, but such a contract must be free from fraud or misrepresentation or the practice of deceit on the part of the husband,

must be reasonable in its provisions, and entered into with the best of good faith on the part of both. Such an agreement, when fairly made, should be upheld, but if there are circumstances which tend to show that the wife has been deceived or overreached, it should be set aside; and, where the contract shows upon its face that it is unjust or unfair, the burden has invariably been placed upon the husband or his representatives to show that it was fairly procured, and that the wife was not overreached or deceived in the execution thereof. The rule is thus most admirably stated in 21 Cyc., p. 1250: "Courts of equity will take into consideration the adequacy of the provision for the wife, since antenuptial agreements wherein the wife releases her rights in the husband's estate should be reasonable in their terms. To determine the fairness and reasonableness of the agreement all of the circumstances, such as the wealth of the husband, the existing means of the wife, the age of the parties, and the prospective wife's full and clear knowledge and understanding of the nature and meaning of the terms of the contract are properly regarded. Good faith is the cardinal principle in such contracts. If the provision made for the wife is unreasonably disproportionate to the means of the husband, the presumption of designed concealment is raised, and the burden of disproving the same is upon him."

This principle is in perfect accord with the reported decisions of our courts. In the case of *Maze's Ex'r v. Maze*, 99 S. W. 336, 30 Ky. Law Rep. 679, the marriage contract, unfair to the wife in its terms, was set aside because of the failure of the representatives of the husband to show that it was understood by the wife at the time she signed it. In *Brooks v. Brooks*, 58 S. W. 450, 22 Ky. Law Rep. 555, the contract was set aside because the wife had been induced to sign it to pacify the opposition of her husband's children by a former marriage, and that it was executed for such a purpose. In *Simpson v. Simpson's Ex'r*, 94 Ky. 586, 23 S. W. 361, the antenuptial contract, which made some slight provision for the wife, was set aside because, judging from the contract itself and the circumstances under which it had been executed, the wife was overreached. The principles announced in these three foregoing cases are in harmony and accord with the opinions of courts of last resort in other states, notably New York and Pennsylvania. The contract under consideration is very unreasonable, inequitable, and unfair in dealing with the wife. In fact it is more unconscionable and unjust to the wife than any marriage contract to which our attention has been called; and, being such, the law casts upon the representatives of Judge Tilton the burden of showing that at the time of its execution appellee understood the nature and extent of her prospective husband's estate, and the value of her marital rights therein, which

she was, by its terms, surrendering. Dr. Brown testifies that he did not know the nature and value of Judge Tilton's estate, although he considered him a man in good circumstances for a Robertson county farmer, yet he did not, according to his testimony, discuss this view of the contract or transaction with Mrs. Tilton. But it is argued that it must be presumed that, having lived in that locality for some time before her marriage, and in his immediate family for more than a year before her marriage, she was bound to know, at least to some extent, the nature and value of his estate. To this we answer that presumptions will not be indulged in order to establish a state of facts that would cast a wife, after more than 30 years' faithful service, penniless upon the world. Neither does the doctor pretend to say that he explained to her what her marital rights were in the property of her prospective husband, and of which this contract was totally depriving her. On the contrary, his whole aim seemed to be to explain to and satisfy her, to use his own language, "of the necessity for the peace offering in the neighborhood on account of the young people living there." When this contract is considered in the light of the circumstances under which it was executed, and the relation in which the parties were situated at the time, their station in life, education, and advantages, we are constrained to the belief that appellee did not understand its terms, but executed same under the mistaken belief that it was a "peace offering," prepared for the express purpose of preventing trouble between herself and the children of Judge Tilton. Such a contract could only be sustained by evidence of the most positive character, to the effect that its terms were fully comprehended, understood, and acquiesced in. No testimony of such a character is introduced in this case.

Lastly it is urged in argument that, after the execution of the contract, appellee had more than two months within which to advise herself as to her rights before she entered into her marriage with the judge, and that therefore she must have been satisfied, else she would have made complaint. This argument is without force. The contract had been signed, and passed from her, and undoubtedly the same influence which induced her to sign it operated to lull her into silence and acquiescence, not only during the two succeeding months, but during the 32 years which followed. The question is not, was she satisfied? but, was she deceived? It was not until after her husband's death that she realized and understood how cruelly she had been imposed upon and deceived in the execution of this contract, and how helpless and poverty stricken it left her in her old age, after a life of service and devotion. Equity to the wife demands that this contract be canceled and held for naught, and appellee awarded that interest in the estate-

of her husband to which, under the law, she is entitled.

The judgment is reversed and cause remanded, with instruction to the trial court to enter judgment in conformity with this opinion.

ROBERTSON et al. v. ROBERTSON'S TRUSTEE et al.

(Court of Appeals of Kentucky. Nov. 11, 1908.)

1. TRUSTS (§ 218*)—MANAGEMENT OF TRUST ESTATE—INVESTMENT—LOSSES—LIABILITY.

In the absence of a statute, a trustee investing trust funds in bank stock is liable for the loss sustained by the depreciation of the stock, notwithstanding his good faith in making the investment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 310; Dec. Dig. § 218.*]

2. TRUSTS (§ 217*)—MANAGEMENT OF TRUST ESTATE—INVESTMENT—LOSSES—LIABILITY.

Under Ky. St. 1903, § 4706, authorizing trustees to invest trust funds in dividend-paying securities of any railroad or other corporation which has been in operation for more than 10 years, etc., a trustee cannot invest funds in bank stock unless the bank has been in operation for more than 10 years.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 307; Dec. Dig. § 217.*]

Appeal from Circuit Court, Shelby County. "To be officially reported."

Action by George T. Robertson and others against Mary Ann Robertson's trustee and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

P. J. Beard, for appellants. J. C. Beckham & Son and Beard & Marshall, for appellees.

BARKER, J. The learned trial judge in his opinion in this case makes the following statement of facts, upon which the legal issues turn, which we adopt as our own: "The defendant S. S. Weakley as trustee of Mary Ann Robertson, in 1901 invested \$1,300 of trust funds in his hands in 26 shares of the stock of the Bank of Waddy, which began business in January, 1900. In his settlement in the county court he was credited by this investment. The cestui que trust having died, this action in equity is brought by parties interested in the estate to surcharge his settlement, and make him liable for the bank stock investment, it having become worthless. Upon this record there can be no doubt that the trustee made the investment in perfect good faith, and that it was such as a prudent business man would make in his own affairs, and to secure a certain support for himself and family. The evidence shows conclusively that when the trustee invested the money, the stock was generally regarded as worth as much or more than he gave for it. The directors were regarded as good business men, and men of means and fine business standing were interested in the bank as officers and stockholders. It was then a good dividend-

paying stock, and continued to be until July, 1905. The trustee owned stock in the bank, individually; in fact purchased some for himself after the trust investment was made, and not long before the bank made an assignment. Other trustees besides the defendant invested trust funds in the stock of the bank, which was finally wrecked by the cunning dishonesty of its cashier." The question arising for adjudication upon the foregoing statement of fact is whether or not the appellee was liable for the loss of the trust fund in his hands, caused by the investment in the stock of the wrecked Bank of Waddy.

It is clear that the trustee, under the rule prevailing in this state prior to the enactment of the statute which we shall hereafter discuss, would be liable for the loss sustained. In the case of *Smith v. Smith*, 7 J. J. Marsh. 238, the guardian was held liable for the depreciation of 16 shares of stock in the Bank of Kentucky, which he had purchased with his ward's money; and in *Clark et ux. v. Anderson*, 13 Bush, 111, it was held that the investment by the trustee of the funds of his cestui que trust in second mortgage bonds of the Louisville, Cincinnati & Lexington R. R. Company was unauthorized, and the loss cast upon the trustee. In that case, Chief Justice Lindsay, speaking for the court, said: "In this state trust funds may be loaned on personal security when it is ample and sufficient (*Higgins v. McClure*, 7 Bush, 381; *Clay v. Clay*, 3 Metc. 548), and may be invested in certain public securities (*Myer's Supp.* 264; *Gen. St.* 508), with the sanction of a court of equity; but no judicial precedent or statutory regulation will justify their investment in the stock or bonds of private corporations, and bonds secured by a second mortgage on the roadbed and other property of a railway company are peculiarly objectionable." The opinion in *Durrett's Guardian v. Commonwealth*, 90 Ky. 312, 14 S. W. 189, does not justify the investment by the guardian of his ward's money in the stock of a bank as an original proposition. It is there held that, inasmuch as the funds were originally invested by the ancestor in bank stock, and in this shape came to the guardian's hands, he was justified in selling the bank stock which had begun to depreciate, and in investing the proceeds in other bank stock which appeared a safer investment. In speaking of the duty of a trustee, in the opinion under consideration, it is said: "Mere good faith, while requisite and commendable, is not all that is required of such a fiduciary. He must be competent also. While it is his duty to make the ward's estate as productive as a prudent use will admit, yet he must do so in conformity to law. He must possess such legal knowledge as is needful to the proper execution of the trust." Again: "It is the duty of the guardian to make the estate productive, and he may therefore, in a prudent manner, loan out

the money of the ward, taking solvent personal security. In such a case he will not be held liable if a loss results without neglect upon his part in preventing it." The case turned upon the right of the guardian to change the security, and there is nothing said by the court which would authorize the assumption that the trustee, as an original proposition, had the right, as the law then stood, to invest the trust fund in the stock of a private banking corporation. From the foregoing authority it is clear that, unless the trustee is authorized by the statute now in force in this state bearing upon the question in hand, he cannot escape liability in the instance before us. The statute relied upon to justify the investment is contained in section 4706 of the Kentucky Statutes of 1903, which is as follows: "That it shall be lawful for persons or corporations holding funds in a fiduciary capacity for loan or investment, to invest the same in real estate, mortgage notes or bonds, or in such other interest-bearing or dividend-paying securities as are regarded by prudent business men as safe investments, and to make loans with such securities as collateral; but such funds shall not be invested in the bonds or securities of any railroad, or other corporation, unless such railroad, or other corporation, has been in operation more than ten years, and, during that time, has not defaulted in the payment of principal or interest on its bonded debt, or be invested in the bonds of a county, district, town or city that, within ten years, has defaulted in the payment of the interest or principal of its bonded debt; and a fiduciary shall account for all interest or profit received."

It is confidently urged that the foregoing statute authorizes the investment by the trustee of the trust fund in the stock of the Bank of Waddy; it being said that this is permitted, in the following general language succeeding the specific enumeration of the property authorized by name, to wit: " * * * Or in such other interest-bearing or dividend-paying securities as are regarded by prudent business men as safe investment, and to make loans with such securities as collateral." It is contended that bank stock is a dividend-paying security, and is included in the general language following the specific enumeration. But the appellant insists that, even admitting this part of appellee's contention to be sound, the investment in question is included in the prohibition of the investment of trust funds in the bonds or securities of any railroad, or other corporation, unless such railroad, or other corporation, has been in operation more than 10 years, and during that time has not defaulted in the payment of principal or interest on its bonded

debt. We are inclined to believe that the contention of the appellant is sound, and that, in order that a trustee may be justified in the investment of trust funds in bank stock, the corporation must have been in operation more than 10 years. We cannot give our assent to the proposition that the investment of trust funds in bank stock is permitted under the general words "or dividend-paying securities," and yet not included in the inhibition of investing in the securities of other corporations, unless such corporations have been in operation more than 10 years. The object of the statute is to render the investment of trust funds as secure as possible on the one hand, and at the same time to widen the field of investment as far as is reasonably consistent with safety. One of the best securities for the integrity of the fund is the fact that the corporation has stood the test of time. This time test is fixed by the Legislature at 10 years, and this was considered necessary to prove the safety and solvency of the corporation in question. There is every reason for fearing for the safety of funds invested in a newly embarked banking venture; but, after time has demonstrated the capacity of the officials to manage the corporation, their honesty and integrity, and also that the business can be made profitable at a given place for a long period of time, then it is that the law considers that trust funds may, with reasonable safety, be invested therein.

We are not willing, on the one hand, to widen by interpretation the field for the investment of trust funds, without also by interpretation holding fast to the safeguards which the Legislature has thrown around such investments. We see no more reason for permitting the investment in bank stock under the general language in the first part of the statute than there is for including it also in the inhibition of the general language following the specific enumeration in the latter part. The doctrine of *ejusdem generis* applies equally to the two instances. It seems to us that, assuming for the purposes of this case that bank stock is legitimate property for the investment of trust funds under the permissive part of the statute, it is also included in the inhibitory part, and that, before a trustee is permitted to invest the funds of his cestui que trust in stock of private business corporations, these must have fulfilled the requirements of the statute as to the time of their existence. This, it is admitted, the Bank of Waddy had not done; and therefore it follows that the investment was not justified.

For these reasons the judgment of the trial court is reversed, for further proceedings consistent with this opinion.

WEBSTER v. CITY OF VANCEBURG.

(Court of Appeals of Kentucky. Nov. 12, 1908.)

1. MUNICIPAL CORPORATIONS (§ 764*) — DEFECTS IN STREETS—SIDEWALKS—USE BY VEHICLES—LIABILITY FOR INJURY.

A city's sidewalks are intended solely for the use of pedestrians, and, while they must be kept in reasonably safe repair for such use, the city is not bound to keep them fit for the use of vehicles also, and if drivers use them for passage of wagons they do so at their peril.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 764.*]

2. MUNICIPAL CORPORATIONS (§ 764*) — DEFECTS IN STREETS—SIDEWALKS—USE BY VEHICLES—ACQUIESCENCE OF CITY.

The fact that sidewalks had been used by vehicles for many years with the acquiescence of the city would not render the city liable for injuries to drivers because the sidewalks were not fit for vehicles.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 764.*]

3. MUNICIPAL CORPORATIONS (§ 764*) — DEFECTS IN STREETS—SIDEWALKS—USE BY VEHICLES—DUTY OF CITY TO FURNISH ROADWAY.

That the only practicable way for wagons to reach a railroad depot was by using the sidewalk did not render the city liable for injuries to a driver caused by the sidewalk being unfit for such use, as the city was not legally bound to provide a roadway for such purpose.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 764.*]

Appeal from Circuit Court, Lewis County.

"To be officially reported."

Action by John M. Webster against the city of Vanceburg. Judgment for defendant, and plaintiff appeals. Affirmed.

Allan D. Cole, for appellant. R. D. Wilson, for appellee.

O'REAR, J. The Chesapeake & Ohio Railway freight depot in Vanceburg is situated on Main street, alongside of which is a pavement. The lay of the land is such that in getting freight into the depot for shipment, and in getting it out for delivery in town, teamsters have for years crossed the pavement in taking their wagons and drays up to the depot building to load and unload freight. Appellant, who was a drayman, loaded his dray with baled hay from the depot, or a car by it, and for that purpose and his own convenience had driven his dray upon the pavement. In driving off the pavement the wheels of his dray dropped off at the pavement curbing, one before the other, which was a foot or more lower at that point than the sidewalk. From the jar thus caused appellant was thrown to the ground and sustained a serious injury to his shoulder. He sued the city, because it had neglected to so repair the pavement at that point as to make it reasonably safe for its use by wagons having occasion to go to the freight depot. Upon the evidence showing the foregoing state of facts, the trial court peremptorily instructed the

jury to return a verdict for the defendant city, of which appellant complains on this appeal.

The sidewalks of a city are intended solely for the use of pedestrians. While they must be kept in reasonably safe repair for such use, the city is not bound to keep them fit for the use of vehicles also. If drivers of vehicles nevertheless use them for passage of their wagons, they must do so at their peril. Nor does the fact that the pavements have been so used by the acquiescence of the city for many years affect its liability in the matter, so far as vehicle drivers are concerned.

It is argued that the way used by appellant was the only practicable way for wagons to reach the depot. Be that as it may, the city was not legally bound to provide a roadway for wagons to the railroad depot, and is not liable for a failure to do so. If the driver of the wagon saw proper to use ways not provided for such vehicles, he has no legal complaint against the city that they were not fit for the use to which he was putting them. A city's legal duty is not to furnish streets, even where they may be needed; but it is to keep such as it does furnish in a reasonably safe condition for use for purposes for which they are provided—sidewalks for pedestrians; roadways for vehicles and horses.

Judgment affirmed.

BAILEY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 12, 1908.)

1. EMBEZZLEMENT (§ 28*)—INDICTMENT—REQUISITES.

Cr. Code Prac. § 124, requires that an indictment be direct and certain as to the party and offense charged, the county where committed, and the particular circumstances thereof, if necessary, to constitute a complete offense; and section 135 declares that it shall be sufficient to allege larceny or embezzlement of money, without specifying the coin, number, or kind thereof. *Held*, that an indictment charging that defendant, while treasurer, secretary, and general manager of a certain corporation, and intrusted with its money, chattels, and effects, embezzled and unlawfully and fraudulently converted to his own use, with intent to deprive the corporation of the same, its money, effects, and property, a more particular description of which is unknown to the grand jury, to the amount of \$500, was sufficient to withstand a demurrer.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 42; Dec. Dig. § 28;* *Indictment and Information*, Cent. Dig. § 279.]

2. INDICTMENT AND INFORMATION (§ 119*)—CHARGES NOT SUFFICIENTLY PLEADED—SURPLUSAGE.

If an indictment is sufficient to withstand a demurrer as to all facts constituting a complete offense, other charges, not sufficiently pleaded to stand alone, may be regarded as surplusage.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 314; Dec. Dig. § 119.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. INDICTMENT AND INFORMATION (§ 120*)—CIRCUMSTANCES OF THE OFFENSE.

Under Cr. Code Prac. § 124, requiring that an indictment shall be definite and certain as to the particular circumstances of the offense charged, an allegation, in an indictment for embezzlement by a corporate officer, as to the effects and property of the corporation alleged to have been embezzled, not specifically described, should be disregarded as surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 315; Dec. Dig. § 120.*]

4. EMBEZZLEMENT (§ 35*)—INDICTMENT—CONSTRUCTION.

An allegation in an indictment for embezzlement that defendant fraudulently converted the money and property in question "to his own use and to the use of other persons," not described, should be limited to the inquiry as to conversion to defendant's own use.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. § 35.*]

5. EMBEZZLEMENT (§ 33*)—CORPORATE OFFICER—CONVERSION TO USE OF OTHERS—INDICTMENT.

Under Ky. St. 1908, § 1202, authorizing conviction of a corporate officer for conversion of its property to the use of others, an indictment charging such offense must name the persons to whose use the property has been converted, or otherwise describe them, if unknown to the grand jury, so that they may be identified.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. § 33.*]

6. CRIMINAL LAW (§ 147*)—ELEMENTS OF OFFENSE—TIME—LIMITATIONS.

There being no limitation against a prosecution of an officer of a corporation for embezzlement of its funds, which is a felony, time is not a necessary element of the offense, further than that the offense must have been committed before indictment found.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 147.*]

7. INDICTMENT AND INFORMATION (§ 121*)—BILL OF PARTICULARS.

Where an indictment for embezzlement, though sufficient to withstand a demurrer, contained a mere general charge and did not disclose the particular transaction which would be asserted against accused, his remedy was by application for a bill of particulars.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 316; Dec. Dig. § 121; * Criminal Law, Cent. Dig. § 1378.]

8. INDICTMENT AND INFORMATION (§ 121*)—BILL OF PARTICULARS—REQUISITES.

Where a bill of particulars is applied for in a criminal case, it should not be so loose as to constitute a drag net, so that accused may be surprised at the trial; nor is the commonwealth required to specify exact dates, nor state circumstances with such absolute precision as may hamper it in presenting its case.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 316; Dec. Dig. § 121; * Criminal Law, Cent. Dig. § 1378.]

9. INDICTMENT AND INFORMATION (§ 121*)—BILL OF PARTICULARS—DISCRETION.

Whether a bill of particulars will be ordered in a criminal case rests in the sound judicial discretion of the trial judge.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 316; Dec. Dig. § 121; * Criminal Law, Cent. Dig. § 1378.]

10. CRIMINAL LAW (§ 1149*)—APPEAL—REVIEW—DISCRETION—BILL OF PARTICULARS.

The discretion of a trial judge in ruling on an application for a bill of particulars in a

criminal case is reviewable, and subject to correction if abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3041; Dec. Dig. § 1149.*]

11. CRIMINAL LAW (§ 753*)—PEREMPTORY INSTRUCTIONS—INSUFFICIENCY OF EVIDENCE.

Where an indictment against an officer of a corporation alleged embezzlement of its funds by a conversion thereof to his own use, but there was no evidence that he had ever benefited by any of the corporation's money, the court erred in refusing a peremptory instruction to find him not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1727; Dec. Dig. § 753.*]

12. INDICTMENT AND INFORMATION (§ 132*)—ACTS CONSTITUTING OFFENSE—ELECTION.

Where, in a prosecution for embezzlement, the commonwealth elected to rely on a specified transaction to secure a conviction, it should have been confined thereto.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 431; Dec. Dig. § 132.*]

13. EMBEZZLEMENT (§ 44*)—CORPORATE OFFICERS—ELEMENTS OF OFFENSE.

Where defendant, as manager of a corporation, bought certain real estate for it through a real estate agent, the fact that he paid an alleged excessive price, in the absence of proof of a fraudulent purpose, or that accused benefited from the transaction at the expense of the corporation, was insufficient to sustain an indictment for embezzlement charging conversion of the corporation's funds to his own use.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. § 44.*]

14. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES.

In a prosecution of a corporate officer for a particular embezzlement alleged, letters written by him to the corporation's president, admitting other wrongdoing with reference to the corporation's affairs, were inadmissible under the rule that proof of other offenses is irrelevant, subject to an exception when such evidence shows the motive for the particular offense on trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 832; Dec. Dig. § 371.*]

Appeal from Circuit Court, Hopkins County.

"To be officially reported."

I. Bailey, Sr., was convicted of embezzlement, and he appeals. Reversed and remanded.

Jonson & Jennings and Waddill & Dempsey, for appellant. James Breathitt, Atty. Gen., Theo. B. Blakey, and Ruby Laffoon, for the Commonwealth.

O'REAR, C. J. This appeal is prosecuted from a conviction; the charge being embezzlement.

Appellant was, and for many years had been, treasurer, secretary, and general manager of the Reinecke Coal Company, a corporation whose place of business was at Madisonville, Ky. The indictment, following substantially the Kentucky statute against the crime of embezzlement, charged that appellant, while such officer of the corporation named, and being intrusted with its money, chattels, and effects, had embezzled, and un-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lawfully and fraudulently converted to his own use, with intent to deprive that corporation of same, its money, effects, and property, a more particular description of which was unknown to the grand jury, to the amount of \$500. A demurrer to the indictment was overruled. Appellant complains that the indictment was too vague and uncertain to apprise him of the particular offense charged and to put him on notice of what the commonwealth would attempt at the trial to prove. While our Criminal Code of Practice requires the indictment to be direct and certain as to (1) the party charged, (2) the offense charged, (3) the county in which the offense was committed, and (4) the particular circumstances of the offense charged, if they be necessary to constitute a complete offense (section 124, Cr. Code Prac.), yet by section 135, Id., it is made sufficient to allege the larceny or embezzlement of money, without specifying the coin, or number, denomination, or kind thereof. *Jones v. Commonwealth*, 13 Bush, 356; *Travis v. Commonwealth*, 96 Ky. 77, 27 S. W. 863. An indictment worded as this one is in its main features was held good in *Schlittbaum v. Commonwealth*, 80 S. W. 784, 28 Ky. Law Rep. 54. If an indictment contains sufficient to stand the test of a demurrer as to all facts constituting a complete offense, other charges which are not sufficiently pleaded to stand alone may be disregarded as surplusage. So that the charge in this indictment as to effects and property of the corporation alleged to have been embezzled, because not specified or described so as to satisfy the requirements of the Code (section 124, supra), that the indictment shall be definite and certain as to the particular circumstances of the offense charged, may be disregarded as surplusage or immaterial matter. Likewise the allegation in the indictment that appellant fraudulently converted the money and property "to his own use and to the use of other persons" should be limited to an inquiry as to the alleged conversion to his own use. An indictment for embezzlement, charging a fraudulent conversion by the officer or agent of a corporation of its property to the use of others, which may be had under the statute (section 1202, Ky. St. 1903), must name the persons to whose use the property was so converted, or otherwise describe them, if unknown to the grand jury, so that they may be identified. Hence the latter clause of the last quotation may also be regarded as surplusage. It follows that the remainder of the indictment, charging appellant with having fraudulently, while an officer or agent of the corporation, having its money intrusted to his custody, converted \$500 of its money to his own use, intending to deprive the owner of the same, is sufficiently definite to meet the requirements of good pleading.

It sometimes happens from the nature of the case, of which the one in hand may be a

fair example, that even a good indictment may fail to particularize the acts relied upon as constituting the offense, so as to fully and fairly put the accused upon notice as to what will be attempted to be proved against him on the trial, so that he may be prepared to meet it with evidence. There is no limitation against such prosecutions for felony in this state. Hence time is not a necessary element in the declaration, further than that the offense was committed before the finding of the indictment. Appellant was treasurer, secretary, and general manager of the corporation for perhaps 20 years. In that time many thousands of dollars of the corporation's money passed through his hands. A general charge, such as is contained in this indictment, might afford him little or no clue as to the particular transaction which would be asserted against him in the evidence as criminal. Fair play, not to say a regard for that scrupulous care which the state ought to take, and which it does take, to afford one accused of a base crime every reasonable opportunity to face the particular transaction which the grand jury had investigated, and for which he is to be arraigned at the bar of the court, call for something more than a technically good indictment. But the way of reaching the matter is not by demurrer. A bill of particulars, in such case, is the proper practice; that is, a statement filed by the prosecution, in which it is indicated the particular circumstances intended to be relied on as constituting the offense, and to which it will be confined in the further progress of the case. It need not specify exact dates, nor with absolute precision such other circumstances as might hamper the commonwealth in presenting its case; nor should it be so loose as to constitute a dragnet, in which forgotten, unsuspected acts might be brought to the surface, surprising the accused, and operating as a practical matter as unjustly as the most indefinite charge could. The accused should be put fairly upon notice. The commonwealth should have reasonable latitude. The whole matter rests in the sound judicial discretion of the trial judge, and he will order it or not as the circumstances of each particular case may seem to warrant. Like other matters of judicial discretion, his action is reviewable, and subject to correction if abused. *Bishop's New Criminal Procedure*, 3643; *People v. John McKinney*, 10 Mich. 54. But, as there was not a motion for a bill of particulars in this case, there was not an exercise of discretion in the matter by the trial court, and consequently no error in its ruling upon the demurrer.

At the conclusion of the evidence for the commonwealth, the defendant moved for a peremptory instruction to the jury to find him not guilty, which was refused. This we think was error, for there was no evidence of his having converted any money of the corporation to his own use. At the close of all

the evidence the motion was renewed, and again overruled. The commonwealth had staked its case on a transaction in 1903, wherein appellant on behalf of his corporation had bought a tract of coal land in Hopkins county. It was shown that the vendor, one Brumley, had instructed a real estate agent to sell the land. The latter priced it to appellant for \$3,300. Appellant bought it at that price, he claims. At least he paid the real estate agent that sum for it. He had no personal transaction with Brumley. The deed recites the consideration as \$2,800. Brumley testified that he was paid only \$2,800, of which he paid the real estate agent \$50 for making the sale. The latter claims his agreement with Brumley was that the agent was to have for his commission all that he got for the land above \$2,750. He admits that appellant paid him \$3,300, and that he paid to Brumley only \$2,750. Appellant directed the bookkeeper of the corporation to enter the purchase price on the company's books as \$3,300. There was no evidence that appellant got a penny of the money. On the contrary, all the evidence was that he paid the real estate agent the whole \$3,300. It is claimed that he ought to have known, when he saw the deed, that he could have bought, and was in fact buying, the land for \$2,800. But that is not material here. There is no evidence of any fraudulent purpose on the part of appellant in the matter, however improvident it may have later appeared. It was also shown that appellant some months later sold the surface of the land for \$2,400 or \$2,500, paying the same real estate agent \$100 for making that sale. It is not claimed that the sale was not a wise step, or that appellant profited by it personally in any way. The whole of the purchase money was paid to the company. But it is intimated that the real estate man was allowed to make too much out of the transaction. However that was, there being no evidence of fraud in it on appellant's part, it was not embezzlement to the

use of another, even though that other had been named in the indictment. But, as we have seen, the indictment did not put appellant on trial for such a charge, and the commonwealth, having elected to rely upon the main Brumley transaction as that upon which it expected a conviction, should have been confined to it.

Certain letters written to O. Reinecke, who was president and principal stockholder of the corporation, written by appellant before the indictment in this case and while he was at a sanitorium at Battle Creek, Mich., suffering from a nervous breakdown, were introduced as evidence against him. They admitted wrongdoing on his part, including the taking of money from Reinecke by appellant in the past; but they did not allude in terms or by necessary implication to the transaction now under investigation, nor did they either allude to any funds of the coal corporation. That they were written concerning the coal company's affairs (but not this one), appellant, while testifying in his own behalf, was forced by the court to admit. This was error, as was the introduction of the letters. Proof that one has committed other offenses is not relevant to establish that he is guilty of a distinct, though similar, offense. An exception is, when the evidence of the other offenses will show motive for the particular one for which he is being tried, the former may be proved. But such was not the purport of this evidence, and such could not have been its natural or legal effect. We think the letters were incompetent on this trial.

So far as this record discloses, the transaction under investigation is really a dispute between Brumley and his agent, in which neither appellant nor the coal corporation appear to be now concerned.

Judgment reversed, and remanded for a new trial under proceedings not inconsistent herewith.

NUNN, J., not sitting.

ST. LOUIS & S. W. RY. CO. OF TEXAS v. THOMPSON.

(Supreme Court of Texas. Nov. 11, 1908.)

1. CONSPIRACY (§ 21*)—CIVIL LIABILITY—JOINT OR SEVERAL LIABILITY—VERDICT.

Where, in an action against a railroad company and certain individuals for conspiracy to expel plaintiff from a brotherhood of locomotive engineers, the jury found against the railway company, but in favor of all the other defendants, the verdict also acquitted the railway company, as a conspiracy cannot be formed by a single person.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 21.*]

2. CONSPIRACY (§ 21*)—JOINT OR SEVERAL LIABILITY—VERDICT.

In a civil action for conspiracy against several, the jury cannot find all guilty, and inflict punishment on but one.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 21.*]

3. TRIAL (§ 136*)—QUESTION OF LAW AND FACT.

In an action for conspiracy in expelling plaintiff from a society because of the writing of a certain letter, whether the writing of the letter could be reasonably considered a violation of plaintiff's obligation to the laws of the society was for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318-327; Dec. Dig. § 136.*]

4. BENEFICIAL ASSOCIATIONS (§ 10*)—MEMBERS—EXPULSION—QUESTIONS—DETERMINATION.

If the members of a beneficial association acted fairly and in good faith in the trial of a member, and believed that a letter written by plaintiff and the circumstances attending it, was a violation of the laws of the order, a finding to that effect would be conclusive on the courts on the question.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. § 17; Dec. Dig. § 10.*]

5. CONSPIRACY (§ 21*)—GOOD FAITH—QUESTION FOR JURY.

In an action for conspiracy to wrongfully expel plaintiff from a society, whether the members acted fairly and in good faith in finding that a letter written by plaintiff was in violation of the constitution and laws of the order was for the jury.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 28; Dec. Dig. § 21.*]

6. BENEFICIAL ASSOCIATIONS (§ 10*)—MEMBERS—EXPULSION—CIVIL LIABILITY—DAMAGES.

Where the members of a beneficial association act fairly and in good faith, on testimony submitted to them in support of charges against a member and find him guilty of violating his obligations or the constitution and laws of the order, their action is conclusive; but, if they act in bad faith, and not in the exercise of an honest judgment, and expel the member, then their action is void, and the member may recover therefor.

[Ed. Note.—For other cases, see Beneficial Associations, Dec. Dig. § 10.*]

7. BENEFICIAL ASSOCIATIONS (§ 10*)—MEMBERS—EXPULSION—GROUNDS.

That a member of a brotherhood of locomotive engineers became a witness against a railroad company, and testified to the injury of the other members, causing the brotherhood at large to lose prestige with the railroad company, was no ground for expulsion.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. § 13; Dec. Dig. § 10.*]

8. BENEFICIAL ASSOCIATIONS (§ 10*)—MEMBERS—EXPULSION—DAMAGES.

If a member of a beneficial association was entitled to recover damages for his wrongful expulsion, he might recover as actual damages such sum as would compensate him for his pecuniary loss for mental suffering and humiliation, and the value of his insurance policy and a traveling card, forfeited thereby.

[Ed. Note.—For other cases, see Beneficial Associations, Dec. Dig. § 10.*]

9. CONSPIRACY (§ 20*)—CIVIL LIABILITY—EXEMPLARY DAMAGES.

In an action for conspiracy to procure plaintiff's expulsion from a beneficial association, plaintiff, if entitled to recover, could recover exemplary damages against those defendants shown to have been actuated by malice in making or prosecuting the charges; it not being required, as in the case of actual damages recovered, that all the defendants should be subjected to the same verdict.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 20.*]

10. BENEFICIAL ASSOCIATIONS (§ 12*)—MEMBERS—EXPULSION—ACTION FOR DAMAGES—REMEDIES IN ASSOCIATION—EXHAUSTION.

A member of a beneficial association, having been wrongfully expelled, is not required to prosecute all his remedies by appeal within the association before instituting a suit for damages against those responsible for his expulsion.

[Ed. Note.—For other cases, see Beneficial Associations, Cent. Dig. § 21; Dec. Dig. § 12.*]

11. BENEFICIAL ASSOCIATIONS (§ 20*)—ACTIONS—EXEMPLARY DAMAGES—EVIDENCE.

Where there was evidence raising an issue of exemplary damages, in an action for conspiracy, resulting in plaintiff's expulsion from a beneficial association, evidence that plaintiff at the time had a home of his own, a wife, and two children was admissible as bearing on the effect such expulsion might have on his mind and reputation.

[Ed. Note.—For other cases, see Beneficial Associations, Dec. Dig. § 20.*]

12. BENEFICIAL ASSOCIATIONS (§ 10*)—MEMBERS—EXPULSION—EVIDENCE.

Where a member of a beneficial association was not tried before the association for taking improper fees as a witness, or for falsely representing himself as an expert in actions against a railroad company, evidence that he had done so was inadmissible to support a finding of the association that he was guilty of other charges.

[Ed. Note.—For other cases, see Beneficial Associations, Dec. Dig. § 10.*]

Error from Court of Civil Appeals of First Supreme Judicial District.

Action by W. Z. Thompson against the St. Louis & Southwestern Railway Company of Texas. Judgment for plaintiff against the railway company alone, affirmed by the Court of Civil Appeals (108 S. W. 453), and defendant brings error. Reversed and remanded.

E. B. Perkins and Marsh & McIlwaine, for plaintiff in error. John M. Duncan and H. E. Lasseter, for defendant in error.

BROWN, J. Thompson instituted this suit in the district court of Smith county against the St. Louis & Southwestern Railway Company of Texas, the Grand International Brotherhood of Locomotive Engineers, J. J. Bartholomew, W. H. McCorkle, G. L. Mc-

Cardell, M. M. Bartholomew, and R. J. McCool to recover of them damages occasioned to the plaintiff by wrongfully and maliciously causing him to be expelled from the said order of the Brotherhood of Locomotive Engineers. Omitting the detail of facts, we will make this brief statement, which will be sufficient for the purposes of this opinion. There was a division of the order of the Brotherhood of Locomotive Engineers at Tyler, No. 201, and the plaintiff, Thompson, and the different individual defendants, were each and all members of that division. The petition charged that the railway company, acting by Green, a general officer of that corporation, J. J. Bartholomew, W. H. McCorkle, G. L. McCardell, M. M. Bartholomew, and R. J. McCool, entered into a conspiracy and combination whereby they agreed and undertook to secure the expulsion of the plaintiff from the said Brotherhood, and, in pursuance of that confederation and conspiracy and to accomplish that purpose, the said individual defendants made out, deposited, and filed with the said Division No. 201 of the Brotherhood of Locomotive Engineers at Tyler the following charges against this plaintiff: "Specification of charges. For writing to Mrs. A. H. Penniman, and urging her to sue the Cotton Belt Railway for the death of her husband. For going on the witness stand in the Bolton case and testifying against the Cotton Belt Railway Company to the injury of the other brothers, and causing the brotherhood at large to lose prestige with the Cotton Belt Railway Company." It is alleged that the said charges were false, and that they were knowingly and maliciously made and presented to the said division. Thereafter the said Division No. 201 of the said Brotherhood notified the petitioner, and placed him upon trial on the said charges. It is alleged that the prosecution of him in the division was maliciously done by the said defendants, and that the members of the said division had no reasonable ground to believe that he was guilty of said charges, and did not believe that he was guilty thereof, but that the said proceeding was prosecuted against him for the unlawful purpose of deterring him from appearing when summoned as a witness in cases against the Cotton Belt Railway. Upon a trial had before the said division, the charges were sustained and the petitioner was expelled therefrom. Petitioner appealed from the said decision to P. M. Arthur, Grand Chief Engineer, who, notwithstanding the unjust and false charges made against the plaintiff, sustained the action of said division. And, in pursuance of said expulsion, the plaintiff's name was printed as one who had been expelled from the said order in a journal of the said International Brotherhood, and was circulated largely in the United States, Canada, and Mexico, greatly to his humiliation and detriment. The plaintiff in his petition alleged with particularity the

different elements of injury that he sustained by reason of the action of the said division procured by the malicious and willful conspiracy and combination of the defendants. Among other things, he alleged that he held a policy of insurance in the said order for \$1,500 upon which he had paid large sums for a number of years, which by the rules of the order was forfeited upon his expulsion and as consequence thereof. He also alleged that, as a member of said order, he was entitled to and had a traveling card which entitled him to ride free upon the trains of the different railroads in the United States, Canada, and Mexico, which was also forfeited as a consequence of said expulsion. He alleged mental suffering and humiliation by reason of the unjust and unlawful action of the said defendants. The case was tried before a jury, which, after being out for some time, presented to the court the following question: "Hon. R. W. Simpson, District Judge. Dear Sir: A part of the jury is not clear as to whether they can find for the defendant separately, as well as collectively. Therefore we ask your advice on this point. Very respt., G. H. Aikins, Foreman." And to this the court replied in writing as follows: "Gentlemen of the Jury: In answer to foregoing question, you are charged as follows: If you should find for all the defendants, your verdict will be 'We the jury find for the defendants.' If you should find in favor of some defendants and against others, your verdict should state against which defendants you find, naming them, and in favor of which defendants you find, naming them. R. W. Simpson, Judge Presiding." The jury returned this verdict: "We, the jury, find for plaintiff in this case a verdict for twenty-five hundred dollars (\$2,500.00), five hundred (\$500.00) as actual damages, and two thousand (\$2,000.00) as exemplary damages against the defendant the St. Louis Southwestern Railway Company and for the other defendants. G. H. Aikins, Foreman." The railroad company moved in arrest of judgment, because, the jury having found by their verdict that the other defendants were not guilty of conspiracy, no judgment could be entered against the railroad company. The same proposition was presented by motion for a rehearing. Both motions were overruled, and, upon appeal to the Court of Civil Appeals of the First District, that court affirmed the judgment of the trial court.

The railroad company did not and could not actually participate in the act of expelling the defendant in error from the order, and can only be held liable for the results of that action by reason of the fact that it had entered into a conspiracy with the individual defendants named to procure some action by the Brotherhood against Thompson. The jury distinctly found for the defendants other than the railroad company, and thereby acquitted all other defendants

from having entered into a conspiracy with the railroad company. There is no room for construction of this verdict, for it is expressed in plain language that the railroad company is the only guilty party defendant to the suit. Under the allegations in this case, the railroad company could not have accomplished the injury which was done to Thompson by its own action, but necessarily must have acted through other guilty parties. It therefore follows that an acquittal of all other defendants acquitted the railroad company of the charge made against it. A conspiracy cannot be formed by one person. *Collins v. Cronin*, 177 Pa. 35, 11 Atl. 869. In the case cited a father and son were charged with a conspiracy to defraud creditors of the son. "It was alleged that Cornelius Cronin has confessed fraudulent judgments to his son John for the purpose of hindering, delaying, and cheating the creditors of the former, that executions had been issued upon these fraudulent judgments, and his property sold and bought in by the son at much less than its value. This, if true, would have been a fraud upon the plaintiff and other creditors. The jury found that it was not true under proper instructions from the court; for how could fraudulent judgments spring into existence between a father and son without collusion, combination, and conspiracy? And, if the judgments were bona fide, then the son was merely using the legal remedies to collect an honest debt due from his father." In that case, as in this, it was contended that the conspiracy or combination between the parties was not necessary to make the father liable, but the Supreme Court of Pennsylvania distinguished the case then before them from one cited as authority in the following explicit manner: "Under the facts of that case the combination or conspiracy was nothing. One of the defendants could have traduced the character of the plaintiff as a teacher, as well as a number of them, and, if he had done so, he was clearly liable in damages for his own act, even although the other defendants had no part in it. It is an act capable of being performed by one defendant alone. But in the case in hand the conspiracy was everything. Without it plaintiff had no cause of action, for the plain reason that the acts charged in the declaration were of such a nature that they could not be committed by one defendant alone." This clearly distinguishes the case now under consideration from those cited by attorneys for the defendants in error. The gravamen of the action in this case is the injury done; that is, the wrongful expulsion of defendant in error from the order of the Brotherhood of Engineers. The railroad company could not have effected that act alone. It could only do it, as we have said before, by the action of its codefendants through a conspiracy entered into by and between the railroad company and the other defendants. The verdict

of the jury in effect finds as to the other defendants that the expulsion was not wrongful or was not procured through the combination charged. Therefore the railroad company could not be guilty and all others innocent.

It is insisted with much earnestness by the attorneys of the defendants in error that the jury might have found all the parties guilty, and yet inflict the punishment upon one of them. Let us test the correctness of this proposition by writing the verdict so as to express the implied proposition of the defendants' counsel. Suppose the jury had said: "We, the jury, find for the plaintiff against the defendant railroad company, and also against the other defendants, but we assess the damages alone against the railroad company for \$2,500." Would the gentlemen contend for such a verdict, or would any court sustain such a discrimination? If it would not sustain it as written out, it cannot sustain it as necessarily implied in the argument of the attorneys for the defendants in error.

It is insisted that suit might have been brought against the railroad company alone in this case. Grant that to be true (we do not intend to intimate to the contrary), the result would be the same, for, in order to recover against the railroad company, the same allegations and proof would be necessary to recover against it as is required in this case; i. e., it would be necessary for the plaintiff to prove the conspiracy between the parties, the unlawful action of other defendants in agreeing to carry it out, both as to making the charge and as to the action of the division, and, if plaintiff should fail to make such proof, he could not recover against the railroad company. If that company had been sued alone and the case submitted on special issues, and the jury had answered that the other defendants did not enter into the conspiracy, or that the expulsion was lawful, no judgment could be entered against the railroad company, although the jury should find against it. We conclude, therefore, that the court erred in giving the charge in answer to the request of the jury, and also erred in overruling the motion in arrest of judgment and the motion for a new trial, for which errors this case must be reversed.

The trial court erred in submitting the issues in this case to the jury by using the following language: "Then, if you further find from the testimony that the writing of the Penniman letter could not reasonably be considered a violation of plaintiff's obligation to the laws of the Brotherhood," etc. The court should have decided that question. If the members of the Brotherhood who tried Thompson, acting in good faith and in fairness towards Thompson, believed and held that the writing of the letter to Mrs. Penniman and the circumstances attending it did or did not constitute a violation of the constitution and laws of the order, that find-

ing would be conclusive of the question. Whether or not the members of the order acted fairly and in good faith towards Thompson in placing this construction upon the letter and the circumstances attending it was a question of fact for the jury, and was so submitted to them. If the members of Division No. 201 of the Brotherhood of Locomotive Engineers in good faith fairly and honestly passed upon the testimony submitted to them, and found Thompson guilty of violating his obligation, or the constitution and laws of the order, then their action would be final and conclusive of the matter, and the plaintiff could not recover in this case because of his expulsion from that order, nor for any of the consequences flowing from it, although they may have found him guilty on the second charge also. If, however, the members of that order did not act in good faith, and did not exercise their honest judgment in coming to the conclusion that, by writing the Penniman letter, Thompson was guilty of a violation of his obligation, or the constitution and laws of the order, but used it as a pretext by which to expel him on account of the second charge made against him, then their action would be void, and Thompson would be entitled to recover.

The second charge, whereby Thompson was arraigned for having gone on the witness stand in the Bolton case and testified, did not furnish any ground for his expulsion from the order. If the Brotherhood of Locomotive Engineers had in their constitution or by-laws provided in so many words that a member who should testify in court in any case where he was called as a witness should be expelled, such provision would be a nullity, and would not be enforced in any court. If Thompson was wrongfully expelled through procurement of the Cotton Belt Railroad Company by a conspiracy and combination with other defendants named because he wrote the Penniman letter, or if he was expelled because he had done what was charged against him in the second specification alone, and not upon the first charge, then he would be entitled to recover against the railroad company, and against such of the other defendants as conspired and acted with it and against the order which expelled him for all damages which naturally flowed from such expulsion.

If the plaintiff shall be found entitled to recover against the defendants, his recovery should be for actual damages; that is, that sum of money which would compensate him for the pecuniary losses sustained by him as a result of his unlawful expulsion, and also such sum as would compensate him for the mental suffering and humiliation that was caused to him by reason of said expulsion and by reason of the publication of the same in the journal of the order. In this connection, we will say that the value of the insurance policy and traveling card alleged to have

been forfeited by the expulsion would be proper elements of actual damages to be assessed in his favor. If the defendants or either of them were actuated by malice in making the charges against Thompson, or in procuring the same to be made and in prosecuting the same before the order thereby procuring his expulsion, then the plaintiff may in the discretion of the jury recover exemplary damages against either or all of the said defendants in such sum as the jury may believe should be assessed against the said defendants or either of them. It is not necessary, as in case of actual damages recovered, that all of the defendants should be subjected to the same verdict because some of the defendants may have acted without malice, but in combination with others, and as to such defendants there would be no right to recover exemplary damages.

It is contended that the plaintiff could not maintain this action because he did not appeal from the decision of P. M. Arthur, Grand Chief Engineer, to the Grand International Division, but this is not a proceeding to restore him to his membership. It is a suit for damages occasioned by his expulsion, and one in which his property rights, as well as personal rights, are involved. We are of opinion that it was not necessary for him to have prosecuted his appeal further than he did before instituting his suit for damages. *Benson v. Screwmen's Ben. Ass'n*, 2 Tex. Civ. App. 66, 21 S. W. 562; *Bauer v. Sampson Lodge K. P.*, 102 Ind. 262, 1 N. E. 571. On application for mandamus to restore plaintiff to membership, the court would not take jurisdiction until the applicant had exhausted his remedies under the laws of the Brotherhood. The same reason does not apply in a suit for damages. The right to apply to the courts for redress of such injuries as in this case exists in favor of all citizens, and could not be abridged by any association except by the consent of the member. The defendants have no ground upon which to stand in demanding that the remedy of appeal should be exhausted before they are called upon to repair the injury they have inflicted upon Thompson. The continuance of his membership in the Brotherhood does not concern the defendants.

It is assigned as error that the court permitted Thompson in testifying to state that at the time of this transaction he had a home of his own, and a wife and two children. There was evidence which raised the issue of exemplary as well as actual damages, and it was permissible to prove those facts so as to determine what effect upon his mind and upon his reputation such a proceeding might have. The testimony was admissible from this standpoint. 18 Am. & Eng. Ency. Law, 1096; *Cahill v. Murphy*, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88; *Rhodes v. Naglee*, 66 Cal. 681, 6 Pac. 863; *Dixon v. Allen*, 69 Cal. 527, 11 Pac. 179; *Klump v. Dunn*, 66 Pa. 141, 5 Am. Rep. 355. In the case last

cited the court said: "The position in life and the family of the plaintiff are always important circumstances as bearing upon the question of damages, and have always been held to be admissible in evidence for that purpose." The fact that Thompson testified as an expert when he was not or that he received pay for his testimony to which he was not entitled is irrelevant to any issue presented in this case. The charges upon which he was tried do not allege against him either the taking of improper fees or that he falsely represented himself as an expert. Therefore such evidence would not be admissible to support the finding and conclusion of the Division No. 201 upon either one of the charges prosecuted before it.

It is therefore ordered that the judgments of the district court and Court of Civil Appeals be reversed, and the cause remanded.

SOWERS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1908.)

1. CRIMINAL LAW (§ 538*) — SUFFICIENCY OF EVIDENCE—CONFESSIONS.

A confession alone, though defendant was not under duress, would not sustain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1229; Dec. Dig. § 538.*]

2. CRIMINAL LAW (§ 519*)—CONFESSIONS.

A confession of defendant could not be considered; the county attorney, to avoid a continuance, having admitted the testimony of absent witnesses that defendant was under duress at the time of the confession to be true.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 519.*]

Appeal from Henderson County Court; J. R. Blades, Judge.

Joe Sowers, Jr., appeals from a conviction. Reversed and remanded.

Miller & Royall, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft, and his punishment assessed at a fine of \$25 and three months' imprisonment in the county jail.

The evidence in this case is not sufficient. It shows that the state relied for a conviction upon the confession of appellant, who was under duress at the time the confession was made. The county attorney admitted the testimony of certain absent witnesses to be true in order to avoid a continuance, and said witnesses' testimony shows that the defendant was under duress. Therefore we hold the testimony is insufficient. A confession alone would not be sufficient to sustain a conviction, if appellant was not under duress.

The evidence being wholly insufficient, the judgment is reversed, and the cause is remanded.

RAMSEY, J., absent.

PIERCE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1908.)

1. RAPE (§ 51*)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.*]

2. CRIMINAL LAW (§ 406*)—ADMISSIONS—ADMISSIBILITY.

A written statement to a justice of the peace, signed by accused after being warned, was admissible against him, under Acts 30th Leg. (Laws 1907, p. 219, c. 118).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 894; Dec. Dig. § 406.*]

3. CRIMINAL LAW (§ 400*)—WRITTEN STATEMENTS—COPIES—ADMISSIBILITY.

On a showing that a written statement made by accused had been lost and diligent search made therefor, testimony as to its contents was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 882, 885; Dec. Dig. § 400.*]

4. CRIMINAL LAW (§ 406*)—ADMISSIONS—ADMISSIBILITY.

A voluntary statement before the grand jury, reduced to writing and signed by accused, was admissible against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 894; Dec. Dig. § 406.*]

Appeal from District Court, Lamar County; Ben. H. Denton, Judge.

A. A. Pierce was convicted of rape, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of rape upon a child 7 or 8 years of age, and given a life sentence in the penitentiary.

Appellant was a man about 74 years of age, and lived in the house of the family of which the little girl was a member. The little girl was placed upon the stand and testified in substance that appellant had intercourse with her. Her mother testified that, after she ascertained the fact that the occurrence had taken place, she examined the child, and had a physician also examine her. The mother testified that the private parts of the little girl were swollen and sore, and, to use her expression, "she walked spraddle-legged" for four or five days. The doctor testified that the little girl was abnormally developed for a child of her age, so much so that he could have placed his two fingers in her private parts with but little pain to the child, and that her private parts had been entered by something, and that they were considerably distended. The brother of the little girl testified that he saw the appellant and his little sister lying on the bed; that she was lying on her side and appellant lying on his side, with the little girl's clothes up and with his private parts out; and that he was pushing against her and making movements as if in the act of copulation. Appellant made two statements while under

arrest, one to the magistrate and the other before the grand jury. Both were reduced to writing and signed by him. He denied, in these statements, that he had had intercourse with her, but admitted that he had her on his lap at the time in question, with his hand under her dress and on her private parts. Appellant also stated that this was the extent of his criminal conduct. We are of opinion that this testimony is sufficient under our authorities.

Exceptions were taken by appellant to the introduction of his conversation or statements to the justice of the peace, as well as before the grand jury. Several objections were made, none of which, we think, were well taken. With reference to the statements to the justice of the peace, it was shown that they were made after being duly warned, reduced to writing, and signed by appellant. This was in compliance with the act of the Thirtieth Legislature (Laws 1907, p. 219, c. 118). With reference to this particular statement, it was shown that the written statement itself had been lost, and search had been made for it, but it could not be found. Evidence of its contents were adduced before the jury. Objection was also urged to this. We are of opinion that the proper predicate was laid for proving the contents of the instrument. It is shown clearly that the instrument had been lost and could not be found, and that diligent search had been made for it. With reference to his evidence before the grand jury it is shown that it was at his request, and that he went voluntarily before that body to make a statement, and did make it, and that it was reduced to writing and signed by him. We think this was admissible under our decisions. The question has been discussed frequently, and this character of evidence given before a grand jury has been held admissible. See Grimsinger's Case, 44 Tex. Cr. R. 1, 60 S. W. 583; Wisdom's Case, 42 Tex. Cr. R. 579, 61 S. W. 926. These cases collate the authorities and discuss the question rather fully.

As the record is presented, we are of opinion that there is no such error shown as would require a reversal of the judgment; and it is therefore affirmed.

RAMSEY, J., absent.

ROBERTS & CORLEY v. FERINGER.
(Court of Civil Appeals of Texas. Oct. 14, 1906.)

BILLS AND NOTES (§ 92*)—CONSIDERATION—SUFFICIENCY.

Where plaintiffs, acting as agents for the owner of certain land, leased it by a lease obligating defendant to pay plaintiffs \$40 a month for three years, and defendant executed a note to plaintiffs for rent to accrue in addition to

other indebtedness to plaintiffs, the note was without consideration to the extent of such rent, notwithstanding plaintiffs' authority to collect the rents; defendant being under no obligation therefor, except to the owner of the premises.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 167; Dec. Dig. § 92.*]

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by Roberts & Corley against G. Feringer. Judgments for defendant, and plaintiffs appeal. Affirmed.

Glasscock & White, for appellants. Fleming & Fleming, for appellee.

KEY, J. Appellants brought this suit against appellee for an alleged balance due upon a promissory note and to foreclose a mortgage upon certain personal property. The face of the note was \$2,127.50, and it bore interest at 10 per cent. per annum. After the defendant had pleaded certain payments, the plaintiffs, in a supplemental petition, admitted payments reducing the amount due to \$1,613.80 and 10 per cent. thereon as attorney's fees, which was stipulated in the note. After filing a general demurrer, the defendant in his answer alleged:

"And if required to answer further herein, and not otherwise, defendant says that he executed the note sued on in making a certain agreement or contract with the plaintiffs, of which the execution and delivery of the said note was a part. That the plaintiffs had charge of the premises now occupied by the defendant, and agreed that they would have executed and delivered to the defendant a lease therefor for a term of three years, and that they would make certain repairs on the residence and barn situated on said land, to wit, that they would cell and repair the residence, and paint the same, and would repair the barn, and would also place all pasture fences in first-class condition. That the defendant on his part promised and agreed, in consideration of the plaintiff executing and delivering, or procuring the execution and delivery of, a lease of said premises, and making the aforesaid repairs, to pay \$40 per month, payable monthly for a term of three years beginning January 1, 1903. That the said repairs agreed to be made by plaintiffs were of a reasonable value of \$10 per month. That the plaintiffs have failed and refused to have executed and delivered a lease to this defendant of said premises, but that they did have defendant execute and deliver to the owner of said premises a certain writing, signed by himself, wherein he agreed to keep the place for three years; but under the terms thereof he was compelled to remove therefrom any time within 30 days' notice from the owners thereof, and plaintiffs failed and refused, and still refuse, to make the repairs agreed on as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

aforesaid on the said premises, and their failure to make the said repairs damaged the defendant in the sum of \$10 per month during the time he occupied said premises, and by reason of their failure to perform their promise as to making said repairs, they became liable and promised to pay the defendant the sum of \$330.

"That on or about the date of the execution of the said note sued on, the plaintiffs and defendant contracted and agreed to close by a note all the indebtedness due by defendant to plaintiffs, and all sums that were to become due by virtue of the rental contract herein to the plaintiffs, or to their principal, and which was in any event to be paid to the plaintiffs, and the defendant, acting in accord with said agreement, executed and delivered the said note sued on, and the real consideration was not exceeding \$812.21, the full amount and only indebtedness of the defendant to plaintiffs at that time did not exceed \$812.21, and defendant believes and charges that this indebtedness did not amount to this much, but is positive that it was no more than said \$812.21, and the remainder of the consideration of said note was said advanced rent placed therein. That the defendant at the time knew that he owed said plaintiffs not exceeding \$812.21, and plaintiffs, acting in and through C. C. Roberts, stated to the defendant, at the time of the execution of the said note, that the same included the rent to be paid on the said premises. That, since the execution and delivery of the said note, defendant has made payments aggregating the sum of \$2,082.25 on said note in cash, the payments being made on or about the following dates, to wit: 4/8/03, \$152.25; 5/5/03, \$80; 6/1/2/03, \$80; 8/21/03, \$80; 9/5/03, \$100; 10/10/03, \$100; 11/4/03, \$100; 12/10/03, \$100; 1/14/04, \$100; 2/9/04, \$100; 3/11/04, \$100; 4/9/04, \$100; 5/20/04, \$100; 3/7/04, \$100; 7/13/04, \$100; 9/15/04, \$100; 10/25/04, \$100; 5/5/03, \$80; 12/7/04, \$80; 12/21/04, \$80; 1/23/05, \$40; 4/10/05, \$50; 5/17/05, \$50. And in cattle the defendant has made the following payments to the plaintiffs on said note: On or about June 11, 1905, 24 head of cattle, \$360, and on or about March or April, 1905, two cows, \$50, which prices were agreed upon and the property was delivered to plaintiffs, and said amount should have been credited upon said note. That on or about the 1st day of April, 1903, defendant repaired fencing for the plaintiffs, for which the plaintiffs promised and agreed to pay him the sum of \$73; that on or about the 1st day of April, 1903, the defendant furnished butter and eggs to the plaintiffs, amounting to \$5.85, and on or about the 1st day of April, 1903, the defendant did hauling for the plaintiffs for a reasonable value of \$25; and that all of the said fencing and hauling was done at the request of the plaintiffs, and were of the reasonable value above set out, and the butter and eggs were sold at the request of plaintiffs and were of the reasonable value

of \$5.85, and each of which three items the plaintiffs promised and agreed to pay the defendant.

"That the plaintiffs on the 26th day of September, 1905, notified the defendant that his lease or rent contract was canceled, and ordered him to move from said premises, which he has done, and by reason of the said removal, after the request and order of the principal, acting in and through their agent, plaintiffs herein, the plaintiffs became liable and promised to pay the defendant the sum of \$120 advanced rent that was theretofore placed in the said note as before stated. That, though demand has been made for damages for the failure to make repairs, as agreed upon, and that defendant be allowed a credit on said rent contract for \$120 for the unexpired time thereof, and for services of the defendant in doing the fencing and hauling as set out, and for said butter and eggs, and plaintiffs have failed and refused and still refuse to pay the defendant said damages and sums for said services as set out. All of the above payments and other indebtedness as set out against the plaintiffs in favor of the defendant are proper charges against the plaintiffs and aggregate the sum of \$2,966.10, and the same being credited on the note sued on, according to the rules of partial payments, leave a balance of \$603.85, which by reason of the matters and things hereinbefore set out the plaintiffs have become liable and promised to pay the defendant.

"That if the said amount for advanced rent was not placed in the said note as a part of the principal thereof, plaintiffs fraudulently, willfully, and knowingly misrepresented the facts as to what was covered by said note, in this: That the said plaintiffs knew that the defendant owed them not exceeding \$812.21, and knew that the defendant would not execute a note for the amount of the note sued on to close up the small amount due by defendant to plaintiffs at that time, and they, the plaintiffs, for the purpose of deceiving him, the defendant, told him that all of the rent to become due on said premises was placed in said note. Defendant, being an illiterate man, relied on their representations, and thereby was induced to execute and deliver the same to them. If said rent was not placed in said note at its execution, plaintiffs falsely represented then and there that all he owed, together with said rent, amounted to the face of the said note; and defendant, relying upon said representations, was damaged in the sum of \$1,500, together with interest thereon at the rate of 10 per cent. per annum from the date of the execution of the said note, and by reason of the said fraud became liable and promised to pay the same to the defendant. That the defendant did not discover that plaintiffs denied that said rent was placed in said note as a part of the consideration thereof until the — day of —, 1905. That if the said

advanced rent to be due to plaintiffs or their principal was not a part of the consideration of the said note, then the plaintiffs are due and liable to this defendant a sum equal to the difference between the indebtedness at the time of the execution of the said note, to wit, not exceeding \$812.21, and the amount as before alleged which is due by reason of the payments made as herein set out, and by reason of the other obligations aforesaid from plaintiffs to defendant as set out hereinbefore, to wit, the sum of \$2,596.10, together with interest on said sum from the time each payment was made, now due and payable from plaintiffs to defendant.

"That defendant charges the said writing, which was signed by defendant, to be in the hands of the plaintiffs, and notifies the plaintiffs to produce the same at the trial of this cause, together with all letters and correspondence between them and any other parties relative to and connected with, and referring to in any way the execution and delivery of and consideration for said note, and also one chattel mortgage, executed and delivered to defendant by plaintiffs on or about the 11th day of January, 1902, filed for record January 18, 1902, and No. 1,904 according to the chattel mortgage register of Jefferson county, Tex., and in default of which secondary evidence will be offered as to contents of said instrument."

The defendant in his prayer asked for judgment against the plaintiffs for a balance alleged to be due him, for cancellation of the chattel mortgage sued on by the plaintiffs, and for general and special relief. The defendant verified his answer, stating under oath that the facts alleged therein as to the consideration of the note sued on were true.

At the trial the plaintiffs by their counsel admitted all the payments set up in the defendant's answer, and the court submitted to the jury the following question only: "Did the note of \$2,127.50, herein sued upon, include as a part of its consideration the rentals under said Cartwright & Roberts lease?" By their verdict the jury answered that question in the affirmative, and thereupon the court rendered judgment in favor of the defendant and against the plaintiffs for the sum of \$144.19, and canceling the note and mortgage sued upon, and the plaintiffs have prosecuted this appeal.

The defendant submitted testimony which amply supports the finding of the jury, and we therefore find as a conclusion of fact that the note sued on included as a part of the consideration the rentals under the Cartwright & Roberts lease contract with the defendant.

There are several assignments of error in appellants' brief, all of which involve substantially the same question of law; the contention being that under the pleadings the defendant was not entitled to submit

oral testimony to show that part of the consideration of the note sued on was the rents which he had agreed to pay under the Cartwright & Roberts lease, nor to have that question submitted to the jury. The record shows that the plaintiffs were the agents of Cartwright & Roberts, and, according to the defendant's testimony, while he signed a written instrument promising to pay the rents to Cartwright & Roberts, the amount of such rents which would accrue under the terms of the contract was added to the amount which the defendant was then indebted to the plaintiffs and placed in the note sued on. The trial court seems to have taken this view of the case: That while the lease contract was made with the plaintiffs, acting as agents for the owners of the premises, the rents to be paid by the defendant were not owing to the plaintiffs, but to said owners, and therefore, to the extent that they were included in the note sued on, that obligation is without consideration and not binding upon the defendant.

We think that view is correct. By the terms of the lease contract the defendant was to pay Cartwright & Roberts \$40 monthly for three years, beginning January 1, 1903, and the lease had not expired when this suit was brought. Now, while the plaintiffs may have had authority to collect the rent as agents for the owners, it could not be used as a consideration for an obligation payable to them in their own right, and not as agents. If, merely because A. is indebted to B., he executes a note payable to C., such indebtedness does not constitute a sufficient consideration, and the note is not a binding obligation. Of course, for a sufficient consideration B. could direct A. to make the note payable to C., and it would then be valid. But that is not what was done in this case. The plaintiffs do not claim to have acquired Cartwright & Roberts' interest in the rents. But if it be conceded that they have, and that they had authority to incorporate the rent in the note and make it payable to them individually, the fact remains that the defendant could be required to pay the rent but once, and the conceded payments were in excess of both the accrued rent and his original indebtedness to the plaintiffs. Therefore, in either view of the case, the finding of the jury that the rent was included in the note supports the judgment of the trial court, and that judgment is affirmed.

Affirmed.

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BISHOP v. RIDDLE.†

(Court of Civil Appeals of Texas. June 13, 1908. Rehearing Denied Oct. 17, 1908.)

1. PARTNERSHIP (§ 99*)—CONTRACTS—BREACH OF FIRM AGREEMENT—LIABILITY.

Plaintiff and a third person owned and operated a telephone exchange as partners. Toll

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

lines owned and operated by them individually were connected therewith. Defendant bought the third person's interest, and thereafter plaintiff and defendant shared equally the charges made by the exchange for handling long distance calls, but each had the exclusive control of his own toll lines. There was no agreement between them as to either of them going into other telephone business. Defendant erected a rival telephone exchange in competition with the firm exchange. *Held*, that defendant was not liable to plaintiff for damages to his individual toll lines.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 153; Dec. Dig. § 90.*]

2. TELEGRAPHS AND TELEPHONES (§ 7*) — FRANCHISES.

A franchise to operate a telephone is not necessary, but one may construct and operate telephone lines on any street subject to municipal regulation as to location of poles and height of wires and obstruction of streets.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 5; Dec. Dig. § 7.*]

3. TRIAL (§ 268*)—INSTRUCTIONS—REQUESTS.

The refusal to give a requested charge, submitting a material issue, not covered by the general charge, is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 673; Dec. Dig. § 268.*]

Error from District Court, Eastland County; J. H. Calhoun, Judge.

Action by O. R. Riddle against G. W. Bishop. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Stubblefield & Patterson, for plaintiff in error. D. G. Hunt, for defendant in error.

PRESLER, J. Plaintiff below, O. R. Riddle, brought this suit for damages in the district court of Eastland county against the defendant below, G. W. Bishop, for the alleged violation of an implied contract of partnership in relation to ownership and operation of a certain telephone exchange in the town of Eastland, Tex., alleged to have been the partnership property of said G. W. Bishop and O. R. Riddle, and for damage alleged to have been caused defendant in error's individual toll lines operated in connection with said exchange, and for exemplary damages, alleging that plaintiff in error during the existence of said alleged partnership had violated the same by procuring a franchise for himself and in the town of Eastland erecting a rival telephone exchange in competition with said partnership exchange, thereby destroying the value of the latter, and by diverting the long-distance business from and over defendant in error's individual long-distance toll lines to those of the Southwestern Telegraph & Telephone Company, greatly injuring and diminishing the value of said toll lines, and that all of said alleged acts of plaintiff in error, Bishop, were wrongfully and maliciously done for the purpose of injuring and damaging defendant in error. The trial in the district court resulted in a verdict

for defendant in error O. R. Riddle upon special issues submitted, in the sum of \$150 as damage to the partnership business, \$250 as damage to the individual long-distance telephone business of defendant in error, O. R. Riddle, and for the further sum of \$250 as exemplary damage, making a total recovery of \$650, and judgment was accordingly entered thereon. Plaintiff in error duly made his motion for a new trial, which was overruled, gave notice of appeal, and filed application for writ of error. Citation in error was executed, supersedeas bond filed, and the case is properly in this court for revision upon numerous assignments of error.

We are of the opinion that under the pleadings and the evidence in this case no recovery should have been awarded defendant in error Riddle as damage to his individual toll lines; it not appearing either from the pleading or the evidence that said lines were a part of the partnership property, or that plaintiff in error Bishop had ever by contract, express or implied, undertaken to protect or in any way further and guard the interests of defendant in error in said toll lines, and, before we can hold plaintiff in error responsible for damage to defendant in error's separate and individual property and business on account of plaintiff in error's competition therewith, it should be made to appear that plaintiff in error owed some duty in this respect to defendant in error arising out of a contract with relation thereto, either express or implied. The theory upon which defendant Riddle contends that a partnership between himself and the plaintiff Bishop existed in reference to said business and property is that one Harrison and defendant in error had originally constructed said Eastland telephone exchange, and for a time owned and operated it jointly upon an equal division of profits and loss, and that said toll lines were then connected with said exchange, and that the plaintiff in error, Bishop, by buying out Harrison's interest in the telephone exchange, and by continuing the business thereof in the way that Harrison had theretofore operated it, became a partner of defendant in error in the further operation of said business, and was under all the obligations and duties imposed in said partnership upon said Harrison. Defendant, Riddle, testified with reference to Harrison's interest in and connection with the toll lines in question as follows: "The toll lines were not partnership property, and Harrison was in no way interested in my lines, nor was I interested in his, except that our system at Eastland handled messages over our toll lines and charged five cents for each message so handled, which was a part of the earnings of the Eastland system. I supposed Mr. Bishop, when he bought

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

out Mr. Harrison, would continue the business in the same way which Harrison had conducted it." And with reference to Bishop defendant in error testified: "We made no agreement for the charge for my toll lines, but he just charged off five cents for each call, which was customary. He has never at any time been a partner with me in the toll business, nor in any way interested in the toll business with me. We shared equally the charges made by the exchange for handling my long-distance calls. I had the exclusive control of my toll lines, but Bishop saw that they were kept in order. I held Bishop only responsible to me for the collections he made on the calls over the long-distance lines, belonging to me. * * * I did not tell Bishop anything about my contract with Harrison, and do not know that he knew anything about it." Defendant, Riddle, further testified, referring to Bishop: "We never entered into any agreement that each should share equally in the profits of the exchange or in the expense of the same. Nothing was said about it. We just went along as before. I did not tell Harrison when we went in together that I expected to run country lines from my exchanges, neither did I tell Bishop that I expected to do so; in fact I never consulted him about it. I think I began to connect the country lines with Ranger exchange in a short while after Bishop bought out Harrison. I have never said anything to Bishop since he bought out Harrison as to my running country lines into territory where the Eastland exchange might desire to run lines. I have never consulted him in regard to the operation of my country lines. And there never has been an agreement between us that neither of us should go into other phone business. I ran other phone business, and my other exchange entered territory in which the Eastland exchange entered. I also had my long-distance business, in which Bishop was in no wise interested, and Bishop was interested in a toll line to Carbon and Gorman from Eastland in which I had no interest. Neither Bishop nor I ever said anything about each not going into competitive phone business. There was no agreement or promise as to that matter." We therefore conclude that plaintiff in error's first, twelfth, and twenty-sixth assignments of error, all of which relate to the question of plaintiff in error's liability for damage to defendant in error's toll lines, are well taken, and that the same should be here sustained, and that this case should be reversed and remanded.

While not material to the disposition of this appeal, in view of another trial of this case, we here state that we do not consider the question raised by plaintiff in error's sixth assignment, to wit, "The defendant excepts to the plaintiff's petition in so far as he seeks to recover damage for the con-

duct on the part of the defendant, subsequent to the time when the franchise, which was granted to O. R. Riddle, and under which the plaintiff and the defendant did a telephone business in the town of Eastland expired," of material interest in this case. This court in the case of *City of Texarkana v. Southwestern Telegraph & Telephone Co.*, 106 S. W. 915, 20 Tex. Ct. Rep. 735, held in effect that no such franchise was necessary; that telephone companies are included in the statute authorizing corporations created for the purpose of constructing and maintaining magnetic telegraph lines to set poles, wires, and fixtures along, upon, and across any public road, street, or water of the state; and that the statute granting city councils of towns and cities incorporated under the general law the exclusive control and power over the streets, alleys, and grounds of the city, and the power to abate nuisances and remove encroachments or obstructions thereon, does not repeal the previous statute giving the right to telephone companies to use the streets for their poles and wires, nor does it take from such companies such right. The assignment is therefore overruled.

Plaintiff in error's fourteenth assignment complains of the refusal of the court to give the following special charge requested: "Should you find from the evidence that the plaintiff and the defendant were at one time partners in the telephone business, but should you further find that the said defendant gave notice to the plaintiff that said partnership, if any there was, was dissolved in January, 1907, then you are instructed that the said notice would be sufficient to dissolve said partnership, and unless you find that the defendant had begun the construction of a telephone exchange in the town of Eastland, during the existence of the partnership between the plaintiff and the defendant, or had done some act in furtherance of the construction of a telephone exchange for himself, then you are instructed that the defendant would not be liable for any damage which might have resulted to the plaintiff by reason of the defendant constructing a local telephone exchange for himself, and you will find in favor of the defendant upon this issue in the case." We are of the opinion that the above submits a correct proposition of law, the submission of which was called for by a material issue of the case, and, not being covered by the general charge, we hold that the refusal to give said special charge, as requested, was error, and the assignment is sustained.

Plaintiff in error's remaining assignments are not considered well taken, and are therefore overruled.

We conclude, because of the errors hereinbefore discussed, this cause should be reversed and remanded; and it is so ordered.

MISSOURI, K. & T. RY. CO. OF TEXAS
v. HOUSE.

(Court of Civil Appeals of Texas. Oct. 14, 1908.)

1. APPEAL AND ERROR (§ 209*)—RESERVATION
OF GROUNDS OF REVIEW—FAILURE TO OB-
JECT.

An objection, not made in the lower court, that the verdict was against the preponderance of the evidence, will be deemed to have been waived on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1290; Dec. Dig. § 209.*]

2. CARRIERS (§ 230*)—CARRIAGE OF LIVE STOCK
—DELAY AND INJURY IN TRANSPORTATION—
ACTIONS—REFUSAL OF REQUESTS.

In an action against a carrier for delay in transporting cattle and for injuries caused by unloading and holding them in a muddy pen, a requested charge to find for defendant if defendant could not have run the train carrying the cattle to their destination in 28 hours was properly refused, where the carrier's line did not extend the entire distance from where the cattle were received to their destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 961; Dec. Dig. § 230.*]

3. CARRIERS (§ 230*)—CARRIAGE OF LIVE
STOCK—DELAY AND INJURY IN TRANSPORTATION—
ACTIONS—REFUSAL OF REQUESTS.

The charge was properly refused, as ignoring the issue of injury by unloading and holding the cattle in the muddy pen.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 961; Dec. Dig. § 230.*]

4. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF
EVIDENCE.

In an action against a carrier for delay and injury to cattle in transportation, a charge that, in making up the verdict, plaintiff's claim for feed bought should not be allowed, was not upon the weight of evidence, as intimating that the jury should allow plaintiff everything else claimed by him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 465; Dec. Dig. § 194.*]

Appeal from Waller County Court; J. D. Harvey, Judge.

Action by J. L. House against the Missouri, Kansas & Texas Railway Company of Texas and another. A verdict was directed for the other defendant, and there was a judgment for plaintiff against the named defendant, which appeals. Affirmed.

Lane, Jackson, Kelley & Wolters and Chas. A. Warnken, for appellant.

KEY, J. J. L. House brought this suit against the Missouri, Kansas & Texas Railway Company of Texas and the Houston & Texas Central Railroad Company for damages alleged to have been sustained on account of delay and injury to six cars of cattle, shipped from Hockley, Tex., to Kansas City, Mo., and diverted to East St. Louis, Ill. Upon trial in the court below the judge instructed a verdict for the Houston & Texas Central Railroad Company, and submitted the case to the jury as between the plaintiff and the other defendant. The verdict and judgment went for the plaintiff, and the losing defendant has appealed.

The first assignment of error assails the verdict and judgment as being against the preponderance of the evidence. Appellant made no complaint against the verdict in the court below, and for that reason must be held to have waived that point in this court. That question is so well settled in this state that it is not deemed necessary to cite the authorities.

The second assignment complains of the refusal of a requested instruction which would have directed the jury to find for the defendant, if they believed from the testimony that defendant could not have run the train carrying the plaintiff's cattle from Muskogee to the National Stockyards in East St. Louis in 28 hours. The charge in question was properly refused for two reasons: First, appellant's road did not extend all the way to the National Stockyards in East St. Louis; and, second, it related alone to the question of delay, and directed a finding for the defendant if the jury found in its favor upon that issue, while the pleadings and evidence presented the issue of injury to the cattle by unloading and holding them in a muddy pen.

Among other things, the court instructed the jury as follows: "You are charged not to allow plaintiff the \$6 claimed in his petition for feed bought at Sedalia in making up your verdict." This charge is complained of as being upon the weight of evidence; the contention being that it intimates to the jury that they should find for the plaintiff everything claimed by him except the \$6 referred to. The objection urged is hypercritical and without merit. The charge complained of is in appellant's favor, and is not susceptible of the construction urged against it.

The other two assignments criticize the court's charge; the contention being that the evidence did not authorize the submission of certain questions to the jury. Our reading of the statement of facts leads us to a different conclusion, and the assignments referred to are overruled.

No reversible error has been pointed out, and the judgment is affirmed.

Affirmed.

PARHAM v. FT. WORTH & D. C. RY. CO.†
(Court of Civil Appeals of Texas. June 27, 1908. Rehearing Denied Oct. 17, 1908.)

1. RAILROADS (§ 401*)—PERSONS ON TRACK—
TRESPASSERS — ACTION — INSTRUCTIONS —
DISCOVERED PERIL.

The court charged that defendant railway company's servants, in operating its trains, might presume that the right of way therefor would be respected by persons on its track, but that this would not excuse running over persons on the track; that it was the duty of defendant's servants at all times to keep a lookout, and, if persons were seen on the track and in danger, to check, halt, or stop the train, if it could be done

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

by exercising ordinary care, and by the use of ordinary means to avoid inflicting injury on such persons. *Held* that such instruction, being followed by a statement that it was the duty of defendant's engineer to use all means under his control, consistent with the safety of the train, to prevent the injury, after discovering the perilous situation of the persons killed, was not objectionable as excusing defendant from employing all means at hand to avoid inflicting injury after discovering such peril.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 401.*]

2. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMED FACTS.

The court's failure to assume as true an undisputed fact is not error, where the charge does not authorize a finding against the complaining party if such fact is not found.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 192.*]

3. RAILROADS (§ 401*)—PERSONS ON TRACK—ACTION—INSTRUCTIONS—DISCOVERED PERIL.

The court charged that, if defendant's engineer in charge of the train that struck plaintiff's decedents saw and knew that they were on the track, and realized that they were in peril, and "could not, or probably would not, leave the track," and if he did not then use all means in his power, consistent with safety to the train, to prevent the injury, etc., plaintiff was entitled to recover. *Held*, that the quoted clause was but an explanation of what the court meant by "peril," and was unobjectionable.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 401.*]

4. RAILROADS (§ 389*)—PERSONS ON TRACK—DISCOVERED PERIL.

A railroad engineer's failure to use all the means at hand, after discovering the peril of persons on the track, to prevent injury is not actionable, unless the use of such means could reasonably have prevented the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1319; Dec. Dig. § 389.*]

5. RAILROADS (§ 398*)—PERSONS ON TRACK—TRESPASSERS—NEGLIGENCE—EVIDENCE.

Evidence *held* to sustain a verdict that defendant railroad company was not negligent, proximately resulting in the death of plaintiff's decedents, who were trespassing on the track when killed.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 398.*]

Appeal from District Court, Childress County; S. P. Huff, Judge.

Action by Emma Parham against the Ft. Worth & Denver City Railway Company. Judgment for defendant, and plaintiff appeals. *Affirmed*.

L. C. Barrett, J. A. Templeton, and J. H. Aynesworth, for appellant. Spoons, Thompson & Barwise, J. M. Chambers, and Fires & Diggs, for appellee.

SPEER, J. Emma Parham for herself and for the benefit of her minor children brought this suit against the Ft. Worth & Denver City Railway Company to recover damages for the death of her husband, C. A. Parham, and a minor son, Riley Parham, and for injuries to another minor son, Lawrence Parham, the two being killed, and the third injured, by one of the passenger trains of the defendant running over them in the

nighttime. The negligence relied on was that of the operatives of the defendant company's train in not averting the accident after having discovered the peril of the deceased persons. There was a verdict for the defendant, and the plaintiff has appealed.

The portions of the charge most seriously attacked are as follows:

"(2) The defendant company was entitled to its railway track for its trains to run upon, and its servants and agents in charge of running the train had the right to act upon the presumption that the right of way for trains would be respected by persons thereon. This, however, would not excuse the running upon or over persons upon the track. It was the duty of the servants and agents of the defendant, running trains upon its track, at all times to keep a lookout; and, if persons were seen upon the track, and in danger, to check up, halt, or stop the train, if it could be done by the exercise of ordinary care, and by the use of ordinary means, to avoid inflicting injury upon such persons.

"(3) You are instructed that it is the duty of a railway engineer to use all the means within his power, consistent with the safety of the train, to prevent injuring persons upon the track, as soon as he may realize from the facts then within his knowledge that such persons thereon would not probably leave the track. And under the facts in this case it became the duty of the engineer to use all the means under his control, consistent with the safety of the train, to prevent the injury of the deceased, C. A. Parham and Riley Parham, and of Lawrence Parham, or to have lessened the injury to them, so soon as he realized, if he did so, from the facts within his knowledge that said parties would not, or probably could not, leave the track.

"(4) Now, if you shall find and believe from a preponderance of the evidence before you that C. A. Parham and his two sons, Riley Parham and Lawrence Parham, were on the defendant's railway track at the time and place mentioned in the plaintiff's petition, and that the said Parham was holding his said sons on said track, as alleged in the plaintiff's petition, and you shall find that the said Parham and his two sons were run down and over by the engine and train of the defendant, and that C. A. Parham or Riley Parham were killed, or Lawrence Parham injured, and you further find that the engineer of the defendant in charge of said train saw and knew that said parties were on said track, and that he realized from facts within his knowledge that said parties were in peril, and could not, or probably would not, leave the track, and that he did not then use all the means within his power, consistent with the safety of the train, to prevent injuring said parties, and you find

that such acts, if any, on the part of the engineer, or his failure to act, if he did so fail, was negligence, which proximately caused the injuries to said parties, or either of them, as aforesaid, then, in case you so find, you should find for the plaintiff, under the rules given you as to the measure of damages. If, however, you shall find that the engineer in charge of said train used all the means within his power, consistent with the safety of his train, to stop or lessen the speed thereof in time to prevent the injuries to the parties, as soon as he realized from the facts within his knowledge the peril of said parties, or that they probably would not, or could not, leave the track, if in fact he did realize the same, or, if you find that he was not negligent, then, you should find for the defendant, and so say by your verdict."

The second paragraph, even though it stood alone, would hardly be subject to the criticism that it excused the defendant company from employing all the means at hand to avoid inflicting the injury, after having discovered the peril of the deceased Parham and his children, but it is perfectly apparent, in connection with the paragraph immediately following, that the jury could not have so understood it. They are there expressly told that it was the duty of the engineer to use all of the means under his control, consistent with the safety of the train, to prevent the injury after having discovered the perilous situation of the parties. It is objected that in the fourth paragraph of the charge the court should have assumed that the deceased C. A. Parham was holding his two little boys, Lawrence and Riley, by their hands in front of the approaching train at the time of the sad accident, since such was the undisputed testimony, instead of submitting such question to the determination of the jury. But if such fact can be said to have been indisputably established, it nevertheless does not follow that the court's failure to assume it to be true in the charge would be error, because the charge nowhere authorizes a finding against appellant, if such fact be not found. The cases of *Tex. & Pac. Ry. Co. v. McCoy*, 90 Tex. 284, 38 S. W. 36, and *Gulf, C. & S. F. Ry. Co. v. Rowland*, 90 Tex. 365, 38 S. W. 756, cited by appellant, are therefore not in point. See *H. & T. C. R. R. Co. v. Johnson* (Tex. Civ. App.) 103 S. W. 239, and *Chicago, R. I. & P. Ry. Co. v. Hugh Johnson* (on motion for rehearing in this court) 111 S. W. 758. The fourth paragraph of the charge is the subject of further criticisms, but we find no merit in them. The expression "and [said parties] could not, or probably would not, leave the track" is but an explanation by the court of what is meant by peril, and the further requirement therein that appellee's failure, on the part of its engineer, to use all the means at hand after

discovering the peril to prevent the injury should be negligence is proper, since it cannot be said that mere failure to use the means at hand is actionable unless their use could reasonably have prevented the accident. In other words, whether or not a failure on the part of appellee's engineer to use the means at hand to check his train or lessen its speed was negligence depends upon the further question of whether or not by the exercise of such diligence he could probably have prevented the injury.

Neither the appellant's pleadings nor the evidence justified the submission of appellant's special charge No. 1, upon the issue of failure to discover the peril of the killed and injured persons by reason of the excessive and dangerous rate of speed at which appellee's train was moving. At most the evidence shows the train to have been running at the rate of 35 or 40 miles per hour, but there is nothing in the evidence to suggest that this was an excessive or dangerous rate of speed for a passenger train, such as appellee's was. The accident did not occur at a crossing, nor at any other place where persons on the track might reasonably be expected to be found. Nor did the evidence call for the giving of special charges Nos. 6 and 7, requested by appellant, upon the issue of negligence in failing to sooner discover the peril of the father and children.

The last assignment complains of the insufficiency of the evidence to support the verdict. We have carefully examined the testimony, and have reached the conclusion that the verdict of the jury is fully sustained by the record. Lamentable as the accident was, it undoubtedly was not due to any negligence upon the part of appellee. The deceased father, together with his two little boys, had started to Childress, some 8 miles distant, on the night of the accident, walking along appellee's tracks, meeting its north-bound passenger train. The father, who was shown to be temporarily insane—*res ipsa loquitur*—instead of leaving the track on the approach of the train, as any one reasonably would have been expected to do, held the little boys on the track until they were run over, and he himself and one of the children were killed, and the other seriously injured. It could not reasonably have been anticipated by appellee's engineer that the deceased, knowing full well of the approach of the train, would not leave the track in time to avoid an injury. His act was that of a madman, and not of a sane person. We find nothing in the evidence indicating that appellee's operatives could have done more than was done to avoid the accident. At least, the verdict in these respects is supported by the testimony.

The judgment of the district court is therefore affirmed.

ARIOLA et al. v. NEWMAN.

(Court of Civil Appeals of Texas. Oct. 14, 1908. Rehearing Denied Nov. 11, 1908.)

1. ACKNOWLEDGMENT (§ 36*) — REQUISITES — PURPOSE.

The omission from a certificate of acknowledgment of a deed of the recital that it was executed for the purposes and consideration therein expressed is not a fatal defect.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 196; Dec. Dig. § 36.*]

2. ACKNOWLEDGMENT (§ 41*) — PARTIES TO DEED—MARRIED WOMEN.

Where the signature of a married woman was not essential to a conveyance of land, an objection that her acknowledgment did not show her privity examination and explanation of the instrument to her, etc., is immaterial.

[Ed. Note.—For other cases, see Acknowledgment, Dec. Dig. § 41.*]

3. APPEAL AND ERROR (§ 742*)—ASSIGNMENT OF ERRORS — PROPOSITIONS — FAILURE TO RAISE OBJECTIONS.

Appellants are confined to the objections raised by their propositions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

4. ACKNOWLEDGMENT (§ 47*)—DEFECTIVE ACKNOWLEDGMENTS—CURATIVE ACTS.

Where certain deeds had been recorded for 10 years prior to the execution of an isolated deed to defendants and to their entry under it, such acknowledgments, if defective, were cured by Rev. St. 1895, art. 2312, as amended by Acts 1907, p. 308, c. 165, providing that every instrument actually recorded for 10 years, whether proved or acknowledged in such manner as required or not, should be admitted in evidence without proof of execution, etc.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 235-240; Dec. Dig. § 47.*]

5. CONSTITUTIONAL LAW (§ 109*)—VESTED RIGHTS—RULES OF EVIDENCE—ALTERATION.

Rev. St. 1895, § 2312, as amended by Acts 1907, p. 308, c. 165, providing that every instrument previously or thereafter actually recorded for 10 years, whether proved or acknowledged in the manner required or not, shall be admitted in evidence without proof of execution, is not unconstitutional, in so far as it affects deeds previously recorded, since it only provided a rule of evidence.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 260; Dec. Dig. § 109.*]

Appeal from District Court, Nacogdoches County; James I. Perkins, Judge.

Action of trespass to try title by L. Newman against Marciano Ariola and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Ingraham, Middlebrook & Hodges, for appellants. Geo. H. Matthews and Blount & Garrison, for appellee.

JAMES, C. J. This action is in trespass to try title. The facts are these: The land was patented to Wm. Goins as assignee. His administrator conveyed to Geo. Clevinger in 1860. Clevinger in 1872 conveyed to H. C. Hancock. Hancock's administrator conveyed to N. Buckland in 1880. Following this the plaintiff's chain of title consists of a deed from N. Buckland and wife to Newman Bros.

& Rivit in 1881, deed from Albert A. Rivit and wife to J. C. and L. Newman in 1881, and deed from J. C. Newman and wife to L. Newman, the plaintiff, in 1882. The members of the firm of Newman Bros. & Rivit were shown to have been J. C. Newman, L. Newman, and A. Rivit. The defendants took possession of the land about December 18, 1906, on which date a deed was executed by Ben Lazarine to defendants, and defendants have been in possession ever since. This action was filed in June, 1907.

The deeds from Clevinger down to plaintiff, as introduced, were from the records, they having been recorded over 10 years prior to the entry and deed of defendants, and of three of these, as proper evidence, appellants complain in their brief. The assignments of error question the sufficiency of the acknowledgments to three of the deeds, and also question the applicability of article 2312, Rev. St. 1895, as amended by the Thirtieth Legislature (Acts 1907, p. 308, c. 165), to them, as permitting such evidence, inasmuch as defendants had entered into possession of the land before suit was brought, and their claim so asserted was adverse and inconsistent to the one evidenced by said instruments, in the sense of the act. They also assert that to construe said statute as applying to said three deeds is to give it a retroactive effect, which is unconstitutional; the act having been passed after defendants had taken possession of the land under their deed from Lazarine.

We will consider first the assignments which go to the acknowledgments. Under them there is a single proposition, to which appellants should be confined, and which we copy: "A deed is not properly acknowledged and is improperly admitted to record when executed by a man and wife, unless the man acknowledges, in substance, that he executed the same for the purposes and considerations therein expressed; and, if the wife acknowledged it, the same must show her privity examination and explanation of the instrument to her, and that she, understanding it, voluntarily signed the same, for the purposes and consideration therein expressed, as her act and deed, and that she did not wish to retract it."

The first deed which is dealt with by the brief, through the above proposition, is that from N. Buckland and wife to Newman Bros. & Rivit. The objection, or proposition, so far as it relates to N. Buckland, is that his acknowledgment should have shown that he executed the instrument for the purposes and consideration therein expressed. This objection is not valid. *Butler v. Brown*, 77 Tex. 342, 14 S. W. 136. So far as it relates to Mrs. Buckland, the proposition is immaterial to the title, for her signature appears not to have been essential to a conveyance of the land. The second of said deeds is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that from Albert A. Rivit and wife to J. C. and L. Newman. What is above stated applies equally to this, the proposition being the same; and also the third, which is the deed from J. C. Newman & wife to L. Newman.

If the said acknowledgments should be defective in any other particular, appellants are not entitled to have them considered here, as they are confined to a consideration of the propositions they make. When tested by the proposition, the acknowledgments do not show defective registration.

We are also of opinion, from the fact that said instruments had been actually recorded for a period of 10 years prior to defendants' assertion of title (prior both to the execution of the isolated deed from Lazarine to defendants and to defendants' entry), the acknowledgments, in so far as they appear to have been required for purposes of conveyance and registration, to wit, those of the husband, were cured by said act, if defective, and, further, that no constitutional right of defendants was affected by the enactment of such rule of evidence.

Affirmed.

MITCHELL et ux. v. COMANCHE COTTON OIL CO.

(Court of Civil Appeals of Texas. June 27, 1908. Rehearing Denied Oct. 17, 1908.)

1. MASTER AND SERVANT (§ 157*)—DUTY TO WARN SERVANT.

Where the master warned and instructed a servant when first employed, he need not repeat the warning.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 157.*]

2. MASTER AND SERVANT (§ 153*)—DUTY TO WARN SERVANT.

A master need not warn a servant, though an infant, of ordinary risks and dangers which the servant actually knows and appreciates, or which are so apparent that one of his age and capacity would, under like circumstances, by the exercise of ordinary care, know and appreciate.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 316½; Dec. Dig. § 153.*]

3. MASTER AND SERVANT (§ 218*)—DUTY TO WARN SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Where an infant servant has been properly instructed and warned, his minority usually ceases to be a material factor in estimating the master's liability, and the defenses of assumption of risk and contributory negligence are then available against him, if under the same circumstances such defenses would be available against adults.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 601; Dec. Dig. § 218.*]

4. MASTER AND SERVANT (§ 130*)—DUTY TO WARN SERVANT—NEGLIGENCE.

That a business might have been carried on in a less dangerous manner is immaterial, where the servant has been sufficiently instructed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 264; Dec. Dig. § 130.*]

5. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

In an action for injuries to a servant operating a sewing machine in connection with machinery used for pressing cotton seed, caused by coming in contact with unguarded belts and pulleys, evidence held not to show actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 961; Dec. Dig. § 278.*]

Appeal from District Court, Comanche County; N. R. Lindsey, Judge.

Action by H. T. Mitchell and wife against the Comanche Cotton Oil Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

G. E. Smith and J. B. Keith, for appellants. Baker & Thomas and Y. H. Goodson, for appellee.

PRESLER, J. This was a suit by appellants, as the father and mother of Wylie Mitchell, for damages on account of the death of said Wylie, which is alleged by them to have been brought about by reason of the negligence of appellee while their said son was in its employ. It was alleged that plaintiffs' son was 19 years of age, and was killed while in the discharge of his duties to defendant, said duty being alleged to have consisted in operating a sewing machine, which was used in connection with the machinery of defendant, for pressing cotton seed. The acts of negligence which were claimed as the proximate cause of the death were: (a) in appellee failing to provide deceased with a reasonably safe place to work, in that he was required to perform his duties in close proximity to a rapidly revolving line shaft, strung with belts and pulleys, which were unguarded; (b) in appellee failing to warn, and in not giving deceased adequate warning of the dangers of his employment; (c) in appellee's failure to guard said line shaft and pulleys; (d) in appellee's arrangement of the machinery at which deceased was required to work, which was claimed to have been negligently arranged. Appellee answered by general exception, general denial, and defense of assumed risk and contributory negligence. A trial before the jury resulted in the court, on motion of appellee, giving the jury a peremptory instruction to find for the appellee company, and in the court declining to give certain charges requested by appellants. The verdict and judgment was for the company, and the appellants duly excepted to this action, order, and ruling of the court, and judgment, and gave notice of appeal to this court, and here now present their appeal upon the following assignments of error.

Appellants' first assignment of error complains of the court's action in giving the peremptory instruction to the jury to return a verdict for the defendant, and is,

in our opinion, decisive of the case. It appears from the evidence that the son of appellants, a young man 19 years of age, had been employed for some $2\frac{1}{2}$ or 3 months by the appellee during the season preceding his death; that during the time referred to he had worked, for the greater part of the time, in the same place and at the machine where his death occurred, and was necessarily familiar with the danger incident to the place and character of his employment—that is, the danger of coming in contact with the line shaft that was being operated $2\frac{1}{2}$ or 3 feet in his rear, and the pulleys thereon and the belt running from said line shaft to the sewing machine which he was operating—it appearing that he was a young man of at least average intelligence and capacity to understand and appreciate danger that was open and patent, and that a person of ordinary intelligence and no experience even would take cognizance of.

It further appears that, when he commenced working for appellee, several months preceding his death, appellee's manager, one Coleman, warned him of the danger incident to his employment, and instructed him to be very careful about the machinery, and to be sure and not come in contact with the shaft or pulleys or anything of the kind that he might get hurt in. This witness testified: "I am foreman of the Comanche Cotton Oil Mill Company. I have been foreman since it started in December, 1904. * * * My duties are to look after the men that are employed in the mill, and keep up the mechanical end of the business, and to look after it in general. * * * I remember the plaintiffs' son, Wylie Mitchell. He worked at the mill some. Wylie is dead. He died the 1st of October, this October a year ago. I was not present right at the time of his injury, but was there immediately afterwards. I was in the engine room when they told me that he was hurt. * * * Mr. Mitchell was sitting up a little west of where the sewing machine set, between the machine and shaft, about middle ways, I suppose. His face was towards the west, and he was sitting flat on the ground. * * * He was holding the stub of his left arm in his right hand when I got to him. * * * His clothing were wrapt around the pulley on the shaft that runs the sewing machine. The line shaft was in motion. I think the shaft is in the neighborhood of 40 feet long. Its diameter is $2\frac{7}{16}$ inches. The diameter of the pulley is between 5 and 6 inches. There are other pulleys on the shaft, but just one near this machine. The others are several feet away. There is one east of where the machine was, and several west of it. The shaft and pulleys were not protected in any way by guards. That could not be done practically. It could not be done for the simple reason that we have to have access to those shafts and pulleys for the pur-

pose of throwing off and putting on belts. If there was a shield at all, it would have to be perfectly tight, or it would wind up, and it would not be practical to fix it that way. In all modern machinery the shaft is put up about a man's waist in the basement. They are not put up about the ceiling in modern mills. The main line shaft is overhead, and this shaft is just a counter shaft that drives the linters. It is not the main shaft at all. We had the machine arranged the best we could. * * * A man has to come in contact with the pulley in throwing the belt, I don't care how large the room is, nor how far off the machine is from the shaft. In throwing the belt we always used a stick or screw-driver. We never put our hands on the belt. I think I employed this young man, if I remember correctly. I gave him instructions the year before, but do not remember that I did last year. He worked for the mill about a half season, $2\frac{1}{2}$ or 3 months in the season of 1905. We run that season about $5\frac{1}{2}$ or 6 months. Yes; I instructed him the first year. I instructed him to be very careful about the machinery, and to be sure and not come in contact with any of the shafts or pulleys, or anything of the kind that he might get hurt in. * * * The belt running from the shaft to the machine was a cross-belt. When the machine was not in operation, we could leave the belt on or throw it off. We sometimes took it off, and hung it up. I don't remember that I instructed Wylie about the machine at that time. I think I have instructed him to take it off and hang it up when the machine was not running. It was our custom to leave it on, but it didn't make any particular difference. That was the first day we operated the machine that year; the first day the mill was run that season. I did not furnish the young man with a stick that day, but we kept the screw-driver there in the drawer all the time. I think the screw-driver is about 14 inches long. The handle is about 4 inches long. * * * I think it was there in the drawer when the young man got hurt. Yes; it was there to keep the screws in shape, but numbers of times the young man has seen me throw the belt with the screw-driver. When I was teaching him all about it I would use the screw-driver in throwing the belt all the time. The screw-driver is round up to pretty close to the end, and then it is flat so it will go in the heads of the screws. The stick that we used was from 10 to 14 inches long. It was just a small belt and most anything would throw it. * * * Wylie Mitchell began working for the oil mill in 1905. He worked right close to three months at this particular work. The machine is constructed just like an ordinary sewing machine, only it is on a larger scale. It is a Singer machine. * * * The ma-

chine is perfectly naked and visible to the eye. Nothing to obstruct it from the view. It is located on a table. * * * The shaft runs through the arm, and the pulley is on the end of the shaft. * * * The belt connects with the line shaft. The shaft extends clear across the room. It is about 4½ feet from the floor. * * * This accident occurred about 12 o'clock in the daytime. It was a bright sunshiny day, the day this thing happened. There are four windows in that room. One right in front of the machine. The basement is not over 2 feet in the ground. The windows in the basement are solid, and are over 3 feet wide. There are four windows and one door. I have tested it, and I can read fine print there in the basement on a day like this; can read it at the place the machine was being operated. * * * There is a globe to an electric light right above the machine. The mill generates the electricity that they use. It can be turned on at all times when the mill is running. My opinion, based on my experience with mills, is that we have one of the safest plants that can be built. We did not regard the machine and the manner in which it was run with the shaft and belt as being any danger whatever. We did not regard the operation of it as a dangerous work at all. It is the simplest piece of machinery about the mill, and we regard it as being one of the safest places to work about the oil mill. * * * Of course there is danger in getting in a shaft wherever it may be, and a man with loose clothing on may get caught on a pulley or set screw on a shaft. Of course it would be dangerous if a man should get into one of them." No eyewitness testified to the accident that resulted in the death of the deceased. Neither did the deceased make any statement as to the manner in which the injury occurred. The evidence of plaintiffs' other two witnesses, D. J. Barker and J. M. Slayton, did not differ, in any material respect, and upon any material issue, from that of the witness Coleman. These three witnesses are all who testified in the case with reference to the location of the machinery, the manner of operating it, and the occurrence of the injury. While not material to the conclusion reached by us, it may be doubted, under many authorities, whether it was necessary and incumbent upon the master in this case to give notice or warning of danger at all, the danger to which deceased was exposed was so open and manifest to a person of his intelligence, and to a person of ordinary observation, and could only arise by his carelessly and unnecessarily coming in contact with the machinery, line shaft, and pulleys, the operation of which was open to the observation of any one; but, if it be conceded that such warning was necessary, we are of the opinion that he was sufficiently warned and instructed

by appellee's manager a few months before, upon first being employed by him, and it does not appear that it was incumbent upon the manager to repeat the warning originally given, as the continued employment and experience in the position and about the machinery made the danger of coming in contact with the machinery better known to him, and obviated the necessity of further and repeated warnings. The authorities, both in this and other states, are uniformly to the effect that no duty rests upon the master to notify even a minor of the ordinary risks and dangers of his occupation which the latter actually knows and appreciates, or which are so open and apparent that one of his age and capacity would, under like circumstances, by the exercise of ordinary care, know and appreciate, as stated in the case of *Truntle v. North Star Woolen Mills Co.*, 57 Minn. 52, 58 N. W. 832. In *Cirlack v. Merchants' Woolen Co.*, 146 Mass. 182, 15 N. E. 579, 4 Am. St. Rep. 307, recovery was denied for an injury received by a boy of 12, whose person came into contact with exposed gearing. The position taken was that, in the absence of anything to show the contrary, the boy must be assumed to have the intelligence and understanding usual with boys of that age, and that this assumption involved the further one that he was well aware of the danger which caused the injury, and that no instruction could have been given him which would have afforded larger measure of knowledge than that with which he was chargeable. In *Buckley v. Gutta Percha & Rubber Mfg. Co.*, 113 N. Y. 540, 21 N. E. 717, it was held that a child of 12, who, after helping operate a machine for only three days, slipped while attempting to put a cylinder in place, and in throwing out his hand to save himself brought it into contact with a cogwheel, could not recover on the ground that he had received no instruction as to the danger. In *White v. Wittemann Lithographic Co.*, 131 N. Y. 631, 30 N. E. 236, it was assumed that a boy of 13 understood the danger of getting his hand caught in cogs, and, as stated by *Labatt* in his work on *Master and Servant*, the duty of instructing minors being predicated upon the fact that without such instruction they would be exposed to avoidable dangers of which they are presumably ignorant, it follows that, after they have been properly instructed, their minority will usually cease to be a material factor in estimating the extent of the employer's liability. In other words, the defenses of assumption of risk and contributory negligence will then be available against them, if under the same circumstances these defenses would have been available against adults. That the business might have been carried on in a less dangerous manner is a circumstance quite immaterial, where the servant has

been sufficiently instructed. See Labatt on Master and Servant, vol. 1, art. 251.

We are therefore of the opinion that the court did not err in giving the jury peremptory instruction in this case to return a verdict for the defendant, and that this case should be, and the same is hereby, in all things affirmed.

ABERNATHY v. FLORENCE†

(Court of Civil Appeals of Texas. July 4, 1908. Rehearing Denied Oct. 17, 1908.)

SPECIFIC PERFORMANCE (§ 93*)—TIME AS ESSENCE OF CONTRACT.

Specific performance of a contract to employ counsel and defray the expenses of litigation between the other party to the contract and a third person over school land, in consideration of a conveyance of a certain part of the land, if successful, and no appeal was taken, and a certain other part if an appeal was taken, cannot be had, where such party did not pay the expenses of such litigation as they accrued, although he did offer to reimburse the other party after the litigation had terminated, as time was of the essence of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 245-248; Dec. Dig. § 93.*]

Appeal from District Court, Lubbock County; L. S. Kinder, Judge.

Specific performance by M. G. Abernathy against W. P. Florence. Judgment for defendant, and plaintiff appeals. Affirmed.

H. C. Ferguson, H. H. Cooper, and Stephens & Miller, for appellant. Geo. R. Bean, Randolph & Penry, and Wm. J. Berne, for appellee.

SPEER, J. This suit was instituted by M. G. Abernathy against W. P. Florence for specific performance of a written contract to convey 640 acres of land, and resulted in a judgment in favor of the defendant. The plaintiff has appealed.

The findings of fact filed by the trial court find sufficient support in the testimony, and are adopted by us. They are as follows:

"(1) I find that prior to March 12, 1904, the defendant, W. P. Florence, was the owner of two certain school sections of land in Lubbock county, Tex., which had theretofore been awarded to him by the land commissioner, under his settlement as an actual settler, and that one Hiram Smith, having an opposing claim to said lands, succeeded in having the said Florence's awards thereto canceled, and the same awarded to him, Smith.

"(2) I further find that on March 12, 1904, the plaintiff, M. G. Abernathy, and defendant, W. P. Florence, entered into a contract, by the terms of which the plaintiff was to assist the defendant in securing the title of defendant to said lands, which said contract is in words as follows:

"State of Texas, County of Lubbock.

"This agreement made and entered into on the 12th day of March, 1904, by and between W. P. Florence and M. G. Abernathy witnesseth: That whereas Hiram Smith has succeeded in having canceled by the Commissioner of the General Land Office, the awards of the said W. P. Florence to surveys Nos. 113 and 114 school files Nos. 2929 and 2930, in block 20, Lubbock county, Texas, and has entered his file thereon, and is endeavoring to dispossess the said W. P. Florence from the title and possession of the above-described land; and whereas, the said W. P. Florence is desirous of contesting the claims of the said Hiram Smith, and will in that event be compelled to employ counsel, and incur the expense of the court and other expenses incident to the suit for the title and possession of the above-described land. Therefore in consideration of the said Abernathy's undertaking and binding himself to employ counsel and pay all expenses necessary for the prosecution and defense of all suits filed by the said Smith, and binding himself to appeal and follow appeals to the Supreme Court of the state of Texas, the said W. P. Florence agrees and binds himself to make, execute and deliver to the said M. G. Abernathy good and sufficient deed to the east one-half of survey 114, block 20, school file No. 2930, surveyed for W. P. Florence, in case the said Abernathy, by his counsel and efforts shall win the suit without appeal from the district court of Lubbock county, Texas, or shall compromise and remove the claims of the said Hiram Smith without a suit further than the district court. But in case it becomes necessary to carry the suit to our Court of Civil Appeals or the Supreme Court, then and in that event, the said W. P. Florence agrees and binds himself to make good and sufficient deed to the said M. G. Abernathy for the whole of survey 114, block 20, school file 2930, Lubbock county, Texas, in consideration of the said M. G. Abernathy paying for counsel, and all costs of the suit upon these appeals whenever the title to the said above-described land are free and clear of any cloud by virtue of the claim and rights of the said Hiram Smith.

"Witness our hands, at Lubbock, Texas, this the 12th day of March, 1904.

"[Signed] W. P. Florence.

"M. G. Abernathy.

"Witnesses: Jno. H. Doyle."

"(3) I find from said contract that the plaintiff obligated and bound himself to employ counsel, and pay all expenses necessary for the prosecution and defense of all suits filed by the said Smith, and bound himself to appeal and follow appeals to the Supreme Court of the state of Texas, and pay counsel fees and all costs of suit and the appeals.

"(4) I find also that the defendant bound

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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† Writ of error denied by Supreme Court.

himself, first, that in the event the said plaintiff by his counsel and efforts should win the said suit without appeal from the district court of Lubbock county, Tex., or should compromise and remove the claims of the said Smith without a suit further than the district court, to deed to the plaintiff, Abernathy, the east one-half of survey No. 114, block 20, said county; and second, should said cause be carried to the Court of Civil Appeals or the Supreme Court, then to deed the said Abernathy the whole of said survey 114, block 20.

"(5) I find that thereafter, on April 5, 1904, the said Hiram Smith filed suit in the district court of Lubbock county, Tex., against the said defendant, W. P. Florence, to try the title to said two sections of land, and that on November 2, 1905, said cause was tried in said court, and resulted in a judgment for the defendant, W. P. Florence, and that said cause was appealed from said court by the said Smith to the Court of Civil Appeals of the Second Supreme Judicial District, and by judgment of that court, rendered on June 30, 1906, said judgment of the lower court was affirmed in the defendant's (Florence's) favor.

"(6) I find from the evidence in the cause that the plaintiff, Abernathy, procured affidavits, and, through his efforts; prior to the filing of the suit by Smith, obtained a reinstatement in the land office of Florence's award to said land, and the cancellation of Smith's claim thereto.

"(7) I find that the plaintiff, Abernathy, employed H. C. Randolph, an attorney at law, of Plainview, Tex., to represent the defendant, Florence, in said suit, and that he paid the said Randolph for his services the sum of \$125.

"(8) I find that the only other sums the plaintiff paid out during the progress of said trial was the sum of \$15, expended by him for affidavits and copies of papers from the land office.

"(9) I find from the evidence that the plaintiff did nothing further in the way of employment of counsel or expending any sums of money, except as found in paragraph 8 and 7 of these findings.

"(10) I further find that the defendant employed J. J. Dillard and Geo. R. Bean, attorneys at law, living in the town of Lubbock, the county site, where said cause was tried, to assist the said Randolph in the trial of said cause, and that the plaintiff authorized the employment of the said Dillard, and knew of the employment and participation in the trial of said cause of the said Bean; and I further find that, on account of these attorneys being residents of the county, and being well acquainted with jurors and witnesses (said cause having been tried before a jury), their services were necessary, and that the plaintiff did not at any time arrange to pay for their services, but the defendant

paid them a total of \$50 fees, which said sum was reasonable and necessary.

"(11) I further find that the defendant when said cause was appealed to the Court of Civil Appeals, employed Wm. J. Berne, a resident lawyer of Ft. Worth, to brief and present said cause to said court, and that the fee of the said Berne was \$125, \$50 of which was cash, and \$21 for printing the brief, and that the defendant paid a part of this fee, and notified plaintiff by letter of Berne's employment, and the necessity of a brief, and the cost thereof, and asked plaintiff to come to his assistance and pay the bills. Plaintiff did not pay any of these bills, nor see defendant in regard thereto, but arranged with J. J. Dillard to pay them, and Dillard promised to do so, which Dillard failed to do, and defendant raised the money, and paid the said Berne his fee, and the further cost of printing the brief; and, in this connection, I further find that said brief and Berne's employment were necessary, the said Berne living at the place where the said Court of Civil Appeals sits, and it being less expensive for him to represent the interest of the defendant in said court than for one of the attorneys to go from either Plainview or Lubbock to Ft. Worth, on account of the great distance and attendant expenses, there; and I further find that plaintiff agreed to the employment of Berne to represent defendant's interest on appeal.

"(12) I further find that the defendant, Florence, paid the said Smith the sum of \$100 in settlement of the suit in the Court of Civil Appeals, in order to avoid further litigation.

"(13) I further find that defendant, in the course of the trial, paid out for employment of counsel, obtaining presence of witnesses from other counties on the trial of the cause in the district court of Lubbock county, printing brief in higher court, and other expenses, all of which was necessary, about the sum of \$326.

"(14) I further find that the plaintiff did not arrange with H. C. Randolph to defray all the necessary expenses of said cause, in any of the courts, and for the said Randolph to draw on him for the necessary sums of money as would be required therefor, and that he did not arrange with any one, as is shown by the evidence, to defray these expenses, and he wholly failed to pay the same himself, or arrange for the payment thereof, as the same accrued and had to be paid.

"(15) I find that the plaintiff, subsequent to the affirmance of the case of Smith v. Florence in the Court of Civil Appeals, tendered defendant the sum of \$171, which was refused by the defendant, and the same was by the plaintiff paid into the registry of this court."

The gist of appellant's whole contention on this appeal is that time was not of the essence of the contract between appellant

and appellee, and that therefore appellant's failure to pay the expenses of the Florence-Smith litigation as they accrued ought not to defeat his right to the relief sought, but we are unable to assent to this proposition. It is generally true that, where time is not of the essence of the contract, and the thing to be done by the complainant can be as well done at a later as an earlier day without detriment to the party for whom the thing is to be done, the delay will be disregarded, or at all events will not defeat a specific performance. *Maltby v. Austin*, 65 Wis. 527, 27 N. W. 162. But this itself is an exception to the more general rule that a specific performance will not be decreed in favor of a plaintiff, who is himself at fault. In the present case the exigencies of the situation of the parties at the time of making the contract were such as to make it quite clear that the principal purpose was to bind appellant to defray the expenses of the Florence-Smith litigation as they accrued. Appellee was without means, and to meet his present necessities entered into the contract with appellant, by which the latter undertook for him to employ counsel, and to defray the expenses of his school land litigation. The undertaking of appellant, which was somewhat of the nature to render personal service, was necessarily to be performed at such seasonable time as to accomplish the purposes of his employment. This would mean that counsel must have been employed, and the expenses of the litigation borne, by appellant, and not by appellee. The thing to be done in this case could not be done at all after the termination of that litigation, and now to permit appellant to have a specific performance of the contract upon his reimbursing appellee for these expenses would be to make an entirely new contract for the parties. *Haldeman v. Chambers*, 19 Tex. 1; *Younger v. Welch*, 22 Tex. 418.

These general conclusions dispose of all assignments of error, and result in the affirmation of the judgment.

Judgment affirmed.

CROUCH HARDWARE CO. v. WALKER. (Court of Civil Appeals of Texas. July 4, 1908.)

1. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTED INSTRUCTIONS COVERED BY INSTRUCTIONS GIVEN.

Where an issue was clearly submitted in the court's charge, a requested charge presenting the same issue was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

2. TRIAL (§ 194*)—INSTRUCTIONS—CHARGE ON WEIGHT OF EVIDENCE.

A requested instruction, in an action for conversion, that if the property was delivered to defendant by plaintiff, and, after a first purchase note had become due, and all the purchase notes had been declared due, plaintiff refused to pay the notes, and told defendant to do what

it pleased with the property, to find for defendant was on the weight of the evidence, since if plaintiff told defendant "to do what it pleased with the property," the jury might reasonably have found that plaintiff meant no more than that defendant should sell the property under the mortgage given for the balance due on the price.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

3. CHATTEL MORTGAGES (§ 176*)—CONVERSION BY MORTGAGEE—ACTIONS—INSTRUCTIONS.

An instruction in an action for conversion of goods, on which a chattel mortgage had been executed to the seller to secure a balance on the price, that, if the seller without the buyer's consent seized and carried away the goods, to return a verdict for the buyer for the market value of the goods, with interest, properly presented the issue of the seller's liability, if it wrongfully converted the goods.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 176.*]

4. TROVER AND CONVERSION (§ 39*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

Plaintiff, in trover, having testified that there was a demand for a cooking range like the one converted, and that it could have been sold, was asked if she knew what it was worth, and could have been sold for, to which she replied, "\$225, the price I paid for it, was what it was worth," over objection by defendant, which was denied, that "it was not the proper rule for ascertaining value." *Held*, that there was no error in denying the objection, as plaintiff's evidence tended to show that the value given was the cash market value of the range.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 39.*]

Error from District Court, Tarrant County; Mike E. Smith, Judge.

Action by C. A. Walker against the Crouch Hardware Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Smith & Lattimore, for plaintiff in error. Templeton & Derden, for defendant in error.

SPEER, J. Miss C. A. Walker sued Crouch Hardware Company, in the district court of Tarrant county, to recover \$794 as the value of certain articles of kitchen furniture alleged to have been wrongfully converted by defendant, and the further sum of \$500 as exemplary damages. The defendant pleaded that it had sold to the plaintiff the articles of kitchen furniture mentioned in her petition, at the agreed price of \$694 (admitting that there had been an error of \$100 in the amount for which her notes had been taken), and at the time she had paid the sum of \$300 cash, executing her promissory notes secured by chattel mortgage upon the property for the balance due; that almost immediately after the purchase she had closed her café, for which the articles had been bought, and had voluntarily returned the property to defendant for safe-keeping until such time as she could procure a suitable place to open up her business again, and that in the meantime one of the notes became due, and upon her failure to pay the same, the remaining notes were also declared to be due and payable, whereupon the plaintiff

turned over the property in controversy to defendant, in satisfaction of the remaining amount so due it. There was a trial before a jury, resulting in a verdict and judgment in favor of plaintiff in the sum of \$222.50, from which the defendant has appealed.

The court instructed the jury as follows:

"(1) If you believe from the evidence that the defendant, without plaintiff's consent, seized and carried away the property mentioned and described in plaintiff's petition, then you will return a verdict in favor of plaintiff for the reasonable market value of said property at the time of such seizure, if any, together with interest thereon from the date the property was taken from plaintiff's possession, at 6 per cent, per annum.

"(2) If you find that defendant did take the property, but you believe that plaintiff agreed with defendant that the same should be taken in full payment and satisfaction of the balance of the unpaid purchase price thereof, then you will find in favor of the defendant, and so say by your verdict.

"(3) If you find for plaintiff under section 1 of this charge, or if you find that she consented to the taking of the property, then you will find in favor of defendant, over against plaintiff, for the amount of unpaid notes in evidence, with interest thereon at the rate of 8 per cent. per annum from date, and 10 per cent. attorney's fees on the amount of principal and interest remaining unpaid, and a foreclosure of the mortgage thereon, but you will credit the notes with \$100 as of date of notes."

It is first insisted that the court erred in refusing the following special charge: "You are instructed that, if you believe from the evidence before you that the property in question was delivered to defendant by plaintiff, and that after the first note was due, and all of the notes declared due, plaintiff refused to pay said notes, and told defendant to do what it pleased with the property, then you will find for the defendant." The issue of defendant in error's delivering to plaintiff in error the property in satisfaction of the unpaid notes was very clearly submitted to the jury in paragraph 2 of the charge, and there was therefore no necessity for again presenting it in the requested charge. Besides the requested charge was on the weight of the evidence, since if defendant in error told plaintiff in error "to do what it pleased with the property," the jury might reasonably have found, in view of the stipulations in the mortgage, that she meant no more than that plaintiff in error should exercise its legal rights in the premises; i. e., to sell the property in accordance with and in pursuance of the terms of the chattel mortgage.

The first paragraph of the charge is not subject to criticism, but properly presents the issue of plaintiff in error's liability if it

wrongfully converted defendant in error's property. If it seized and carried away her property without her consent, it clearly would be liable, and the court did not err in so stating to the jury. The verdict, when read in the light of the charge, makes it quite clear that the jury adopted the defendant in error's version of the affair, and disregarded the testimony of plaintiff in error to the effect that she consented to the taking in the first place. Defendant in error, while a witness in her own behalf, having testified that there was a demand for a range like the one involved in this suit, and it could have been sold before it was ever moved from her place, was asked if she knew what it was worth and could have been sold for, to which she replied, "\$225, the price I paid for it, was what it was worth." To this plaintiff in error objected, "because it was not the proper rule for ascertaining value," and the court overruled the objection and admitted the testimony. There was no error in this. The objection made is so indefinite as hardly to raise any question at all; but, if it be interpreted as invoking the rule that the cash market value of the property at the time of its conversion would be the proper measure of damages, the court's ruling was yet not erroneous, since the testimony of the witness tended to show that the value given was the cash market value of the range.

The positive testimony of plaintiff in error's witnesses and many of the circumstances surrounding the transaction tend strongly to support plaintiff in error's contention in this case, but we are unable to say that the verdict and judgment are not supported by the testimony of defendant in error, which so flatly contradicts such contention.

We find no error in the judgment, and it is affirmed.

WESTERN UNION TELEGRAPH CO. v. BLAIR,†

(Court of Civil Appeals of Texas. June 20, 1908. Rehearing Denied Oct. 17, 1908.)

1. CONTINUANCE (§ 9*) — DILIGENCE — NECESSITY.

Where, defendant having used no diligence to secure an absent witness, a first application for a continuance because of her absence was properly overruled, the fact that after the refusal to continue counsel agreed, with the court's consent, that the trial should proceed, and that, if the witness had not arrived when the testimony was all in, the trial might be postponed until her arrival, would not prevent the trial court from forcing defendant to close his case without the testimony.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 12; Dec. Dig. § 9.*]

2. APPEAL AND ERROR (§ 1064*) — HARMLESS ERROR—INSTRUCTIONS.

In an action for the negligent failure to deliver a telegram informing plaintiff of the serious illness of her daughter, any error in the court's charge in assuming that the daugh-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

ter was dying when the telegram was presented was harmless, where she did in fact die a few hours thereafter, and defendant's liability was properly submitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4221; Dec. Dig. § 1064.*]

3. TELEGRAPHS AND TELEPHONES (§ 66*)—ACTIONS FOR DAMAGES—BURDEN OF PROOF.

In an action for damages for failure to deliver a telegram announcing the serious illness of plaintiff's daughter, whereby she was prevented from being with her daughter at the latter's death, there is a presumption of mental anguish, and it need not be affirmatively proved.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 61; Dec. Dig. § 66.*]

4. TELEGRAPHS AND TELEPHONES (§ 73*)—ACTIONS FOR DAMAGES—BURDEN OF PROOF—QUESTION FOR JURY.

In an action for damages for a failure to deliver a telegram announcing the serious illness of plaintiff's daughter, whereby she was prevented from being with her daughter at the latter's death, the mere fact that plaintiff did not attend her daughter's funeral, which she explained as because of her sudden illness, was not conclusive that plaintiff did not suffer mental anguish, but raised, at most, a question for the jury.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. § 73.*]

Appeal from District Court, Dallam County; J. N. Browning, Judge.

Action by M. E. Blair against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Fearsons and Veale & Underwood, for appellant. Reese Tatum, for appellee.

SPEER, J. Mrs. M. E. Blair sued the Western Union Telegraph Company, and recovered a judgment for \$400 for damages for its negligent failure to deliver to her a telegraphic message informing her of the serious illness of her daughter, by reason of which she was deprived of the comfort of being at her bedside prior to her death. The defendant has appealed, and asks for a revision of the judgment on proper assignments of error.

It is first urged that the trial court erred in refusing to postpone the further hearing of the cause so that the appellant might be able to produce the witness Fournier, its former employé and operator at Dalhart, the home of appellee, the sendee in the message, who was at the time of the trial out of the employ of the company and out of the state. The bill of exception shows that by said witness it was expected to be shown that the message was received at Dalhart at 11:55 a. m., and that it was immediately taken from the wire of defendant company and was given to the messenger boy, who at once left with it, going in the direction of appellee's home. The bill further shows that, when appellant was called to announce for trial, it announced that it would not be ready be-

cause of the absence of this witness, but that she would in all probability reach Dalhart, where the case was being tried, within a few hours, and asked the court to postpone the trial, which the court refused to do. But by agreement of counsel, and with the consent of the court, it was understood that the trial was to proceed, and that, when the testimony available was all in, if said witness had not arrived in Dalhart, the trial might then be postponed until her arrival, but that, when the other testimony had been introduced and the witness had not yet arrived, the court declined to wait longer, and forced appellant to close its case without the testimony of this witness. It is shown that the witness would have testified as set out above, and the court in explanation of his ruling appears to put it on the ground that the testimony would only be cumulative of that of the witness Thorne, appellant's messenger boy. However that may be, appellant cannot insist on a reversal for this ruling because clearly, having used no diligence whatever to obtain the testimony of this witness, it was in no position to ask for a continuance or postponement to procure her testimony, and was not caused to forego any right whatever by reason of the agreement with counsel above set forth. If the court had overruled the application for postponement in the first place (as he in effect did), appellant could not have complained, and we cannot see that the agreement with counsel changes the situation in the least respect.

Appellant urges that the court's charge assumes that appellee's daughter was dying at the time the message was sent, but it is immaterial whether she was then actually dying or not, and, if the court erroneously assumed that she was, it could not possibly have affected appellant's rights, since undisputably she did die within a few hours after the transmission of the message, and the real issue as to appellant's liability was submitted to the jury and by them found adversely to appellant. Nor do we think the use of the word "dying" in that connection under the circumstances was at all calculated to unduly affect the jurors to appellant's prejudice.

The seventh and last assignment, complaining that the verdict is not supported by the evidence, is also overruled. It is not necessary that there should have been affirmative testimony that appellee suffered mental anguish, since there is a presumption from the relation shown that she did suffer such anguish. Of course, this presumption is capable of being rebutted by testimony, but we find nothing in the record that would so overcome the presumption as to require us to set aside the verdict. Besides, appellee's testimony tends to show that she did suffer mental anguish. The fact that she did not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

attend the funeral on the next day is explained by her testimony that she was suddenly taken ill, and could not travel on the early train which she would have had to take the next morning to attend the funeral. At most, the circumstances only made a controversy which the jury has settled.

Finding no error, we affirm the judgment.

HANEY v. GARTIN et al.†

(Court of Civil Appeals of Texas. July 4, 1908.
Rehearing Denied Oct. 17, 1908.)

1. ACKNOWLEDGMENT (§ 47*)—DEFECTIVE ACKNOWLEDGMENT—CURATIVE STATUTES.

Rev. St. 1895, art. 2312, as amended by Gen. Laws 1907, p. 308, c. 165, providing that every instrument which has been recorded for 10 years, shall be admitted as evidence, though the acknowledgment thereof is not, in form or substance, such as required by the law, includes conveyances of land, and embraces a deed defectively acknowledged because of the failure of the acknowledgment to show that the grantor was known to the officer to be the person who executed the deed, where such deed had actually been recorded for 10 years.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 237; Dec. Dig. § 47.*]

2. CONSTITUTIONAL LAW (§ 92*)—STATUTES—VESTED RIGHTS.

Statutes will not be permitted to take away a right vested, or to restore one lost, prior to their enactment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 175; Dec. Dig. § 92.*]

3. CONSTITUTIONAL LAW (§ 109*)—STATUTES—VESTED RIGHTS.

Rev. St. 1895, art. 2312, as amended by Gen. Laws 1907, p. 308, c. 165, providing for the admission in evidence of defectively acknowledged instruments which have been recorded for 10 years, etc., is remedial in its nature, and governs procedure, and applies to suits pending at the time it took effect.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 260; Dec. Dig. § 109.*]

4. CONSTITUTIONAL LAW (§ 109*)—STATUTES—VESTED RIGHTS.

A statute, depriving a party to a pending suit of an objection to the admission of evidence available under former laws, does not deprive him of any right in property vested before the enactment of the statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 260; Dec. Dig. § 109.*]

5. ACKNOWLEDGMENT (§ 47*)—DEFECTIVE ACKNOWLEDGMENTS—CURATIVE ACT.

A deed, defectively acknowledged, which had been recorded for 10 years before the assertion of an adverse claim to the land conveyed, was properly received in evidence, under Rev. St. 1895, art. 2312, as amended by Gen. Laws 1907, p. 308, c. 165, authorizing the admission in evidence of defectively acknowledged instruments which had been recorded for 10 years, provided no claim adverse to the one evidenced by the instrument was asserted during "that 10 years."

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 239, 240; Dec. Dig. § 47.*]

6. ACKNOWLEDGMENT (§ 47*)—DEFECTIVE ACKNOWLEDGMENTS—CURING DEFECTS.

A deed, defectively acknowledged, because of the use of the words "Ester A.," instead of

the words "Ester A.," is properly received in evidence, under Rev. St. 1895, art. 2312, as amended by Gen. Laws 1907, p. 308, c. 165, authorizing the admission in evidence of defectively acknowledged instruments.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 239, 240; Dec. Dig. § 47.*]

7. WILLS (§ 560*)—PROPERTY DEVISED—DESCRIPTION—SUFFICIENCY.

A will, regularly probated in a sister state, devised to the testator's wife "the 160 acres in T. county, Texas," referred to in another place as "the farm in Texas." Testator owned 160 acres in the county, and there was nothing to show that he had ever owned any other land in Texas. *Held*, that the description was sufficient to raise an inference that the 160 acres was the land described in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1217; Dec. Dig. § 560.*]

8. WILLS (§ 245*)—PROBATE—NECESSITY.

Under Rev. St. 1895, arts. 5353, 5355, authorizing the filing of a foreign will admitted to probate in a sister state, etc., a foreign will, disposing of real estate in Texas, confers the title on the devisee on the death of testator, and its probate in a sister state and record in Texas are but legal formalities required to evidence and give effect to that right.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 577-581; Dec. Dig. § 245.*]

9. DEEDS (§ 207*)—DESCRIPTION OF GRANTOR—RECITALS.

A recital in a deed, conveying land devised to "Mary E. Newlin," that the grantor, "Mary E. Kurtz," was formerly "Mary E. Newlin" is, in the absence of controverting evidence, conclusive on the issue of the identity of the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 620; Dec. Dig. § 207.*]

10. TRESPASS TO TRY TITLE (§ 40*)—DEEDS—DESCRIPTION OF GRANTOR—RECITALS.

Where a quitclaim deed purported to convey all the title the grantors had in the premises, and the evidence showed that the premises had descended in regular sequence from the patentee to one of the grantors, the grantors were shown to have such connection with the title that their deed was admissible in evidence, in a suit for the possession of the premises.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 57; Dec. Dig. § 40.*]

11. TRESPASS TO TRY TITLE (§ 33*)—DAMAGES—IMPROVEMENTS—PLEADINGS.

In an action to recover real estate, a plea suggesting improvements in good faith, which alleges that the lands were delinquent for taxes, that a regular foreclosure sale for unpaid taxes was had, that the premises were conveyed to a third person, who by warranty deed conveyed to defendant for a valuable consideration, and that defendant believed, and had good reason to believe, that he acquired a valid title, is good as against a general demurrer, and as against a special exception based on the ground that the plea did not aver that defendant had ever examined the title or knew what it was.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 42; Dec. Dig. § 33.*]

12. TRESPASS TO TRY TITLE (§ 59*)—DAMAGES—IMPROVEMENTS—PLEADINGS.

In an action to recover real estate, the testimony of defendant, claiming for improvements, that he had placed in good faith on the land improvements of a total value of \$1,733 was some evidence that the value of the land was actually enhanced to the amount of \$1,673, as found by the court, as authorized by Rev. St. 1895, art. 5278, subd. 1, authorizing the court to estimate the value, at the time of the trial, of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

improvements made in good faith by defendant before the filing of the suit, etc.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 90; Dec. Dig. § 59.*]

Appeal from District Court, Lubbock County; L. S. Kinder, Judge.

Action by J. N. Haney against J. B. and William Gartin. From a judgment granting relief, both parties appeal. Affirmed.

H. C. Ferguson and H. C. Randolph, for plaintiff. McGee & Puckett and Geo. L. Beatty, for defendants.

CONNER, C. J. J. N. Haney instituted this suit in the district court against appellees, on the 11th day of July, 1906, to recover the title and possession of one tract of 80 acres of land, and another of 160 acres, situated in Lubbock county, and fully described in his petition. Appellees pleaded not guilty, the plea of five years' limitation (which appears to have been abandoned), and one suggesting improvements in good faith. Appellant filed a supplemental petition, with general and special exceptions addressed to the plea suggesting improvements in good faith, which were overruled by the court, and the cause proceeded to trial, on the pleadings above stated the 5th day of November, 1907, before the court without a jury, and resulted in a judgment in favor of appellant for both tracts of land described in his petition, and in favor of appellees for the value of improvements to the extent of \$1.673, from which all parties have appealed and assign errors.

Appellees admit that appellant has title to the 80-acre tract of land sued for, but raise by their assignments, which we will first dispose of, various questions affecting appellant's title to the 160 acres adjudged to him. This 160 acres of land is part of a larger survey, patented to Seth Brown January 30, 1879, from whom, through conveyances in regular order, appellant has title. On the trial appellees objected to the admission in evidence of the deed from Seth Brown and wife, Maranda Brown, to David Armstrong, on the ground that it was defectively acknowledged, and hence improperly recorded and inadmissible without proof of its execution, which was not attempted. The acknowledgment is clearly defective in that it does not appear therefrom that Seth Brown or his wife was known, to the officer taking the acknowledgment, to be the persons who executed the deed. It appears, however, that the deed was in fact recorded in the proper county January 10, 1884, and that Rev. St. 1895, art. 2312, was amended by an act of the Legislature approved April 23, 1907 (see Gen. Laws 1907, p. 308, c. 165), which specially provides that: " * * * Every instrument which has been or hereafter may be actually recorded for a period of ten years in the book used by said clerk for the

recording of such instruments, whether proved or acknowledged in such manner or not, shall be admitted as evidence in any suit in this state without the necessity of proving its execution; provided no claim adverse or inconsistent to the one evidenced by such instrument shall have been asserted during that ten years; * * * and after such instrument shall have been actually recorded as herein provided for a period of ten years it shall be no objection to the admission of same, or a certified copy thereof, as evidence, that the certificate of the officer, who took such proof or acknowledgment, is not in form or substance such as required by the laws of this state, and said instrument shall be given the same effect as if it were not so defective." The act clearly includes conveyances of land, and is certainly broad enough in terms to embrace the deed under consideration and to answer the objection made to its admission in evidence, but appellees insist that it does not apply, in that, first, an adverse claim inconsistent with the deed is shown to have been asserted within the 10-year record relied upon; and, second, that the act was not intended to apply to pending suits; and, third, that inasmuch as more than four years had elapsed from the taking of the said acknowledgment, the right to inquire into and correct such certificate was barred by limitation, and the Legislature was hence without power to revive or restore a right so lost. These contentions, however, we think more plausible than sound. The suit was not for the correction of the certificate, and the act evidently purports only to govern the practice or procedure in cases to which it applies upon the introduction of evidence, and is therefore remedial in its nature, applying to suits pending at the time it took effect, as well as to those thereafter instituted. Statutes will not be permitted to take away a right vested, or to restore one lost, prior to their enactment; but the statute in question confers no right of property in appellant not theretofore existing. It was the deed, and not the acknowledgment, that gave the right, and the statute merely affords a manner of proving the deed, in the absence of an affidavit attacking it, that under the circumstances was not before given. Nor does the statute deprive the defendants of any right in property vested before its enactment. It merely deprived them of an objection to its admission in evidence that would have been available under former laws. Says Mr. Sutherland, in his work on Statutory Construction (article 164, p. 220): "A statutory right is to be distinguished from the remedy for its enactment. * * * New statutes may be valid which take away defenses based on irregularities and informalities. * * * Nor does the record support the contention of an adverse claim within the quoted proviso of the statute. After

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the record of the deed the first adverse claim was that of defendants' vendor, Judge Geo. L. Beatty, by virtue of a purchase at a tax sale May 7, 1901, more than 10 years after the record of the deed executed by Seth Brown and wife. "That 10 years," and not the 10 years immediately preceding the suit, brought the case within the statute we have quoted. We are of opinion that the deed mentioned was properly admitted in evidence. This conclusion also applies as well to the objection made to the admission of a deed from Easter Armstrong to Paris Cox because of a defective acknowledgment, the use of the name "Easter," instead of "Ester" being regarded as a mere clerical error.

The will of A. W. Newlin was shown to have been regularly probated in Pennsylvania in October, 1895; was properly certified and recorded in Lubbock county on September 5, 1906. It devised to his wife, Mary E. Newlin, among other things, "the 160 acres in Lubbock county, Texas," referred to in another place as "the farm in Texas." Title to the 160 acres in controversy having been shown to have devolved upon A. W. Newlin, and it not appearing that A. W. Newlin ever owned any other land in Texas, we think the description in the will sufficient to raise an inference that the land in controversy was the same as that described in the will, which was therefore admissible as against the objection of an insufficient description. Nor is the will subject to the objection that it conferred an after-acquired title because recorded in Texas after the institution of the suit. The will conferred the right upon Mary E. Newlin upon the death of the testator. Its probate in Pennsylvania and record in Texas were but legal formalities required to evidence and give full effect to that right. Rev. St. 1895, arts. 5353, 5355.

The admission of the deed from T. J. Kurtz and Mary E. Kurtz to Frank Butterfield, purporting to convey the land in controversy, was also objected to, on the ground that the grantors are not shown to have other connection with the title. The deed recites, however, that Mary E. Kurtz was formerly Mary E. Newlin, and this recital, without other evidence of its truth, and even as against strangers to the title, is competent evidence on the issue of identity which is involved. As a whole, the deed purports to have been executed by Mary E. Newlin, although partially under another name. At least, there is partial identity in name, and this, in the absence of all controverting evidence, is sufficient, it seems, to show that Mary E. Kurtz who signed the deed is the same person as the Mary E. Newlin to whom the land had been devised; it being presumed that the change in surname was brought about by marriage. *Chamblee v. Tarbox*, 27 Tex. 144, 145, 84 Am. Dec. 614; *Dowdy v. McArthur*, 94 Ga. 577, 21 S. E. 149.

There is an objection, also, to the convey-

ance from Jennie S. Steel and R. W. Steel to appellant Haney, on the ground that the grantors are not shown to have connection with the title, and that it is but a quitclaim deed. The deed purports to convey all the title the grantors had, and the evidence, as presented in the transcript, shows that it had descended in regular sequence from the patentee to Jennie S. Steel. It was therefore clearly admissible in evidence.

Having thus adversely disposed of all objections made by appellees to appellant's title to the land, it remains for us to determine the questions, presented by the cross-appeal of appellant, that relate to the issue of improvements in good faith pleaded by appellees. Appellant first assigns error to the action of the court in overruling his general and special demurrers to appellees' plea setting up such improvements. The plea is as follows: "The defendants in the above styled and numbered cause suggests to the court that they, and those under whom they claim, have had adverse possession in good faith of the lands and premises described in plaintiff's petition for more than one year before the commencement of this suit, and defendants say that the lands described in plaintiff's petition were delinquent for the state and county taxes due thereon for the year A. D. 1898, and thereafter, to wit, on the 2d day of March, A. D. 1900, the state of Texas, as plaintiff, brought suit against the unknown owner of said lands, in the district court of Lubbock county, Tex., for the unpaid taxes due thereon, and made additional allegations showing a regular foreclosure and sale thereunder to Geo. L. Beatty, and deed to him May 7, 1901, and continuing as follows: 'That thereafter to wit, on the 31st of December, 1901, said Geo. L. Beatty, by warranty deed duly executed, conveyed the said lands and premises to these defendants for a valuable consideration to him paid, and these defendants believed, and had good reason to believe, that they thereby acquired a good and valid title to said lands.'" To which the only special exception was: "Because it does not appear by said answer that the defendants believed, or had any reason to believe, that at the time they took possession of the land sued for the title was good, or that they ever examined it, or had it examined, or knew what it was." We think the plea good as against the general demurrer, and, in so far as it omits deficiencies pointed out in the special exception, it is not subject to legal objection. The fact that appellees may or may not have examined, or had examined, the title under which they entered was merely matter of evidence on the issue of good faith, which it was unnecessary to plead. It follows that no error was committed by the court, as alleged under the second assignment, in permitting appellee to state the ground of his good faith as pleaded, the only objection to this evidence offer-

ed being that it was not alleged in the plea that "he (the witness) had examined the title, or knew what it was, or that he had any reason to believe that the title he was buying was good." The same objection is urged in the third assignment to the rendition of judgment for appellees for the value of improvements.

In the fourth and last assignment, questioning the judgment on the issue of improvements, it is insisted that the court erroneously gave judgment for \$1,073, when the proof shows that the land, "without the improvements, was of the market value of \$10 per acre, or \$1,600, and with the improvements placed thereon by the defendants it was of the market value of \$12.50 per acre, or \$2,000 for all of said land." No proposition follows this assignment, and we think that, as made, it should be overruled. While the evidence referred to in the assignment of course tends to show that the court's judgment was excessive, it cannot be said to be conclusive on the subject. Appellees' proof, which is not controverted on this point, shows that they placed upon the land in controversy in good faith permanent improvements of a total value of \$1,733.05, which must be held to be at least some evidence that the value of the land was actually enhanced to the amount of the judgment, as required by statute. Rev. St. 1895, art. 5278, subd. 1. We think at least we must attribute to the court a finding to this effect, and that therefore the assignment must be overruled.

Having found no reversible error as assigned by either party, we order that the judgment be in all things affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. CLARK.

(Court of Civil Appeals of Texas. Oct. 15, 1908. Rehearing Denied Nov. 12, 1908.)

RAILROADS (§ 400*)—INJURIES TO PERSON CROSSING TRACK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad for injuries through being struck by a car, plaintiff's evidence showed that the car was standing still when he attempted to cross the track in front of it, and that after he started to cross a heavy train was switched in on the track, striking the car and causing it to run over plaintiff. *Held*, that plaintiff was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1377; Dec. Dig. § 400.*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Action by Jeff Clark against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

Marsh & McIlwaine, for appellant. McCord & Bullock and Gentry & Castle, for appellee.

HODGES, J. This suit was instituted in the district court of Smith county by the appellee, Jeff Clark, against the appellant, to recover damages for personal injuries sustained by him by reason of the alleged negligence of the appellant's servants in the operation of its train in the yards at Tyler. A trial was had before a jury, and the appellee recovered a judgment against the appellant for the sum of \$250. From that judgment the case is before us on appeal.

The testimony is very conflicting upon some of the important issues involved. The case comes before us solely upon the ground that the verdict of the jury was not supported by the testimony. It was shown upon the trial that the appellee was injured in the yards of the appellant, at a place where many people were accustomed to cross over and pass along the tracks. The appellee testified that, in attempting to pass over from the west side to the east side of the appellant's track, he was struck by a car and knocked down, and his leg was run over and injured. He further testified that before crossing over he saw the car which struck him; that it was distant about four or five feet, and was standing still; that in passing from the west to the east, and before he reached the east side track the car was set in motion and struck him. There was testimony tending to show that the train from which the injury resulted was being operated by one of the appellant's switch engines; that at the point where the appellee was injured there were five tracks, counting the main track and an elevated track commonly used for icing and called the "ice track." The main line was on the east side of the yard, and the ice track on the opposite side; and between them were the three switch tracks, numbered 1, 2 and 3, respectively, beginning at the main line track. The testimony showed that some time prior to the appellee's injury the switch engine, with about 18 or 20 cars, passed south along the main track until it reached the switch leading onto track No. 3. At that point it backed up on track No. 3 and struck 2 or 3 cars about the point where the appellee was injured. We gather from the testimony that it was one of these cars, which were standing and which were struck by the incoming train pushed by the switch engine, that caused the appellee's injury. One of the witnesses who testified for the appellee stated that he saw the switch engine back the train of cars in at the time, and that it was moving very rapidly; that no bell was being rung, nor whistle blown, nor was there anything to indicate the approach of the car; that this occurred about the time and just before the appellee was injured. The testimony on the part of the appellant is contradictory of the main facts testified by the appellee and his witnesses. It adduced

evidence tending to show that the appellee was drunk at the time, and was injured on account of lying under one of the cars struck by those pushed by the switch engine; that he had been asleep, and that his injury was unavoidable.

The question before us is whether or not, under the testimony, we can say that the appellee was guilty of contributory negligence, as a matter of law, in attempting to cross the track at the time he did and under the circumstances surrounding him. After carefully considering all of the facts in the record, we have reached the conclusion that we cannot. According to his testimony, and that of his witnesses, the car that struck him was standing at the time he saw it, and when he attempted to cross, and after having started across track No. 3 it was struck violently by a heavy train of about 18 or 20 cars moving at a rapid rate, and thus caused to run over him before he had time to pass over. If this be true, then the jury was warranted in returning a verdict in favor of the appellee. While this view of the case is contradicted strongly by much testimony offered on the part of the appellant, yet it is not our province to undertake to say that the jury erred in crediting the witnesses of the appellee, and in discrediting those of the appellant, upon those conflicting issues.

The judgment is therefore affirmed.

HARRIS v. IGLEHART et al.

(Court of Civil Appeals of Texas. Oct. 21, 1908.)

1. ADVERSE POSSESSION (§ 71*)—VOID GRANT—EXTENT OF POSSESSION.

One in actual possession of land under a void grant, which describes the land, may hold and prescribe under the 10-year statute to the extent of the boundaries of the grant, if he asserts possession thereunder.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 417; Dec. Dig. § 71.*]

2. DEEDS (§ 38*)—REQUISITES—PREMISES CONVEYED—DESCRIPTION.

The calls of a grant are sufficient, if they are certain and definite enough to enable a surveyor to locate and identify the lands attempted to be described.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 65; Dec. Dig. § 38.*]

3. ADVERSE POSSESSION (§ 106*)—STATUTE OF LIMITATIONS—SUSPENSION.

Where the possession of one holding land under a void grant was sufficient to bar plaintiff's right prior to the suspension of the statute of limitations during the Civil War, the character of the party's possession thereafter was immaterial.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 106.*]

4. ADVERSE POSSESSION (§ 43*)—POSSESSION OF TENANT.

While the possession of land by a tenant inures to the benefit of his landlord, yet, if the tenant acquires title from the landlord, he may

assert whatever rights the latter acquired by such possession.

[Ed. Note.—For other case, see Adverse Possession, Cent. Dig. § 219; Dec. Dig. § 43.*]

5. ADVERSE POSSESSION (§ 100*)—POSSESSION BY TENANT—EXTENT.

Where a landlord asserted title to land in controversy under a grant, the possession of the tenant of a part of the land extended the landlord's claim of adverse possession to the boundaries of the grant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 555; Dec. Dig. § 100.*]

Appeal from District Court, Chambers County; L. B. Hightower, Judge.

Action by Lloyd G. Harris against D. T. Iglehart and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. H. Jackson, J. R. Davis, and Marshall & Marshall, for appellant. Stevens & Pickett, for appellees.

FISHER, C. J. This is a suit of trespass to try title, brought by appellant on the 24th day of January, 1906, in the district court of Chambers county against the appellees. Appellees pleaded not guilty, and the statutes of limitation of three, five, and ten years. The case was tried before the court without a jury, and judgment rendered to the effect that the plaintiff take nothing by his suit against the appellees.

The plaintiff claimed title under a grant from the Mexican government to Moses A. Carroll, dated in 1835, and the evidence shows that he is connected with that title by conveyances which are set out in the record. Appellees claim title by virtue of a grant from the Mexican government to T. J. Chambers, issued in 1834. The evidence shows, also, a deed from T. J. Chambers to William Chambers, of date 1865, conveying 800 acres of land in the Chambers grant. The evidence also shows that the appellees are connected with and asserting title under this deed. If the land in controversy is embraced in the calls of the grant to Chambers and the calls in the deed from him to William Chambers, and the calls are sufficient to enable a surveyor to find and identify the land, and the defendants and those under whom they claim were in possession of the land a sufficient length of time to prescribe under the 10-year statute of limitation of 1841, then we need not pass upon and determine whether the Chambers grant was void, as insisted upon by appellant, on the ground that it was located within the 10 littoral leagues without the consent of the executive of the Mexican government being shown.

The act of 1841 has been construed in several cases, and it was there held that one in actual possession under a void grant which describes the land in controversy could hold and prescribe under the 10-year statute to the extent of the boundaries of the grant, provided he is asserting possession thereun-

der. *Charle v. Saffold*, 13 Tex. 94; *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53; *Lambert v. Weir*, 27 Tex. 362; *Craig v. Cartwright*, 65 Tex. 417. The calls in the two instruments referred to, in our opinion, are sufficiently certain and definite to enable a surveyor to locate and identify the lands therein attempted to be described, and the evidence with reasonable certainty establishes the fact that the defendants and those under whom they claim were in possession of the land described in the deed from Chambers to William Chambers executed in 1865. Prior to that time the Chambers grant was occupied by and in possession of William Chambers, holding and occupying the same for his brother, T. J. Chambers. The deed from him to William Chambers recites the fact that it is executed in part in consideration of the fact that William Chambers had occupied and been in possession of the land, holding the same for the grantor.

There is evidence in the record which shows that William Chambers was in possession as far back as 1846, and thus continued in possession for a much longer time than was necessary to prescribe under the 10-year statute. He was in possession when the statute was suspended during the period of our Civil War; and as the time of such possession was sufficient under the act of 1841 to bar the plaintiff and those under whom he claims in their right of action by virtue of the 10-year statute prior to the time that the statute was suspended, we need not consider the question of limitation after that time. Of course, the possession of William Chambers during that period as a tenant of T. J. Chambers inured to the benefit of the latter, and, William Chambers having acquired title in 1865 from T. J. Chambers, he could assert whatever right was possessed by the latter. William Chambers during that period being in actual possession of a part of the grant, holding the same for T. J. Chambers, the latter, under the 10-year statute then in force, could claim possession to the extent of the boundaries of the grant under which he was asserting title.

We find no error in the record, and the judgment is affirmed.

GOODNEY v. INTERNATIONAL & G. N. R. CO.

(Court of Civil Appeals of Texas. Oct. 14, 1908.)

1. CARRIERS (§ 303*)—CARRIAGE OF PASSENGERS ON FREIGHT TRAIN—LIABILITY FOR INJURIES.

Where a carrier's rule, in continuous force for many years, forbade passengers from riding on freight trains, and could only be suspended by the company's superior officers, a passenger riding on a freight train by contract with the

brakeman could not recover for injuries sustained in alighting while the train was in motion.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1226; Dec. Dig. § 303.*]

2. APPEAL AND ERROR (§ 959*)—PLEADINGS—TRIAL—AMENDMENT—DISCRETION OF COURT.

While pleadings may be amended at any time before the conclusion of the trial, the allowance of a trial amendment rests largely in the discretion of the judge, which will not be disturbed on appeal, in the absence of abuse.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3830; Dec. Dig. § 959.*]

3. APPEAL AND ERROR (§ 1029*)—REVIEW—HARMLESS ERROR—PLEADINGS—REFUSAL OF TRIAL AMENDMENTS.

Where, under any view of the facts, plaintiff was not entitled to recover, the refusal to allow a trial amendment of his pleading was not prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4035; Dec. Dig. § 1029.*]

Appeal from District Court, Montgomery County; L. B. Hightower, Judge.

Personal injury action by Andrew Goodney against the International & Great Northern Railroad Company. There was judgment on a directed verdict for defendant, and plaintiff appeals. Affirmed.

W. A. Cook for appellant. John M. King and Dean, Humphrey & Powell, for appellee.

RICE, J. This is a suit by appellant to recover damages for personal injuries growing out of an alleged breach of contract which appellant claims to have been made by him with appellee relating to his right of passage on one of its freight trains from Dodge to New Waverly, stations on its road. He predicates his right to recover upon the following facts: While at his work at Oakhurst, on the afternoon of December 13, 1904, he received a message stating that his sister was at the point of death and his baby was very sick, whereupon he immediately quit his work and walked to the station of Dodge, arriving there about 9 o'clock on said evening, where he made inquiry of one Roark, a clerk in appellee's ticket office, relative to the time of the arrival of a passenger train going to New Waverly that night. Said clerk told him that it would pass a little after 1 o'clock, and while making this statement to appellant the south-bound freight train stopped at the depot, whereupon appellant told said clerk that if he were allowed to take passage on said freight train he would save several hours. Roark replied that appellant would have to see the conductor, and they immediately went out together for this purpose; but appellant walked up to a brakeman, and Roark passed on. The brakeman then agreed with appellant to transport him to New Waverly for 50 cents, which having been paid by appellant, he at the instance of the brakeman boarded the train, climbing by means of a ladder inside of a coal car, in which he rode. It was shown that the conductor of the train knew nothing about this contract, and told Roark

that the train would not stop at New Waverly that night, which statement was probably heard by the appellant. The train did not stop at New Waverly, but continued on to Willis, where appellant voluntarily jumped from the train while the same was in motion. According to his own statement, it was running at this time from 10 to 15 miles per hour, and he while attempting to alight therefrom, was thrown under the wheels of the car; both legs being so badly crushed as to necessitate amputation. It was shown that appellant had never seen the conductor in charge of this train, nor did he see the brakeman during the time he was riding thereon, nor was he seen by any of the operatives on said train from Dodge to New Waverly; the sides of the coal car in which he was riding reaching up to his neck, and the car being somewhere about the middle of the train.

Appellant alleges that on account of the breach of its contract to stop at New Waverly he was required to choose between two evils, either to remain on the train and suffer great mental anguish on account of being carried beyond the station where his relatives were ill, or to jump therefrom as he did. Appellee answered by general and special exceptions, general denial, contributory negligence, and pleaded that by its rules, which had been duly adopted and promulgated, prohibiting passengers from riding upon freight trains, its brakemen and operatives had no authority to permit passengers to ride upon said trains, and such authority could only be granted by the general officers of the company, and that no such consent had been given in the present case, and that the alleged contract, relied upon for recovery by appellant, between himself and the brakeman, was not within the scope of his authority, and that no brakeman had any control over the movements of its trains. Wherefore it was not liable for any injuries resulting from a breach of said alleged contract. The evidence, in addition to what has been stated, showed the establishment and promulgation of such rule and the continuous enforcement thereof for many years on the part of the officials and operatives of said company. The trial court, after hearing the evidence, instructed the jury to return a verdict for appellee, which was done, from which judgment this appeal is prosecuted.

The chief contention in this case on the part of appellant is that the court erred in instructing a verdict in behalf of appellee. In view of the uncontradicted evidence in this case, which shows that appellant's right to ride upon said train was based upon the contract made by him with the brakeman, who under the evidence had no authority to make such contract or grant said permission to ride, and it further appearing that the rules of the company, which had been duly made and promulgated, forbade passengers from riding upon its freight trains, which rule could not be suspended except by the

superior officers of the company, which is not shown to have been done in this case, we are clearly of the opinion that the action of the trial court in directing a verdict in favor of the company was correct. Justice Brown, speaking for the court, in *Railway Co. v. Black*, 87 Tex. 160, 27 S. W. 118, says: "A railroad company has the right to carry passengers and freight by different trains, and when such provision is made the conductors and brakemen have no implied authority to receive passengers upon freight trains. It is not within the scope of their authority. When one gets upon a freight train, made up exclusively of cars appropriate alone to the carrying of freight and the employes on such train, he must take notice of the fact that the train is not provided for passengers." In the case of *Galaviz v. I. & G. N. R. R. Co.*, 15 Tex. Civ. App. 61, 38 S. W. 234, wherein the plaintiff sued for damages for injuries caused by being unlawfully compelled to disembark from a moving freight train by a brakeman, he having alleged and testified that the brakeman made a contract with him by which he obtained permission to ride on said train from Taylor to San Marcos, and that when the train was nearing San Marcos the brakeman unlawfully compelled him to get off the train while it was in motion, and while attempting to do so his foot was caught between the cars and was injured, there being no evidence tending to show any misconduct or negligence on the part of any one connected with the train except the brakeman, and it having been shown that the defendant promulgated and continuously enforced for a number of years a rule prohibiting all persons, except its employes, from riding on freight trains, and that conductors had no power to suspend said rule, it was held, Justice Key delivering the opinion, that a person riding on a freight train by permission of a brakeman, contrary to the rules, could not recover for personal injuries sustained in getting off the train while in motion. The same doctrine is held in *Railway Co. v. Lynch*, 8 Tex. Civ. App. 513, 28 S. W. 252; *Railway Co. v. Hanna* (Tex. Civ. App.) 58 S. W. 548; *Graham v. Railway*, 100 Tex. 27, 93 S. W. 104, 5 L. R. A. (N. S.) 1025; *Cockrell v. T. & N. O. Ry.*, 36 Tex. Civ. App. 559, 82 S. W. 529; *Railway Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902.

By the remaining assignment appellant contends that the court erred in refusing to permit him to file a trial amendment, setting up that the train, at the time he alighted therefrom, was running at about 6 miles an hour; he having theretofore alleged in his pleading that the train was running from 10 to 15 miles an hour, and basing his right to amend upon the fact that he did not know how fast said train was running, and the statement of appellee's engineer, who testified upon the trial that the train upon which appellant was traveling, when his injuries

were received while passing through Willis, was moving at the rate of 6 miles an hour. The court, in explanation of appellant's bill of exception upon this subject, stated that permission to amend was denied, because this evidence was only based upon the opinion of said engineer, and was given about the conclusion of the trial. While it has been held by our Supreme Court that the right to amend the pleadings exists at any time before the conclusion of the trial, still these matters are confided largely to the discretion of the trial judge, and, unless this discretion is abused, it is not ground for reversal. In the present case we cannot see how appellant was prejudiced by reason of the refusal of the court to grant him the right to so amend, because, under any view of the facts as presented in the record, appellant was not and could not be entitled to recover. Therefore, if there had been error in refusing to permit him to amend, the same was harmless under the facts disclosed by the record.

Believing that no error has been shown in the action of the trial court, the judgment of the court below is in all things affirmed.

Affirmed.

APPLEBAUM v. BASS.

(Court of Civil Appeals of Texas. Oct. 26, 1908.)

1. APPEAL AND ERROR (§ 1165*)—ERRORS ASSIGNABLE—FAILURE TO FILE STATEMENT OF FACTS—“ERROR APPARENT OF RECORD”—“JURISDICTIONAL QUESTION.”

The trial judge's failure to make up and file a statement of facts within the time prescribed by law is not assignable, in the Court of Civil Appeals, on ex parte affidavit showing such failure as an error, since it is not one of the subjects which Rev. St. 1895, art. 1014, authorizes that court to review, and not being an error “apparent upon the face of the record” within such article, nor a jurisdictional question within article 998, so as to authorize review, and since there is adequate remedy to bring a statement of facts into the record under articles 1015 and 1382, authorizing the Court of Civil Appeals, for good cause, to extend the time for filing it, and under an application for mandamus to compel the trial judge to make up and file a statement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4522; Dec. Dig. § 1165; *Mandamus, Cent. Dig. § 117.]

2. APPEAL AND ERROR (§ 672*)—REVIEW—“ERROR APPARENT OF RECORD.”

An error “apparent upon the face of the record,” reviewable by the Court of Civil Appeals, under Rev. St. 1895, art. 1014, is a prominent fundamental error, or one determining a question upon which the very right of the case depends.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 672.*]

3. APPEAL AND ERROR (§ 571*)—STATEMENT OF FACTS—MANDAMUS.

Generally mandamus lies to prevent a failure of justice upon reasons of public policy, to enforce official action, and to compel a trial

judge to make and file a statement of facts for use on appeal, as required by statute.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 571.*]

4. APPEAL AND ERROR (§ 564*)—STATEMENT OF FACTS—MAKING AND FILING—JUDGE'S DUTY.

As a matter of law, a trial judge does not fail to perform his duty to file a statement of facts, upon disagreement of parties, until expiration of the 30 days allowed for that purpose; and the duty continues until performed, notwithstanding lapse of that period.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 564.*]

5. APPEAL AND ERROR (§ 548*)—STATEMENT OF FACTS—NECESSITY FOR.

Questions arising upon the evidence cannot be reviewed on appeal, in the absence of a statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2436; Dec. Dig. § 548.*]

6. APPEAL AND ERROR (§ 971*)—DISCRETION OF COURT—COMPETENCY OF WITNESS—CHILDREN.

It was not an abuse of discretion to allow a child to testify, where there was some evidence tending to show his appreciation of an oath.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3852; Dec. Dig. § 971.*]

Appeal from Harrison County Court; H. T. Lyttleton, Judge.

Action by J. H. Bass against J. Applebaum. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee sued for the conversion of his property; and appellant pleaded that he had purchased the property from an agent of the appellee, which sale by the agent had been confirmed by the appellee. The trial was before a jury, and, in accordance with their verdict, a judgment was entered for the appellee. There is no statement of facts appearing in the record, but there is incorporated in the transcript an affidavit, made by the attorneys for appellant on December 21, 1907, before the county clerk, and filed by him on the same day, setting out the trial of the case, which was on September 12, 1907, and rendition of judgment in favor of the plaintiff, and on the 19th day of October, 1907, the overruling of a motion for a new trial by the court, notice of appeal to the Court of Civil Appeals, and the granting of a 20-day order, from the date of adjournment of the court, within which to prepare and have filed a statement of facts in the cause, and the entry of said order on the minutes of the court, and “that thereafter on the 4th day of November, 1907, the attorneys for the defendant prepared a statement of facts in the case, which they believe contained a full and fair statement of all the facts proven on the trial, and on said day presented the same to the attorneys for the plaintiff; that the attorneys for the parties could not agree upon the statement presented, or upon any other statement that might be prepared by them, and that thereupon afterwards on the same

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

date, presented said statement to the county judge, who tried the case, and informed him that the attorneys for the defendant and plaintiff had failed and were unable to agree upon a statement of facts in the case, and requested such county judge to prepare and file in the case a statement of all the facts, as was required of him by law; that the said trial judge failed to prepare and file in this cause such statement of facts; that the term of the court in which the case was tried began on the 2d day of September, 1907, and adjourned on the 28th of October, 1907." Predicated upon the affidavit incorporated in the record, the appellant made the following assignment of error appearing in the transcript: "The appellant, Applebaum, has been wrongfully and illegally denied and deprived of a statement of facts herein by the county judge before whom said cause was tried, without fault or negligence on the part of said Applebaum or his attorneys." Appellant makes the following proposition under his assigned error: "Where appellant has done everything possible to obtain a statement of facts, and the trial judge fails to perform his duty by filing in the cause a statement of his own, such as required of him by law, when the parties and their attorneys cannot agree, and such judge is requested to do so, the cause will be reversed." The appellee insists that "this is a matter not reviewable by assignment of error; the aggrieved party's remedy being by mandamus to compel the county judge to make up and file statement of facts."

Alvin G. Carter and M. B. Parchman, for appellant. Jno. W. Scott and Jos. H. T. Bibb, for appellee.

LEVY, J. (after stating the facts as above). We are of the opinion that the appellant cannot, as a legal right to him by assignment of error on appeal, avail himself of the failure of the county judge to make up and file a statement of the facts within the time prescribed by law for him to do so, nor is this court authorized to consider such assignment on appeal of the case as a legal right to appellant, when predicated on such state of facts. As a basis for the exercise of appellate jurisdiction of the Court of Civil Appeals, in cases brought before the court on appeal or writ of error, the statute has prescribed the matters and subjects and method of procedure in relation thereto to appear in the record for review by this court. Article 1014, Rev. St. 1895. And it is quite conclusive from the language of the article, "and in the absence of all these, the case shall be dismissed with costs alone, or with cost and damage, at the discretion of the court," that it was the purpose of the act, and properly should be so construed, to restrict the exercise of appellate jurisdiction of the Court of Civil Appeals, in reviewing cases on appeal or writ of error, to the matters and subjects named in the article. This view is

supported in the opinion of Justice Brown, speaking for the Supreme Court, in construing this article of the statute, which is: "In the absence of any of the matters mentioned the case must be dismissed which supports the conclusion that the power of the court is confined to the subjection named." See *Ennis Mercantile Co. v. Wathen*, 93 Tex. 622, 57 S. W. 948. Ex parte affidavit, setting out the failure of the trial judge to prepare and file a statement of the facts for the use on appeal within the time prescribed by law for him to do so, is not a "subject named," in the article, or included within the subject for review on appeal or writ of error by this court. In the *Ennis Mercantile Company Case*, supra, in passing upon the exercise of appellate jurisdiction by this court, the Supreme Court said: "The appellate jurisdiction of Courts of Civil Appeals is directed to the correction of errors, committed in the courts, of proceedings prior to and connected with the rendition of the judgment, and they are confined to the record as it is made by the trial court." We quote further from the opinion in the same case: "The failure of the judge in this case to approve the statement of facts presented to him, or to make up one in case of the disagreement of the parties, does not appear in the record in any manner specified by the statute, and was not a proper subject for assignment." Considering that the recital in the statement of that case was that "the affidavits were also filed in the trial court setting up the facts, copies of which are embraced in the transcript," the expression of the court "does not appear in the record in any manner specified by the statute" is significant; and, taken in connection with the further expression, "and was not a proper subject for assignment," it was evidently meant that the matter presented could not be considered on appeal by assignment, even if it had been made, because it was not a subject or matter named in the statute for review on appeal. That this meaning was intended in the case mentioned appears clear in a later opinion by the Supreme Court in the case of *Middlehurst v. Collins-Gunther Co.*, 100 Tex. 349, 99 S. W. 1025. This latter case was where the trial judge had failed to make up a statement of facts for reasons, and his refusal and reasons appeared incorporated in the record, and assignment of error was properly made predicated upon the failure. In this case this state of the record, and in answering that portion of the certified question propounded, "should appellant, in order to avail himself of such error, have applied for a writ of mandamus against the district judge?" Justice Brown, speaking for the court, said: "The facts stated disclosed nothing to prevent the appellant from applying to the Court of Civil Appeals for a writ of mandamus to the district judge, requiring him to make and file a statement of facts. The Court of Civil Appeals should not, under such state of facts,

consider the matter on bill of exception or an assignment of error." The latter portion of the answer in that case was directly involved in the question, and in the determination of the case, just as it is in the instant case. This matter, as presented, could not be classed as an error "apparent upon the face of the record," as designated in the article, because such errors have been classed as "a prominent error, either fundamental in character, or one determining a question upon which the very right of the case depends." *Wilson v. Johnson*, 94 Tex. 272, 60 S. W. 242. Neither is it a jurisdictional question, where article 998, Rev. St. 1895, would apply, and give this court power to review the matter as presented in the record. *Ennis Mercantile Co. v. Wathen*, supra.

There are several cases cited us by appellant, and on which he relies to support his contention for a reversal of this case, where on a similar state of the record a reversal was ordered by the appellate court. The case of *Hilburn v. Preston* (Tex. Civ. App.) 32 S. W. 702, was, in effect, overturned by the Supreme Court in the language used in referring to it, "but we cannot assent to this construction." *Anderson v. Walker*, 95 Tex. 596, 68 S. W. 981. By reference to some of the cases it is noted that they are of date prior to the enactment of article 1382, Rev. St. 1895, authorizing the Court of Appeals to admit, as a part of the record on appeal, delayed statement of facts, upon good cause shown. Prior to the act mentioned there does not seem to have been any provision made or authority for filing a statement of facts in the Court of Appeals, or restoring the same to the record of appeal after the time prescribed by law for filing them in the trial court. To have resorted by mandamus to compel the filing of the statement would have been futile, unless statutory authority existed, as now, to this court to extend the time for filing and restoring the same to the record as part of the record on appeal. So, prior to the act mentioned, and in the case referred to, the appellate court, in the exercise of appellate jurisdiction over the case, invoked its inherent power to prevent the failure of justice to innocent litigants through official inaction, and, as affording relief from the situation, ordered a reversal of the cause, there being no other procedure or remedy provided to prevent the injustice from official inaction; the distinguishment being that the appellate court did not place the order of reversal upon the ground purely that it was the legal right of the appellant to have a ruling in decision of the assignment as error arising on the trial or any proceeding connected with the rendition of judgment. But the ruling was placed upon the broad ground and principle that, because the matter presented to the court's attention by assignment involved the prevention of the failure of justice from official inaction on the part of the court below, in respect to the case over which the ap-

pellate court had acquired jurisdiction by appeal, it was necessary and proper for the appellate court to call into active exercise its power to act and grant such relief to the aggrieved party as could be done within the proper exercise of appellate jurisdiction. Upon reason of public policy the action of the court could be justified in good conscience, and as the proper exercise of the general appellate power of the court under the state of the then law. Especially do we think that it is not appellant's legal right, by assignment of error on appeal, to avail himself of the omission of the county judge, and have the omission considered as an error arising in the trial, or proceeding incident to the trial, and on the record made by the trial court. It would rather appear to be in contravention of law to so consider the assignment as a proper error arising in the record of the trial of the case made in the court below. And where there is other and adequate provision in procedure and remedy to restore a statement of facts to the record for use on appeal, and not resorted to by an appellant, we think it would be improper to call in to exercise general appellate power to afford the relief, and order a reversal. Our ruling is supported by an expression which we quote from the opinion of the court in the case of *Collins v. Kay*, 69 Tex. 365, 6 S. W. 814: "Under the rule of procedure prescribed by the act of Twentieth Legislature the statement of facts might be restored to the record, upon proper motion for the purpose; and, in the absence of the provision made by the Twentieth Legislature, we would feel constrained to hold, on the authority of the decisions of other courts, and the intimation of this court in *Railway v. Underwood*, 67 Tex. 594, 4 S. W. 216, that such failure upon the part of the trial, where the attention of this court is called to it by proper assignment of error, would require a reversal of the judgment." It is clear that it would be an unjust and as well an abuse of the exercise of the appellate power to employ that power to reverse the case upon the ground of mere official inaction, as a way to protect an appellant's right of appeal, without requiring the appellant to exhaust all other available procedure and remedies to have the statement of facts for use on appeal restored to the record. The result of the reversal operates practically to punish an innocent appellee in the payment of the costs flowing from a reversal, and would have the effect, in many instances perhaps, to unnecessarily delay the final determination of the litigation on appeal, and as well to present the appearance, if not giving the loophole, of having appeals trifled with by collusion.

We do not feel justified in following any of the cases cited. In our opinion ample and enforceable provision now exists to litigants to restore to the record, for use on appeal, a statement of facts which has been delayed beyond the time fixed by law for filing in the

trial court. Article 1382, Rev. St. 1895. The appellant, in any case appealing to this court, has 90 days, or for good cause shown a longer time, after the date perfecting the appeal, within which to file the transcript in this court. Article 1015, Rev. St. 1895. By the two articles statutory authority is conferred upon this court, for good cause, to extend the prescribed time of filing either the record or statement of facts. Under these articles the certiorari could perfect a portion of the record not incorporated in the record filed in this court. In the event the trial judge has failed to file a statement of facts in the time prescribed by statute for him to do so, and after the expiration of the time allowed by law for the judge to do so, the appellant in the exercise of diligence can apply to this court at once for mandamus to compel the judge to make up and file a statement of facts for use on appeal. If, after the expiration of the 30 days within which the judge has to prepare and file a statement of facts, the procedure suggested were adopted, and mandamus should be awarded by this court to compel him to make up and file a statement of facts for use on appeal, there would be yet left the difference in time between the 90 days allowed to file the transcript and the 30 days in which the judge has by law to file a statement of facts to have the statement of facts made a part of the record in the trial court before the lapse of the time within which the transcript could be taken out. Then upon proper motion, under article 1382, Rev. St. 1895, made in this court, this court would have the authority to restore the statement of facts so made up by the trial judge under the order of mandamus. Should a trial judge neglect to make up and file a statement of the facts within the time prescribed by law, or from sickness fail to do so, and yet, even though mandamus were not applied for, he actually after the time does file the statement of facts in the trial court, then and in that event, upon proper motion alleging good cause, under article 1382, Rev. St. 1895, and it being without the fault of the appellant that the delay occurred, the statement of facts could by this court be restored to the record and considered. So, by these suggestions casually made, there is a way for an appellant to obtain a statement of facts in the record, and have same reviewed, though the time prescribed by statute for having the same filed in the trial court might, for cause beyond his control, have elapsed.

It is a general doctrine that mandamus will lie to prevent a failure of justice upon reasons of public policy and to enforce official action. Where a trial judge refuses to make and file a statement of facts for use on appeal, as required by statute, mandamus will lie to compel him to do so. *Reagan v. Cope-land*, 78 Tex. 556, 14 S. W. 1031; *Railway v. Lane*, 79 Tex. 648, 16 S. W. 18; *Osborne v.*

Prather, 83 Tex. 211, 18 S. W. 613; *Gueguin v. McGown* (Tex. Civ. App.) 53 S. W. 585. The reason in support of the right of this court to issue mandamus is convincing. Having acquired jurisdiction of the case by appeal, and a completed record being the basis of the exercise of appellate jurisdiction, the Court of Civil Appeals would have power to issue the mandamus to compel the proper closing and completion of the record for appeal, because the restoration to the record for use, on appeal, of a statement of facts of the case, signed and certified by the trial judge as required by law, is a matter in furtherance of, and that affects the exercise of, its appellate jurisdiction. The statute clearly prescribes and directly creates the duty of the trial judge to approve a statement of the facts presented to him for use on appeal by the parties, or to make up and file one for use on appeal in case of disagreement of the parties. The statute allows the statement to be filed within 30 days after adjournment of the court, upon such order being applied for and granted in term time. It would not be held in law to be a failure to perform his duty until the expiration of the 30 days allowed him. *Perry v. Turner* (Tex. Civ. App.) 108 S. W. 192. Though the statute has prescribed the time within which the judge must file the statement upon disagreement of the parties, yet the performance of his duty is not discharged by him merely because of the lapse of the time. This duty as to him is continuing until the statement of facts be actually made up and filed by him. Failure to make up and file the statement of facts within the 30 days is of the same force and equivalent, in our opinion, as would be a refusal in fact to file the same before the expiration of the 30 days. We do not think it necessary to discuss the matter any further.

Since the questions raised in the brief on the bill of exceptions arise out of the evidence offered upon the trial, they cannot be considered in the absence of the statement of facts.

We are not prepared to rule that the court did not properly exercise his discretion in allowing the young witness Bass to testify. There is some support in the test of his competence as a witness, tending to show the appreciation of an oath.

The case was ordered affirmed.

ADAMS-BURKS-SIMMONS CO. v. JOHN-SON et al.

(Court of Civil Appeals of Texas. May 23, 1908. On Rehearing, July 4, 1908.)

1. CHATTEL MORTGAGES (§ 241*) — SATISFACTION AND RELEASE — TAKING OF SECOND MORTGAGE.

The taking of a second chattel mortgage to secure the same debt secured by a first mortgage on the same property does not operate as a sat-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

isfaction and release in law of the first mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 503; Dec. Dig. § 241.*]

2. PLEADING (§ 248*) — AMENDMENT — NEW CAUSE OF ACTION.

A trial amendment, which in effect only alleged a new reason or ground why plaintiff's right to recover, first alleged in his original petition, should prevail, was not the statement of a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-709; Dec. Dig. § 248.*]

On Rehearing.

3. APPEAL AND ERROR (§ 1177*)—REVERSAL—NECESSITY OF NEW TRIAL.

Where, in an action by a mortgagee of mules for their conversion by a purchaser from the mortgagor, a judgment for defendant was reversed on appeal, but the findings of the trial court did not show the value of the mules, the appellate court, on reversing the judgment, cannot render judgment for plaintiff, but will remand the cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4599; Dec. Dig. 1177.*]

Appeal from Comanche County Court; Edwin Dobney, Judge.

Action by the Adams-Burks-Simmons Company against J. H. Johnson and others. From the judgment, plaintiff appeals. Reversed and remanded.

E. C. Gaines, for appellant. Martin & George, Goodson & Goodson, and Calloway & Calloway, for appellees.

On Rehearing.

SPEER, J. Appellant sued to recover a debt due by appellee Johnson, secured by a chattel mortgage on two certain mules, and to recover the value of the mules as against appellee Hollis, upon an allegation that he had converted the security, and from an adverse decision by the trial court has appealed.

The findings of fact of the trial court, upon which he based his judgment, are as follows:

"First. I find that the mortgage declared upon in the plaintiff's first amended original petition was filed on the 17th day of January, 1906, the same day the defendant made and executed the said mortgage to the said plaintiff. One of said mortgages was made to secure a note for the amount of \$303.75, and retained a lien against and described the two mules in controversy between said plaintiff and the defendant Hollis.

"Second. I find that the defendant J. H. Johnson, on October 17, 1905, sold the mules in controversy between defendant Hollis and plaintiff to one Cull Stafford in Stephenville, Erath county, Tex., and that the said Stafford paid valuable consideration for said mules, and that he had no actual notice of any lien of any kind against said mules at the time of said purchase, and that thereafter, on the first Monday in December, 1905, the said Stafford sold the said mules to the de-

fendant J. H. Hollis, in Stephenville, Erath county, Tex., receiving therefor a valuable consideration, and that the said Hollis had no actual notice of any lien whatever against the said mules at the time of said purchase, and that the said Hollis, together with the said Stafford, has had possession of the said mules in Erath county, Tex., for more than two years prior to the filing of the plaintiff's trial amendment as herein shown, which trial amendment was filed on the 31st day of October, 1907.

"Third. I find that on the 11th day of September, 1905, defendant J. H. Johnson duly executed to the plaintiff his mortgage note for the sum of \$138.75, which was secured by lien on the two mules in controversy between said plaintiff and defendant Hollis, which said mortgage was first set up in plaintiff's trial amendment, and that said amount was taken up by the note hereinbefore referred to executed on the 17th day of January, 1906, for \$303.75, which said note was secured by a mortgage on said two mules in controversy. I find that the said mortgage for \$138.75 was duly recorded in the county clerk's office of Comanche county, Tex., on the 18th day of September, 1905, and that the old mortgage, executed on the 11th day of September, 1905, was taken up at the time that the new mortgage was executed, and that the new note and mortgage was given in renewal of the \$138.75, together with other amounts at that time due by the defendant Johnson to the said plaintiff.

"Fourth. I find that the said note and mortgage, of date January 17, 1906, was filed with the county clerk of Erath county on the 3d day of August, 1906, same being the day on which plaintiff first learned that said mules had been sold by said Johnson and were in Erath county. I also find that plaintiff never consented for said mules to be sold or removed out of Comanche county.

"Fifth. I find that each of said mortgages contained the usual stipulations whereby said security was also security for any other or additional debts which said Johnson might become indebted to plaintiff, either in his own right or as security for others; and I find that said Johnson thereafter became indebted to said plaintiff in the sum of \$233.70 by reason of said plaintiff having paid a note for like amount to the Comanche National Bank, of Comanche, Tex., which said note was secured by the said Johnson on the 17th day of January, 1906; and I find that at the time of the trial, after deducting all legal offsets, payments, and credits, said defendant Johnson was still indebted to said plaintiff in the sum of \$263.72."

On a former day of the term we reversed and rendered this cause in the following words:

"From the court's findings of fact it necessarily follows, we think, that appellant is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

entitled to judgment against appellee Hollis, unless he is precluded by the statute of limitations, upon which the trial court seems to have based his decision. The taking of the second mortgage to secure the same debt secured by the first mortgage upon the same property does not operate as a satisfaction and release in law of the first mortgage. *Ploeger v. Johnson* (Tex. Civ. App.) 26 S. W. 432; *Howard v. Bank*, 44 Kan. 549, 24 Pac. 983, 10 L. R. A. 537; *Challis v. Bank*, 56 Ark. 88, 19 S. W. 115; *Austin v. Bailey*, 64 Vt. 367, 24 Atl. 245, 33 Am. St. Rep. 932. Indeed, appellee has not pleaded that the first mortgage was released, and the burden would be upon him to do so and to support the allegation by proof (*Ross v. Com. Co.*, 18 Tex. Civ. App. 698, 46 S. W. 398); so that we have to consider only the question of limitation above suggested.

"The trial court wrongfully confounded appellant's cause of action with the grounds of recovery relied upon to establish his cause of action. In other words, appellant's cause of action against Hollis is one for the wrongful conversion of chattels upon which he held a valid lien, and in no sense a recovery upon the written instrument evidencing Johnson's indebtedness, or even upon the written contract giving the mortgage lien. Appellant's trial amendment in effect only alleged a new reason why his right to recover first alleged in his original petition should prevail against appellee. This was in no just sense a new cause of action. *Johnson v. T. C. R. Co.* (Tex. Civ. App.) 93 S. W. 433.

"Upon the trial court's findings of fact, which we adopt, the judgment is reversed, and judgment here rendered in favor of appellant against appellee J. H. Hollis for \$263.72, with 10 per cent. interest thereon from November 29, 1907; but as to the other appellees the judgment is not disturbed.

"Reversed and rendered."

Upon a consideration of the motion for rehearing we have decided that we were in error in rendering the judgment for appellant against appellee Hollis for the sum of \$263.72, since the findings of fact of the trial court do not show the value of the mules converted by the appellee Hollis. Of course, if the mortgaged property converted by Hollis was worth less than the indebtedness owing by appellee Johnson to appellant and secured by the mortgage lien on such property, the judgment against Hollis should be for the value of the property only, and in the absence of a finding by the court as to this value we should not render the judgment, but the same will be remanded upon the conclusions originally announced and above set forth. The motion for rehearing is therefore granted, to the extent of remanding the cause as between appellant and appellee Hollis.

Reversed and remanded.

PRESLER, J., not sitting.

ELLISON FURNITURE & CARPET CO. v. LANGEVER.

(Court of Civil Appeals of Texas. June 27, 1908. Rehearing Denied Oct. 24, 1908.)

1. SALES (§ 166*)—COMPLIANCE—NECESSITY FOR.

Under a contract to construct an electric light sign with a specified number of lamps in the border, the buyer need not accept a sign containing a less number, though the lesser number be more desirable from the standpoint of beauty or utility; the doctrine of substantial compliance being inapplicable.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 392; Dec. Dig. § 166.*]

2. SALES (§ 347*)—BREACH OF AGREEMENT—EFFECT ON RIGHT TO RECOVER.

One contracting to construct an electric light sign, having broken an agreement not to construct another sign of the same design in the city, cannot compel his customer to accept and pay for the sign.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 347.*]

3. SALES (§ 358*)—ACTION FOR PRICE—EVIDENCE—ADMISSIBILITY.

In an action for the contract price of an electric sign, which defendant refused to receive because it did not contain the number of lamps on the border required by the contract, etc., plaintiff could not show that he placed a greater number of lamps in the letters of the sign than was required.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 358.*]

Appeal from Tarrant County Court; John L. Terrell, Judge.

Action by J. J. Langever against the Ellison Furniture & Carpet Company. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for new trial.

Morgan Bryan, for appellant. T. J. Powell and Theodore Mack, for appellee.

SPEER, J. Appellee recovered judgment against appellant in the sum of \$488 for the contract price of a certain electric sign built for it, from which judgment the defendant has appealed.

Appellant's defense was that appellee undertook to construct for it a certain electric sign according to plans and specifications agreed on between the parties; that the lights in the word "Ellison," constituting the sign, were to burn steady; that the same should be surrounded by a border consisting of rows of electric lights, containing 296 lamps so arranged that by a system of intermittent lights the border produced the effect of two snakes chasing each other around the word "Ellison"; that appellee also agreed that he would not build another "snake" sign in the city of Ft. Worth; but he alleged that he had not only failed to construct the sign according to his agreement, in that he had placed a less number of lights in the border than called for, but had used inferior material and workmanship in the construction of the sign, and had also built and erected another crawling snake sign in the city of

Ft. Worth for a saloon man. Appellee resents the imputation that he has violated his contract or the proprieties by erecting a crawling snake sign for a saloon keeper by replying that the latter was known as a "rat chaser."

The assignments of error for the most part relate to the court's charge, which is here set out:

"(1) The law demands of a person making a contract that he should substantially comply with his contract in every material particular, as called for by a fair, reasonable, and practical construction of the contract between the parties.

"(2) If you find from the evidence that it was agreed between the parties that there were to be 296 bulbs in the sign's border, and the sign as constructed by plaintiff and tendered defendant was not in substantial compliance with the contract's terms, you will find for the defendant; but if you believe that the said number of bulbs was not in the contract, or that the sign as tendered as to the bulbs in the border was a substantial compliance with the terms of the contract, you will find for plaintiff on this issue.

"(3) If you find from the evidence that it was understood between the parties as a part of the contract that plaintiff would not make another crawling snake sign in Ft. Worth, and that said agreement, if any, of plaintiff's was a material inducement to defendant to contract for the sign, and that plaintiff did make or place in the city of Ft. Worth another crawling snake sign, then you will find for defendant; but if you find that plaintiff did not agree not to make another crawling snake sign in Ft. Worth, or that, if plaintiff did so agree, defendant was not induced thereby to enter into the contract, or that plaintiff did not make another crawling snake sign in Ft. Worth, you will find for the plaintiff on this issue of the case."

We think the court erred in permitting the jury to find, as he did, that appellee might recover upon the theory of substantial compliance with his contract. The evidence shows without dispute that the sign actually constructed contained only 263 lamps in the border, whereas appellant contended for 296. Appellant's president testified that the border of the sign was the principal thing, and he was especially desirous of having the right number of lamps in the border, so as to produce the desired effect. If the parties to the contract specifically stipulated that the border should contain 296 lights, the courts would have no power to set aside such stipulation; but the appellee would be bound by it, even though a less number of lights might be more desirable, either from the standpoint of beauty or utility. Any other rule would put it beyond the power of the parties to

contract as they please, and would require the appellant to accept and pay for something it had never bargained for. The doctrine of substantial compliance has no application under the facts of this case. If appellant contracted for a specific number of lights in the border of his sign, appellee has not complied by placing therein a less number. *Linch v. Harris Lumber & Grain Co. (Tex.)* 14 S. W. 701. In the case of *Ross Armstrong Co. v. Shaw* (No. 4,888, an officially unpublished opinion by this court) 113 S. W. 558, Shaw sued Ross Armstrong Company to cancel a series of notes given for the purchase price of a piano, alleging that the piano was sold to plaintiff upon a specific representation that the same had no mandolin attachment, whereas the piano actually delivered had such an attachment, and the defense interposed was that, inasmuch as the attachment did not injure the piano, but was just that much more than was bargained for, the representation was not material, and therefore no ground for relief. We there held, however, that the representation was material, and, the evidence showing it to be false, the plaintiff was entitled to relief upon the broad ground that, as parties bind themselves, so must they be bound. The case is analogous in principle to the one under consideration. It can make no difference that the sign as actually constructed and tendered to appellant is as good or even better than if it contained the requisite number of electric lights, since that is a matter controlled by the terms of the contract entered into between the parties.

If we are correct in our reasoning above, it also follows that the court erred in the third paragraph of his charge, submitting to the jury to find whether or not the stipulation that appellee would not make another similar sign in Ft. Worth was a material inducement to appellant to enter into the contract.

The court also erred in permitting the appellee to testify that he placed a greater number of lamps in the word "Ellison" than he had agreed to, since it was wholly irrelevant to any issue in the case, and could only tend to excuse him in the minds of the jurors from a full compliance with the contract in the other important particular already discussed. There is some evidence tending to show that appellant waived appellee's breach of the contract by approving a sketch or plan of the sign showing a less number of lights than he originally contracted for, and the pleadings perhaps made pertinent this defense; but the court seems not to have submitted the question to the jury.

For the errors discussed, the judgment of the county court is reversed, and the cause remanded for another trial.

TEXAS CENT. R. CO. v. RANDALL.

(Court of Civil Appeals of Texas. June 6, 1908. Rehearing Denied Oct. 17, 1908.)

1. RAILROADS (§ 350*) — INJURIES AT CROSSINGS—HORSE SHYING AT BOX CAR—ACTIONS—NEGLIGENCE.

Where a person was injured at a railroad crossing by the shying of his horse at a box car which had been negligently placed at the crossing by the railroad company, the mere fact that he attempted to pass after he saw that the horse was shying, and knew that there was danger in doing so, would not as matter of law preclude his recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1166; Dec. Dig. § 350.*]

2. RAILROADS (§ 347*) — INJURIES AT CROSSINGS—HORSE SHYING AT CAR—ACTIONS—EVIDENCE.

In an action against a railroad company for injuries caused by the shying of plaintiff's horse at a box car placed at a crossing, where one of the material issues was whether the car was standing in the street or on the crossing at the time of the injury, and the time at which different witnesses saw the car varied, evidence relating to the removal of the car shortly after the accident was admissible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1128; Dec. Dig. § 347.*]

3. RAILROADS (§ 347*) — INJURIES AT CROSSINGS—SHYING OF HORSE AT CAR—ACTIONS—EVIDENCE.

Evidence that the crossing was such as are in common use throughout the state where public highways cross railroads in towns of similar size was properly excluded as immaterial.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1129; Dec. Dig. § 347.*]

4. RAILROADS (§ 350*) — INJURIES AT CROSSINGS—SHYING OF HORSE AT CAR—ACTIONS—QUESTION FOR JURY—CONDITION OF CROSSING.

Whether the crossing in question was negligently maintained *held* to be for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1154; Dec. Dig. § 350.*]

5. RAILROADS (§ 303*) — MAINTENANCE OF CROSSINGS—STATUTORY REQUIREMENTS.

Railroads must comply with Rev. St. 1895, art. 4426, requiring them to keep highway crossings in repair, and ordinary care on their part to do so is not sufficient.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 959; Dec. Dig. § 303.*]

6. RAILROADS (§ 304*)—CROSSINGS—RIGHTS OF PUBLIC TO UNOBSTRUCTED CROSSING.

A traveler is entitled to the unobstructed use of a public highway railroad crossing maintained by the public and recognized by the railroad company, and is not compelled to cross or try to cross at some other crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 964; Dec. Dig. § 304.*]

Appeal from Bosque County Court; P. S. Hale, Judge.

Action by N. B. Randall against the Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cureton & Cureton, J. A. Kibler, and E. B. Robertson, for appellant. W. T. Schenck, and H. S. Dillard, for appellee.

PRESLER, J. In this case the jury, under a substantially proper general charge of the

court, supplemented by several special charges given at the instance of the defendant, fairly submitting the law of the case, found that plaintiff's injuries were proximately caused by defendant's negligence in the construction and maintenance of a certain street crossing and roadway over Shepard street, in the town of Morgan, Bosque county, Tex., and by further obstructing the free use of said street crossing and roadway by negligently leaving a box car partly on and across said street crossing and roadway.

Appellant here insists that appellee's injuries and the loss and damage resulting therefrom were the result of contributory negligence on the part of appellee, claiming that he failed to exercise ordinary care and prudence that the law devolved upon him by driving a young, scary, and wild horse into a place of known danger. This issue under proper instructions upon all material questions therein involved was submitted to the jury, and we are unable to hold that their finding against defendant is unsupported by a preponderance of evidence. In the able supplemental brief of counsel for appellant, in attempting to distinguish this case from the Morris Case, 101 S. W. 1038, 18 Tex. Ct. Rep. 527 (which in all material respects is a parallel case), we find the gist of appellant's contention for a reversal of this case thus concisely stated: "Plaintiff is precluded from recovering from the railway company for injury caused by his horse shying at a box car, although it had negligently been permitted to remain at a street crossing, because he attempted voluntarily to drive the horse near the car after he saw that the horse was shying and would shy; it appearing to him at the time to be dangerous to do so." Upon a full examination of the evidence in this case relating to the above proposition, it does not occur to us that, upon the question of voluntarily acting upon the knowledge of known danger, this case is distinguishable materially from the Morris Case. While in the latter case it does not appear that Morris made an affirmative statement to the effect that he knew of the danger, as the appellee did in this case, we are forced to the conclusion that from the circumstances necessarily observed by Morris, and occurring at the time that he drove into the place of danger, he must and did know of the danger connected with attempting to use the crossing at that time. The appellee Randall in this case, after admitting that he knew that it was dangerous to attempt to cross the road under the circumstances surrounding, on redirect examination further stated, however: "The horse that I was driving would sometimes shy, but no more than the old, gentle horse I am now driving. At the time I undertook to cross, and knowing the horse as I did, and seeing the situation, I did not expect this horse to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

shy and run off of this road crossing." On a review of the authorities, we are not inclined to hold, even if the facts in this case warranted its application, that appellant's above quoted proposition is a correct statement of the law of contributory negligence in acting upon known danger. This court in opinion rendered by Chief Justice Conner at this term in the case of the Chicago, Rock Island & Pacific Ry. Co. v. Mrs. Kate Shannon, 111 S. W. 1060, held that it was not error upon the part of the trial court to refuse to give the following special instruction: "You are instructed that if you find the injured party, Vernon Oliver, knew that it was dangerous to board a moving train, and that this was the cause of the injury received by him, you are instructed to find a verdict in favor of the defendant." The testimony of said Oliver upon the issue presented by the charge refused was as follows: "I know it is more or less dangerous to attempt to get on a moving train. I know that the faster it is going, the more dangerous it is. Assuming it to be true that this train was coming from 15 to 20 miles an hour, I know it would be very dangerous. If it had been going that rate of speed, it would. I know it is very dangerous to attempt to board a train moving 15 to 20 miles an hour, and I know it is dangerous to attempt to board any moving train." The court observes "that Oliver may have known that it was dangerous in a sense to board the moving train, * * * yet the evidence quoted does not necessarily constitute negligence. This was for the determination of the jury. In other words, the jury under all of the evidence could well conclude that a person of ordinary care and prudence would have attempted to board the train under the same circumstances rather than to abandon the journey. It hence would have been error to have taken this issue from the jury, as in effect sought by the special charge quoted. See Railway Co. v. Gasscamp, 69 Tex. 545, 7 S. W. 227. And, while Oliver used the language quoted in the course of his examination as a witness, we do not think it is sufficient to overturn the verdict, when considered in the light of all of his testimony." In the case of Gulf, Colorado & Santa Fe Ry. Co. v. Grisom, 36 Tex. Civ. App. 630, 82 S. W. 67, 11 Tex. Ct. Rep. 194, Associate Justice Speer of this court rendering the opinion, the plaintiff, not an employe, was injured while attempting to pass between two cars of a train by the moving of the train, the court holding the mere fact that the plaintiff knew the danger incident to his act did not prevent a recovery, this issue being expressly made by the appellant's requesting the following special charge, which was refused: "If you find from the evidence that

plaintiff Ollie Grisom knew of the danger incident to climbing between cars just prior to and at the time he attempted to climb between the same, you will find for the defendant." This court held that the refusal of the trial court to give said charge was not error, observing that "it is not the law in a case of this character that a plaintiff who has received injuries through the negligence of a defendant cannot recover merely because he knew there was some danger incident to the act through which he was injured," citing Ry. Co. v. Gasscamp, 69 Tex. 545, 7 S. W. 227; Railway Co. v. Prescott, 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654. As indicated above, we conclude that the trial court did not err in refusing to give peremptory instruction to the jury to return a verdict in favor of the defendant.

We think that the evidence complained of in appellant's fourth, fifth, and sixth assignments of error, relating to the removal of the car shortly after the accident occurred, was properly admitted. One of the material issues of the case being whether this car was standing in the street or on the crossing at the time of the injury, and the time at which different witnesses saw said car varying, said evidence was necessary and explanatory on the above referred to issue.

We think the court properly rejected and refused to admit the evidence offered by appellant as to the crossing in this case being such crossing as is in common use throughout the state where public highways and streets cross railroads in towns the size of Morgan. We regard this evidence as immaterial. If other crossings were negligently maintained, the appellant could not relieve itself of liability on that ground. It was a question of fact for the jury as to whether or not this particular crossing was negligently maintained. Railway companies must obey the requisites of Rev. St. 1896, art. 4426. Ordinary care is not sufficient. Besides, this was a public crossing maintained by the public and recognized by this appellant for more than 20 years. Appellee had the right to the unobstructed use of it, and was not compelled to cross or try to cross at some other crossing. I. & G. N. R. Co. v. Haddox, 36 Tex. Civ. App. 395, 81 S. W. 1036; I. & G. N. R. Co. v. Butcher (Tex. Civ. App.) 81 S. W. 819; Pecos & N. T. Ry. Co. v. Bowman, 34 Tex. Civ. App. 98, 78 S. W. 22.

We are of the opinion that appellant's ninth, tenth, eleventh, and twelfth assignments present no reversible error and that the general charge, together with the special charges asked by defendant and given, adequately submitted the law on all the phases of the case.

Judgment affirmed.

NONA MILLS CO. et al. v. WINGATE et al.†
(Court of Civil Appeals of Texas. Oct. 14,
1908. Rehearing Denied Nov. 11, 1908.)

1. JUDGES (§ 56*)—DISQUALIFICATION—EFFECT ON ACTS.

The acts of a judge, in a case where he is subject to any of the disqualifications mentioned in the Constitution, are void.

[Ed. Note.—For other case, see Judges, Cent. Dig. §§ 235-245; Dec. Dig. § 56.*]

2. CONSTITUTIONAL LAW (§ 13*)—CONSTITUTIONS—CONSTRUCTION.

A Constitution must be interpreted liberally, so that it may accomplish the objects of its establishment and carry out the principles of government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 9-17; Dec. Dig. § 13.*]

3. JUDGES (§ 56*)—DISQUALIFICATION—EFFECT ON ACTS.

Under Const. 1845, art. 4, § 14, providing that no judge shall sit in any case wherein he may be interested, an order for the sale by a guardian of a certificate for land issued to minor heirs, at which sale the certificate was purchased by the judge granting the order, is void when invoked by him or by one claiming under him, to support the sale to him.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 235-241; Dec. Dig. § 56.*]

4. GUARDIAN AND WARD (§ 99*)—SALES—PERSONS WHO MAY PURCHASE.

A judge is incapable of purchasing at a guardian's sale, the validity of which must be passed on by him in his official capacity.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 99.*]

5. GUARDIAN AND WARD (§ 103*)—SALES—CONFIRMATION.

The confirmation of a guardian's sale of a certificate for land issued to minor heirs, by the judge who purchased the certificate at the sale, is void; and the deed to him, reciting the sale and confirmation, is also void.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 103.*]

6. GUARDIAN AND WARD (§ 103*)—SALES—CONFIRMATION.

Where the record shows on its face, in connection with the undisputed facts, that the judge who confirmed a guardian's sale of a certificate for land was the purchaser thereof, an order approving the guardian's final report, entered by another judge, is not a confirmation of the sale.

[Ed. Note.—For other cases, see Guardian and Ward, Dec. Dig. § 103.*]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Action between the Nona Mills Company and others and Artnes Wingate and others. From a judgment for the latter, the former appeal. Affirmed.

Smith, Crawford & Sonfield, V. A. Collins, Tallafarro & Nall, W. W. Cruse, John L. Little, and Greer, Minor & Miller, for appellants. Greers & Nall, D. Edward Greer, and G. P. Dougherty, for appellees.

NEILL, J. This appeal is from a judgment rendered in favor of appellees against appellants for two surveys of land, located

by virtue of a certificate for one-third of a league, issued to the heirs of William Wingate. The appellees claim as and through the heirs of William Wingate, and the appellants through a purported guardian's sale of the certificate. If such sale was valid, appellants are entitled to recover the land in controversy. If the sale was void, the judgment must be affirmed.

The uncontroverted facts which were found by the court, who tried the case without a jury, are, in substance, as follows: On February 2, 1858, Isalah Junker, county judge of Jefferson county, Tex., entered an order in said court, while sitting for probate and other like purposes, appointing Tabitha Wingate guardian of the estate of the minor children of William Wingate, to whom, as decedent's heirs, the certificate referred to was issued. Tabitha duly qualified as guardian of the estate of said minors under said appointment, and on February the 6th an inventory and appraisalment of the estate, showing that the certificate in question was the only property of said estate, was duly filed. This inventory and appraisalment was approved by said court on February 23, 1858. On the same day, upon a proper application, it was ordered by said court that the guardian of the estate, after giving lawful notice of the time and place of sale, should on Tuesday, the 11th day of March, 1858, at the courthouse door, in the town of Beaumont, between the hours prescribed by law, sell at public sale to the highest bidder, for one half cash and the balance on a credit of 12 months, with lien note and approved personal security, all the right, title, and interest of the said minors in and to said one-third league certificate. On March 29, 1858, the guardian of the estate filed in said court her report of sale, addressed to Isalah Junker, chief justice of Jefferson county, which is as follows: "The undersigned, Tabitha Wingate, guardian of the minor heirs of William Wingate, deceased, in accordance with your order and the law in such case made and provided, on the 11th day of March, 1858, made the sale of the headright certificate of said decedent, and returns the following account: I. Junker bought the said certificate No. 5091-5092 for 1,476 acres, at 50 cents per acre, \$738." On the same day an order was entered by said court, approving and confirming this report or account of sale, and the guardian ordered to execute the necessary deed to the purchaser. Whereupon a deed bearing date the 29th of March, 1858, reciting the order of sale, the report of sale, and the order of the court confirming the same, was executed by Tabitha Wingate as guardian of the heirs of William Wingate, deceased, to Isalah Junker, who was, during all of said probate proceedings, chief justice and county judge of Jefferson county, Tex., and who presided as such judge over said court, and as judge

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

thereof granted all the orders above mentioned affecting the sale of the certificate. Isaiah Junker lived in Jefferson county, Tex., from 1849 until 1870, the date of his death. On January 29, 1861, Mrs. Wingate filed in the county court her final account as guardian of the estate of the Wingate minors, in which she debits and credits herself as follows:

Dr.

To amount derived from sale of land certificate as per account of sale, one-half cash, and balance in six months from date thereof.....	\$ 738 00
Interest thereon from the date of the receipt thereof, at 10 per cent., to this date, about.....	191 00
	<hr/> \$ 929 00

Cr.

By the maintenance and support of my five wards above mentioned six years and a half after the death of my said husband, Wm. Wingate, and to the present time, at about \$3.00 each per month.....	\$1,170 00
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Showing a balance due this guardian of	\$241 00
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This account was ordered approved, and the guardian discharged by the court on the same day, A. J. Ward then being the judge of said court. Upon these undisputed facts the only question of law to be determined is, was the sale of the certificate made by the guardian of minors to Isaiah Junker, the judge of the court who ordered, approved, and confirmed the sale, void? This was answered in the affirmative by the trial court, and we have no doubt as to the correctness of its decision.

Article 4, section 14, Const. 1845, provides that: "No judge shall sit in any case wherein he may be interested." It has been uniformly held in this state that the acts of the judge, in a case where it is subject to any of the disqualifications mentioned in the Constitution, are void. *Chambers v. Hodges*, 23 Tex. 104; *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604; *Templeton v. Giddings* (Tex.) 12 S. W. 851; *Andrews v. Beck*, 23 Tex. 455; *Burks v. Bennett*, 62 Tex. 277; *Gains v. Barr*, 60 Tex. 676; *Jouett v. Gunn*, 13 Tex. Civ. App. 84, 35 S. W. 194; *Johnson v. Johnson* (Tex. Civ. App.) 89 S. W. 1102. It is, however, conceded by the appellants that the order of confirmation of the sale of the certificate by the judge of the court, who purchased it, was void, by reason of the constitutional inhibition. But their insistence is that, notwithstanding its invalidity, he not being disqualified when the order of sale was granted, such order was valid, and that he did not become disqualified until he became the purchaser at the sale which he had ordered. And that therefore the sale to him was valid, and the approval of the guardian's final account by another judge was, in effect, a confirmation of the sale. This contention, in our opinion, is founded

upon such a narrow construction of the constitutional inhibition against a judge sitting in a case wherein he "may be interested" as would, in many cases, thwart its obvious purpose. It is a canon of construction that: "A Constitution is not to be interpreted on narrow or technical principles, but liberally and on broad general lines, in order that it may accomplish the objects of its establishment, and carry out the great principles of government." Black on Interpretation of Laws, 13. The constitutional inhibition in question is but a reiteration of the ancient maxim "Nemo debet esse iudex in propria sua causa," which is translated in the language of, and has its place in the laws of, every civilized nation in the world. It is so deeply imbedded in the human breast as to place beyond contemplation a determination by a judge of his own case, or any case in which he may be interested.

Judge Junker, having purchased the certificate at the sale made by a guardian, on an order made by himself ipso facto, became interested in the matter of guardianship pending before him. His title to the property depended upon the validity of the order of sale, which might have become the subject of review during the pendency of the matter of guardianship of the estate; and by his purchase he precluded himself from passing upon any question that might have afterwards been raised as to the validity of the order, which was the origin of his claim to the property. From this it seems to us that the order of sale should not, as between him and the wards of the guardian, be held to be of such validity as would support the sale of the property to him. But, on the contrary, it should be adjudged of no effect whatever, when invoked by him or those claiming under him. Besides, we think that a judge is incapable of purchasing at a sale, the validity of which he must in his official capacity pass upon. *Frieberg v. Isbell* (Tex. Civ. App.) 25 S. W. 988; *Halsey v. Jones* (Tex. Civ. App.) 25 S. W. 697; *Livingston v. Cochran*, 33 Ark. 295; *Walton v. Torrey, Harr.* (Mich.) 250. But be this as it may, the confirmation of the sale, which was essential to its validity, by the judge who purchased the certificate, was, by reason of his interest, unquestionably void, as was the deed to him by the guardian, reciting the sale and confirmation. No title having passed by the deed, based upon the void order of confirmation, neither lapse of time, nor any subsequent proceedings in the matter of guardianship, could inspire it with vitality. It was "as dead as a door nail" when it was delivered to Judge Junker, and could afterwards be no more galvanized into life than a corpse. All the cases cited by appellants in their brief, as well as any others known to us, to sustain their contention that the order January 29, 1861, approving the

guardian's final report, was, in effect, a confirmation of the sale by the guardian of the certificate to Junker, rest upon the presumption that, where the record is shown to be lost, or fails to recite an order essential to the validity of a sale, such an order was duly made. But here we have a case where the record shows upon its face, in connection with the undisputed facts, that the judge who confirmed the sale of the certificate was the purchaser thereof. This excludes any presumption of a valid order of confirmation, but shows indubitably its invalidity.

There is no error in the judgment, and it is affirmed.

ALEXANDER v. BRILLHART.†

(Court of Civil Appeals of Texas. June 20, 1908. Rehearing Denied Oct. 17, 1908.)

1. APPEAL AND ERROR (§ 1002*) — REVIEW — FINDINGS—CONCLUSIVENESS.

A finding upon conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

2. TRIAL (§ 192*) — INSTRUCTIONS — ASSUMPTIONS.

In an action to specifically perform a contract, an instruction was not erroneous for assuming that a contract was made, where that fact was undisputed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 432; Dec. Dig. § 192.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL.

Instructions covered by the main charge are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

Appeal from District Court, Taylor County; J. H. Calhoun, Judge.

Action by G. W. Brillhart against J. M. Alexander. From a judgment for plaintiff, defendant appeals. Affirmed.

Hardwicke & Hardwicke and Theodore Mack, for appellant. Wagstaff & Davidson, for appellee.

SPEER, J. Appellee, Brillhart, sued appellant, and for cause of action alleged: "That on or about the ——— day of March, 1906, plaintiff and defendant entered into a contract by the terms of which contract the plaintiff agreed to sell, convey, and deliver to defendant a certain piano, then owned by the plaintiff, and in consideration therefor the defendant contracted and agreed to convey to the plaintiff lots 13 and 14, in block D. Baldwin subdivision of lot No. 2, block 204, city of Abilene, in Taylor county, Tex., said lots facing east on Hickory street, in the northern part of the city of Abilene, in Taylor county, Tex. The plaintiff further shows to the court that on said date he delivered said piano to the defendant, and

that the defendant received said piano and accepted the same, but refused to convey said lots to plaintiff, as he had contracted to do, and still refuses to convey said lots and to carry out said contract, although he has received the consideration for said lots, and the defendant is in position and able to carry out said contract and to convey said lots to the plaintiff." The prayer of the petition was for a decree of specific performance and for general and equitable relief. The defendant interposed general and special demurrers, general denial, and answered specially that he had agreed to convey to plaintiff's wife, in exchange for said piano, any two lots that she might select from the Steffens & Lowdon addition, while the lots sued for were not in that addition, but were in the Baldwin addition. There was a judgment for the plaintiff, and the defendant appeals.

Most of appellant's assignments serve as a basis for the general proposition that the minds of the parties did not meet upon the subject-matter of this transaction, and that therefore the trial court should have instructed a verdict for appellant, or at least have granted a new trial. It is true the appellant's version of the affair would have authorized a judgment in his favor upon the ground that he specially restricted Mrs. Brillhart, who appears to have acted for appellee in the matter, to a selection of lots belonging to him in the Steffens & Lowdon addition. On the other hand, Mrs. Brillhart's testimony was to the effect that the lots in controversy were pointed out to her by a Mr. Wood, whom appellant had specially deputed to show her the lots, and were selected by her, and this selection made known to appellant, and he fully acquiesced in the same. This conflict in the evidence was pointedly submitted to the jury in appellant's favor in the following language: "Unless you find from the evidence that, at the time such contract or agreement was made between the defendant and the plaintiff's wife, the defendant intended and understood that the two lots in controversy, No. 13 and 14 in Baldwin's addition, were included in the contract of sale then being made, you will find for the defendant as to said lots, but find for the plaintiff that he recover of the defendant the piano tendered by the pleadings." The verdict, therefore, implies a finding that the minds of the parties did meet upon the specific subject-matter of the contract, and we are unable to disturb this finding.

It is objected that the portion of the charge above quoted assumes that a contract had been made between the parties; but, if it does, such fact is nevertheless undisputed, since both parties testified to a contract, and the only difference was as to which lots were included in it.

The issues submitted in appellant's special charges were included in the main

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

charge, and his general and special exceptions were all properly overruled.

We find no error in the judgment, and it is affirmed.

ROYAL FRATERNAL UNION v. LUNDY.

(Court of Civil Appeals of Texas. Oct. 22, 1908.)

1. INJUNCTION (§ 232*)—DECREE—OPERATION—ENFORCEMENT.

A judgment, enjoining the officers and agents of an insurance society from canceling a certificate, operates in personam only, and can be enforced only by attaching the bodies of the contumacious individuals, and the infliction of punishment.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 232.*]

2. CORPORATIONS (§ 636*)—FOREIGN CORPORATIONS—MANAGEMENT—INTERNAL AFFAIRS—SUPERVISION BY COURT.

It is not within the judicial province of the courts of a state to supervise and direct the internal affairs and management of a foreign corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2571; Dec. Dig. § 636.*]

3. COURTS (§ 12*)—JURISDICTION—TERRITORIAL LIMITS.

Where the officers of a foreign insurance society, doing business in Texas, were nonresidents, a Texas court of equity would not render a decree enforceable only in personam, restraining such officers from canceling a certificate of a Texas citizen; the rule that a court of equity in one state may enjoin the performance of acts beyond its territorial jurisdiction being limited to cases where the persons against whom the injunction is sought reside within the jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 36; Dec. Dig. § 12.*]

4. INJUNCTION (§ 13*)—THREATENED INJURY.

A threatened cancellation of an insurance certificate by the officers of a society is not ground for an injunction, unless such threats, if carried into execution, would produce some substantial injury to complainant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 13; Dec. Dig. § 13.*]

5. INJUNCTION (§ 22*)—THREATS—SCOPE OF REMEDY.

A person is not entitled to an injunction to restrain a threatened injury if the execution of the threats is such action as cannot be appropriately controlled by injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 20; Dec. Dig. § 22.*]

6. INSURANCE (§ 730*)—MUTUAL BENEFIT SOCIETY—CANCELLATION OF POLICY.

No action of a mutual benefit society without the consent of insured, he having fully performed his part of the contract, will terminate or relieve the society from liability thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1877; Dec. Dig. § 730.*]

7. INSURANCE (§ 765*)—TERMINATION OF POLICY—REMEDIES OF INSURED.

On the alleged termination of a policy by insurer, insured in general may tender the premiums when due, wait till the policy matures, and then sue for the benefits, or when notified that the insurer has elected to forfeit the policy, may acquiesce and sue for damages, or he may institute proceedings to have the issue as to

whether or not the policy has been in fact forfeited, or is still in force, judicially determined.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 765.*]

8. CORPORATIONS (§ 665*)—FOREIGN CORPORATIONS—ACTIONS—EXTRATERRITORIAL JURISDICTION.

The fact that insurer is a foreign corporation, domiciled in another state, does not deprive a court of equity in Texas of jurisdiction of a suit to determine whether a policy has been in fact forfeited or is still in force, and to pass a decree determining the status of the parties thereto.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 665.*]

Appeal from Bowie County Court; Sam H. Smelser, Judge.

Suit by Isaac G. Lundy against the Royal Fraternal Union. Decree for complainant, and defendant appeals. Reversed and dismissed.

Hart, Mahaffey & Thomas, for appellant. F. M. Ball, for appellee.

HODGES, J. In view of the disposition we make of this case and the issues discussed, we think it unnecessary to do more than to state the character of the suit, and give some of the pleadings in detail. The suit was instituted by the appellee, plaintiff below, asking for a writ of injunction, restraining the appellant from forfeiting and canceling a certain policy of insurance which the appellee asserts he holds, and which had been theretofore issued to him by the appellant. Omitting the formal introductory portion of the appellee's original petition, it is as follows: "That the plaintiff is an individual residing in Bowie county, Tex., and that the defendant is a corporation chartered under the laws of the state of Missouri, to which was issued a permit by the state of Texas to transact business therein, after having designated the commissioner of insurance of the state of Texas as a proper person upon whom service may be had in all suits against the said defendant in the state of Texas, and at present Hon. Robt. T. Milner is the commissioner of insurance in this state. For cause of action the plaintiff alleges that heretofore, to wit, on the 19th day of August, A. D. 1902, in the state of Texas, upon application being made and accepted in the form required, this defendant issued to this plaintiff a certain certificate or policy of life, health, and accident insurance, under which he has protection and indemnity against sickness, accident, and death, and since the issuance and delivery of the same this plaintiff has faithfully performed each and every condition and requirement imposed upon him, whether by the terms of the said policy or certificate of insurance, or the constitution and laws governing the order. That the plaintiff was born, to wit, July 1, 1848, and he is now over the age of 60 years; and 60 years is the maximum limit whereby he is

eligible to procure such indemnity as that contained and afforded by such certificate or policy of insurance, or by any organization transacting a like or similar business. That there is no time limit fixed for the termination of the said policy of insurance, but by the terms of the same, so long as the dues of the plaintiff are paid as required, the instrument and relationship which it creates between the parties exists during his lifetime. That by reason of his age of over 60 years this plaintiff cannot procure such or similar indemnity, and, having in good faith relied upon the continuity of the relationship which this defendant created by the issuance of the policy of insurance, plaintiff will be without the protection and indemnity which it affords, if the defendant is permitted to wrongfully, illegally, and unjustly act as it is threatening to do, by arbitrarily terminating the contract. Plaintiff says that he is now old and infirm from age and years; otherwise well and healthy as one ordinarily of his age could reasonably expect to be. That for years he has made prompt and punctual payment of every assessment and all dues required by him, and that he is on this day, the 30th of May, 1907, remitting to the defendant at St. Louis, St. Louis exchange, for his assessment and dues for the month of June, 1907, as per contract. That this plaintiff has faithfully performed every condition and obligation imposed on him by the contract, and entered into the same, as the defendant well knew, and now does know, for the purpose of having the protection and indemnity which the contract affords, and the contract to the plaintiff is reasonably worth, for the indemnity and financial aid which it affords, the sum of \$500. That plaintiff is a man of good moral character, of exemplary habits, conduct, and deportment and that he is free from any wrongdoing that would impose a hardship or burden upon the defendant in the payment of the indemnity; that he is a man of moderate means, and in his declining years and old age is in need of and entitled to the indemnity and protection offered by the terms of the policy, which was contemplated at the time of applying for and receiving the policy in his younger days; and, unless restrained by your honor's most gracious writ of injunction, this defendant will do him the irreparable wrong and injury that it is threatening to do by arbitrarily, wrongfully, and unlawfully canceling out and terminating his policy. That the plaintiff now offers to perform every condition thereof. That the plaintiff's said policy of insurance No. 23,106 has been lost, and he cannot find same after diligently searching for it, and a copy of which is in the hands of this defendant, as are the constitutions and by-laws governing the order, and it is hereby notified to produce the same on a trial of this cause, otherwise parol evidence will be resorted to, to prove the same. Plaintiff says, further, that the defendant's effort

to breach this contract and terminate this contract in the above manner was unjust and wrongful. That plaintiff here tenders in court, and again offers to pay, any dues of money now owing; and there naturally arose from the wrongful effort to breach the said contract the further damage of \$200, incurred in the employment of counsel to prosecute this suit, for the recovery of which the plaintiff here prays for damages, alleging that said expense was reasonable and proper in the premises. Wherefore plaintiff prays, on a hearing of this petition, for the \$200 item as damages last above mentioned, and for the issuance of your honor's most gracious writ of injunction perpetually restraining the defendant from unlawfully and wrongfully canceling or terminating the said policy or certificate of insurance, and for your honor's most gracious mandatory writ of injunction and mandamus compelling the defendant to restore and keep vital and of force and effect the said certificate or policy of insurance, and for costs of suit, and for such other and further orders, judgments, and decrees, legal or equitable, as this cause of action may be shown to merit." The appellant filed a general demurrer, and general and special denials, and also alleged some matters in avoidance, which are not necessary here to notice. The cause was submitted to the court without a jury, and a judgment entered in favor of the appellee, perpetually enjoining the appellant and its officers and agents from doing any act "to impair, destroy, cancel, annul, or breach either the contractual relationship, or any right, privilege, guaranty, or immunity afforded or created by the contract, certificate, or policy of insurance. * * * That said writ shall also order, command, and require, and immediately compel, the Royal Fraternal Union, its officers, agents, and employes, whomsoever, jointly and severally, to immediately restore the said Isaac G. Lundy to full membership and fellowship," etc. It was also further ordered that the appellee take nothing upon his prayer for \$200 damages, which he seeks as attorney's fees. The judgment is quite lengthy, but the foregoing gives its substance.

Putting that construction upon his petition most favorable to the appellee his allegations amount to this: That the appellant is a foreign corporation, with its domicile in the state of Missouri, and is engaged in the business of issuing policies of insurance against sickness, accident, and death; that it is doing business in this state under and by virtue of a permit from the proper officer; that the appellee is the holder of one of the appellant's policies of insurance, without naming the benefits agreed to be paid; that he has promptly paid in full, as they accrued, all of the dues and assessments required of him by the terms of his policy, and is therefore entitled to be regarded as a policy holder in good standing; that notwithstanding those

facts, the appellant is wrongfully threatening to cancel and declare forfeited the policy issued to the appellee; that unless the appellant is restrained from so doing, it will cancel and declare forfeited the aforesaid policy of insurance; that the appellee is now over 90 years of age, and if his policy of insurance is forfeited, he will be without protection, inasmuch as he will be unable, by reason of his age, to obtain any further insurance. It thus appears from the allegations of the appellee that he is asking a court of equity in this state to enjoin the officers and agents of a foreign corporation, domiciled in another state, from doing certain acts in and about their business affairs in that state. The court below having granted the relief prayed for, let us suppose that this court should affirm that judgment. The question would then arise, how is such a decree to be enforced in the event the officers and agents of the appellant company should persist in doing the acts prohibited? Such a judgment could only operate in personam, and obedience to the court's mandate can be compelled only by an attachment of the body of the contumacious individuals and the infliction of some punishment. In the case before us all of the parties against whom the order of the court is directed are permanently domiciled beyond the territorial jurisdiction of the court, and cannot be reached by any process issued therefrom. It is therefore evident that such a decree would be utterly futile. Moreover, the appellant being a foreign corporation, domiciled in another state, it is not within the judicial province of a court of this state to undertake to supervise and direct its internal affairs and management. *Clark v. Mutual Reserve Fund Ass'n*, 14 App. D. C. 154, 43 L. R. A. 392; *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; 3 *Cooley's Briefs on Ins.* p. 2841. It is true that there are instances in which a court of equity situated in one state will enjoin the performance of acts beyond its territorial jurisdiction, but this seems to be limited to cases where the parties against whom the injunction is sought reside within the jurisdiction of the court. *Bellows, etc., v. Rutland*, 28 Vt. 470; *Margarum v. Moon*, 63 N. J. Eq. 586, 53 Atl. 179; *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; 1 *High on Inj.* §§ 105, 106. Such judicial restraints imposed upon the conduct that may be enacted beyond the jurisdiction of the court are predicated upon the principle that such judgments are intended to operate only upon the person, and that, if the parties against whom they are directed are within the jurisdiction of the court, the decree can be enforced, and are not considered an interference with the jurisdiction of any other tribunal over the subject-matter of the controversy. It would seem that, if the justification for the exercise of this power is to be found in the fact that the party defendant resides within the terri-

torial jurisdiction of the court rendering the decree, it would follow that no such authority would be exercised where this situation does not exist.

We are disposed to think that there is still another fatal objection appearing upon the face of the appellee's pleadings. That is the remedy sought. The injury which he seeks to avert is alleged to be the threatened cancellation and forfeiture of the appellee's policy of insurance, or, in practical effect, that the appellant company is threatening to consider and treat the policy as forfeited and canceled. Unless this threat on the part of the appellant, if carried into execution, would be productive of some substantial injury to the appellee, there can be no sufficient reason why he should be entitled to a writ of injunction. Neither would he be entitled to the writ if the execution of the threats is such action as cannot be appropriately controlled by injunction, leaving out of consideration the question as to whether or not there is an adequate remedy at law for any injury that might follow. The situation, as depicted by the appellee, is that the appellant is threatening to refuse to recognize the continued existence of the policy, and may decline to accept the monthly premiums tendered by the appellee. This would not in the least impair the rights of the appellee, even if done. No act of the appellant, without the consent of Lundy, will terminate the contract of insurance, or relieve the appellant from liability thereon. Assigning as a reason why it will not recognize its liability that the policy has been forfeited would not strengthen the appellant's claim. *Day v. Conn. Life Ins. Co.*, 45 Conn. 480, 29 Am. Rep. 693. Generally, when a controversy arises between the insurer and the holder of the policy as to whether or not it is still in force, there are three courses open to the policy holder: (1) He may tender the premiums when due, wait till the policy matures, and then bring an action for the benefits; (2) he may, when notified by the insurer that it has elected to consider the policy as forfeited, acquiesce, treat the contract as terminated, and bring an action for damages for the wrongful cancellation of the policy; or (3) he may institute a proceeding in equity, and have the issue as to whether or not the policy has in fact been forfeited, or is still in force, judicially determined. *Metropolitan Ins. Co. v. McCormick*, 19 Ind. App. 49, 49 N. E. 44, 65 Am. St. Rep. 302; *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Day v. Conn. Life Ins. Co.*, supra; 3 *Cooley's Briefs on Law of Ins.* pp. 2840-2842. The fact that the insurer is a foreign corporation, domiciled in a state different from that in which the action is brought, does not deprive the court of jurisdiction to render a decree determining the status of the parties to the contract. 3 *Cooley's Briefs on Law of Ins.* 2840, 2841, and cases there cited.

We deem it unnecessary to consider the

various other assignments of error presented in the brief of the appellant, in view of the fact that the case will be finally disposed of upon the objections discussed.

For the reasons stated, we think the judgment of the trial court should be reversed, and the cause dismissed, but without prejudice to the right of the appellee to institute, in a court of competent jurisdiction, another action for the proper relief. We decline to pass upon the issue as to whether or not the policy of insurance has been forfeited in fact, or that the appellant could justly so consider it, leaving that to be determined in such other action as the appellee may see fit to institute.

The judgment is reversed, and the cause dismissed.

WEBB COUNTY v. HASIE†

(Court of Civil Appeals of Texas. Oct. 20, 1908. Rehearing Denied Nov. 11, 1908.)

1. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS.

There being no conclusions of the trial judge, all the issues on which there was evidence must be taken as resolved by the trial court in favor of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 931.*]

2. APPEAL AND ERROR (§ 1042*)—HARMLESS ERROR—STRIKING OUT PARTS OF PLEADING.

Where, in an action for the contract price for the construction of a county bridge, the petition alleged that the plans referred to in the contract and on file in the county clerk's office when the contract was made were those in accordance with which the contractor built the bridge, and the issue, whether the plans on file at the time of the making of the contract were the original plans or not was raised by the answer and was litigated, and the court found in favor of the contractor, the striking of allegations in the answer alleging the fraudulent substitution of plans after the execution of the contract, with the knowledge of the contractor, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

3. BRIDGES (§ 20*)—CONSTRUCTION—CONTRACTS—PERFORMANCE—EVIDENCE.

Where, in an action on a contract for the construction of a county bridge, the petition alleged that the plans referred to in the contract and on file in the county clerk's office when the contract was made were those in accordance with which the contractor had built the bridge, the court did not err in admitting in evidence the tracing of a plan for the bridge to show the fact alleged.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 20.*]

4. BRIDGES (§ 20*)—CONSTRUCTION—CONTRACTS.

A contract for the construction of a county bridge, calling for the construction of a bridge "in accordance with plans on file and forming a part of this contract," refers to the plans on file at the time of the execution of the contract, though the plans originally adopted differed therefrom.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 20.*]

5. BRIDGES (§ 20*)—CONSTRUCTION—STATUTORY AUTHORITY.

Under Rev. St. 1895, art. 4792, conferring on the commissioners' court full authority to cause all necessary bridges to be built in their respective counties, the county, in the absence of any statute restraining the exercise of such power, may contract for the construction of a bridge according to plans differing from those originally adopted.

[Ed. Note.—For other cases, see Bridges, Dec. Dig. § 20.*]

Appeal from District Court, Webb County; J. F. Mullally, Judge.

Action by M. S. Hasie, Jr., against the county of Webb. From a judgment for plaintiff, defendant appeals. Affirmed.

Atlee & Atlee, for appellant. Earl D. Scott, for appellee.

JAMES, C. J. The appellee sued the county upon a contract for the construction of a bridge according to the plans and specifications on file in the office of the county clerk made a part thereof, and obtained judgment for \$4,393.

The contract, dated September 19, 1905, which was an exhibit to the petition, was "to build, paint, and erect in place, including all dirt fills, by the 19th of March, 1906, for the county, a steel bridge with approaches across the Santa Isabel creek, consisting of one 75-foot span, 175½ feet of approach and the necessary dirt fills at each end of the bridge," the "entire bridge to be built in accordance with plans on file, and forming a part of this contract," for the sum of \$3,964. The petition alleged: That on or about August 17, 1905, the county commissioners advertised that bids would be received by the county clerk up to noon of September 18, 1905, for the construction of a steel bridge across said creek. That plans and specifications for same were on file and subject to inspection in said clerk's office, etc. That on the 18th of September, before noon, plaintiff filed his bid in said office in accordance with the plans and specifications then on file, etc., and that on the same day the contract was awarded plaintiff by the commissioners, who entered a special resolution and order awarding the contract to plaintiff, and ordering the contract to be signed in duplicate by the county judge on the part of the county, which was done as above stated. Plaintiff alleged compliance with what the contract required in respect to a bond and deposit, and that he proceeded in accordance with the said plans, etc., on file in the clerk's office, and furnished the bridge in a good, substantial, and workmanlike manner and fully according to said plans and specifications before the date fixed, when the county became liable to him for said contract price. That plaintiff tendered the bridge and demanded the price, which defendant refuses to pay. The petition contained further allegations, which sought to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

assert a builder's lien or title to the bridge, and, in the event the prayer for the contract price was for any reason not allowed, he asked for other relief. The answer contained a general denial. It pleaded specially that plans and specifications for the bridge were made for the county by Chas. E. Frees, which were approved and placed on file in the office of the county clerk; that said original plans, etc., upon which bids were invited and which were submitted to all those who bid, have disappeared from the clerk's office, and diligent search has failed to trace them; that the plaintiff on September 18, 1905, examined the same and prepared his bid and submitted same, which was accepted and the contract entered into; that the contract so entered into required a bridge to have a 16-foot roadway, piers, or cylinders 3 feet in diameter, flooring 8 inches thick, etc.; that the roadway, etc., were shown on the plans submitted by appellant for competitive bids, and that the bridge was not constructed by plaintiff in accordance with such plans, but, instead, was constructed with a 12-foot roadway and with materials of lighter weight and smaller dimensions; that on or about March 8, 1906, the commissioners' court entered an order reciting that "it having been brought to the attention of the court that there is evidently a discrepancy between the original plans and specifications for the San Isabel bridge bid upon by various contractors and the tracing now in the office of the county clerk, it was ordered by the court that Webb county refuse to receive said bridge as erected by M. S. Hasie, Jr., contractor, for the present, and that payment on his contract with Webb county for such construction be temporarily suspended." And on March 13, 1906, the following order which recited: "And it appearing to the court that said bridge has not been constructed in accordance with the plans and specifications furnished by this court, and upon which bids for the construction of said bridge were invited by this court and the contract awarded; it is therefore considered and decreed by the court that the said bridge be, and the same is hereby, rejected and the claim of M. S. Hasie, Jr., for the sum of \$3,964 for the construction thereof is hereby in all things disapproved, and payment refused." Said original plans or drawings for which bids were invited and received and which were submitted to all the bidders have disappeared from the office of the county clerk, and cannot be found. "(4) And defendant further says that the disappearance of said plans occurred, as defendant is informed and believes, and so alleges, after plaintiff had examined the same and had submitted his bid and had made the contract sued on, and that they were removed from the office of the county clerk of Webb county at the instance of plaintiff fraudulently and for the purpose of carrying out a scheme, and to cheat and

defraud the said county, and to enable plaintiff to construct and tender a structure to said county different in dimensions and of lighter and different materials from that contracted for; that, in the perpetration of such fraud, other and different plans with the knowledge of plaintiff were thereafter substituted and returned to the office of the county clerk of said county, instead of said original plans, without the knowledge or consent of said clerk or of any officer or agent of said county, or of any member of the commissioners' court of said county, which substituted plans have there remained ever since, but the said substituted plans have never been recognized or adopted by defendant in any manner, and are not the plans of the structure or bridge for which the said contract sued on was made. (5) Wherefore defendant says that it is not liable to plaintiff by reason of any of the matters alleged in his said petition; but, by reason of the fraud and fraudulent acts of plaintiff and his failure to perform his said contract, defendant has suffered damage, to wit, in the sum of \$5,000; that, by reason of the frauds and failures aforesaid, the defendant has not been able to afford and provide for public use the convenient facilities for crossing the Santa Isabel creek, in Webb county, at a point where there is a great public necessity therefor; that the pretended structure is not adapted as would have been the structure contracted for, and defendant does not desire to open the same and make of it a highway, and defendant prays that it be discharged as to any liability alleged by plaintiff, and that it have judgment against plaintiff for its said damages and for costs of suit, and for such other and further relief as in law or equity may be deemed meet and proper."

The court, upon exceptions, struck out of clause 4 that part which read, "at the instance of plaintiff, fraudulently and for the purpose of carrying out a scheme and to cheat and defraud the said county, and to enable plaintiff to construct and tender a structure to said county different in dimensions and of lighter and different materials from that contracted for" "in the perpetration of such fraud," and out of clause 5 the words; "but, by reason of the fraud and fraudulent acts of plaintiff and his failure to perform the said contract, defendant has suffered damage in the sum of \$5,000" and "frauds and." This action of the trial court is the subject of the first assignment of error. Appellant's proposition (as embodied in the first assignment) is that the allegations of the answer, in connection with what was stricken out, constituted sufficient allegation to warrant the admission of testimony of the fraudulent substitution of plans for the construction of a bridge, and the clause, "but, by reason of the fraud and fraudulent acts of plaintiff and his failure to perform his

said contract, defendant has suffered damages, to wit, in the sum of \$5,000," and also the clause "fraud and" in connection with the remaining allegations were sufficient to warrant the admission of testimony as to the amount of damages suffered through the fraudulent acts and failures of plaintiff. It appears to us to be unnecessary to investigate the sufficiency of the allegations or the merits of the proposition. It will be seen that the fraud undertaken to be alleged by the answer consisted in the fact that, when the contract was made, the plans on file were the original ones, and these were afterwards changed by substitution, by or with the knowledge of plaintiff, for fraudulent purposes. The plaintiff's case, as made by the petition, was that the plans, etc., referred to in the contract and on file when the contract was made, were those in accordance with which he had built the bridge; that, by reason of his having built it in accordance with same, he was entitled to be paid the contract price. Now the answer, as it remained, raised the issue as to what plans, etc., were then on file; that is, whether they were the originals or not. A finding that they were the originals, as the same were alleged by defendant, would have defeated plaintiff's recovery. That issue (which was the foundation of the allegations stricken out) remained was tried, and upon evidence sufficient to sustain a finding that the plans, etc., then on file were not said originals, but such as accorded with the work as done. There being no conclusions of the judge, all issues upon which there was evidence must be taken as resolved by the trial court in favor of the judgment. There being the issue whether or not the originals or other than the originals were on file when the contract was entered into, and this issue being litigated, it must be presumed that defendant adduced what evidence it had on the subject. Our conclusion is that, had the court not stricken out the clauses referred to, defendants would have been in no better position than they now are. The fact underlying the clauses would presumably have been litigated and resolved against defendant as was done at this trial, and therefore it appears that no harm has followed to defendant from the ruling.

The second assignment of error reads: "The court erred in admitting in evidence, over objection of defendant, the tracing of a plan for a bridge; the same not being a tracing of the plans which the commissioners' court had in mind when they solicited bids for the construction of a bridge over the Santa Ysabel creek, and there being no evidence showing that such tracing or plans from which the same was made had ever been filed in the office of the county clerk of Webb county, and because the said tracing was shown, by the evidence, to have been substituted for plans which the commissioners' court had adopted, and upon which bids

had been solicited, and that such substitution had been accomplished without the knowledge or consent of any officer or agent of defendant or of any member of the commissioners' court, and that such substituted plans had never been recognized nor adopted by defendant in any manner, and were not the plans of the structure or the bridge for the erection of which bids were solicited, all as shown in defendant's bill of exceptions No. 1." Other testimony of the tracing was introduced without objection. In addition to this, we conclude that, as plaintiff had alleged that the plans, etc., on file when the contract was made were those in accordance with which the work was done, he was not required to prove more than that fact, and was clearly entitled to introduce any testimony which tended to show that fact. Our opinion is that the contract is by its terms to be construed as having reference to the plans then on file in the county clerk's office, as will be explained hereafter, and which disposes of the fifth and sixth assignments of error.

The qualification of the court to the bill of exceptions disposes of the third assignment; also the qualification to the bill which is the subject of the fourth assignment.

The proposition under the seventh assignment is "that appellant alleged facts fraudulent per se, viz., that a bridge had been constructed not in accordance with plans adopted by the commissioners' court, and, such facts having been proven, the law should not hold defendant liable." As we have already stated, the plans originally adopted may have been different from those existing in the clerk's office when the contract was executed, and which were made a part thereof, yet the county by its contract adopted those then on file, so far as the contract in question is concerned, and defendant is not wronged by being held to the performance of its contract.

The proposition under the eighth assignment is: "The facts alleged in defense and proven on the trial were fraudulent per se, viz., that a bridge was constructed not in accordance with plans adopted by the commissioners' court, and the evidence showing, or tending to show, that appellee was a party to such fraudulent acts, the law applicable to such issue requires that judgment be rendered for appellant. Inasmuch as there was evidence freeing plaintiff from any connection with the change of plans, or knowledge thereof, that issue, in so far as it affected the case, must be taken to have been determined by the trial judge in his favor.

The ninth assignment is that the court erred in not granting a new trial "because the plaintiff, having brought an action at law to recover strictly according to the terms of a written contract, and having failed to show a meeting of the minds in a contract to build a bridge of the dimensions as to width, cylinders, and materials of the bridge

constructed by plaintiff, is not entitled to relief at law, and plaintiff is entitled to no relief under the pleadings, unless it be the equitable relief prayed for, viz., permission to remove and take away said bridge and materials." The testimony developed the fact that there was no mutual mistake as to what plans, etc., were intended as the subject-matter of the contract. The court was authorized by the testimony to find that the commissioners thought they were contracting with reference to other plans than those which the court may have found were on file at the time, and that they so intended, but may have found, also, that there was no mistake on the part of the plaintiff, or other intention on his part than to contract with reference to what was then on file. It must be taken by us in support of the judgment that the court thus resolved the facts. This would bring the case within the rule announced in *May v. Townsite Co.*, 83 Tex. 505, 18 S. W. 959. There was ample testimony to support a finding that plaintiff was guilty of no fraud, and the fact the court must be presumed to have found also.

Under the tenth assignment the proposition is that the county clerk did not have authority to exhibit other plans than those adopted by the commissioners' court, and, if he did exhibit other plans, his act was not binding on appellant. The testimony would sustain a finding that within the time in which bids were to be received, to wit, before noon of the 18th of September, plaintiff for the first time came to Laredo, went to the clerk's office where the advertisement directed him to go for the inspection of the plans, and that he then and there went over the same with the clerk and formulated his bid thereon which went in, and was accepted by the court and the contract executed under appropriate orders, and that, if the plans had been changed or substituted, plaintiff had no knowledge of it, and that neither party had knowledge or suspicion of it until about when the work had been completed in good faith by plaintiff and in accordance with the plans on file when the bid was formed and the contract made. The county was authorized by article 4792, Rev. St. 1895, to cause all necessary bridges to be built. We find no statute restraining the exercise of this power so that the county could not be said to be without power or capacity to enter into a contract with regard to plans then on file, or without power to contract other than for a bridge according to plans they originally adopted. There being no question of power or legal capacity to contract, the question resolves itself simply to one of contract. *Sexton v. Chicago*, 107 Ill. 323.

There is no proposition presented under the eleventh assignment.

The judgment is affirmed, but without damages for delay.

TAYLOR v. READ.

(Court of Civil Appeals of Texas. Oct. 14, 1908.)

1. JUSTICES OF THE PEACE (§ 174*)—APPEAL—AMENDMENT OF PLEADINGS—NEW CAUSE OF ACTION.

Plaintiff having sued in justice court on a contract, whereby it was agreed that he should receive a specified commission for selling land, an amendment in the county court, declaring upon a contract made between defendant and a partnership, in which plaintiff was a member, set up a new cause of action, within Sayles' Ann. Civ. St. 1897, art. 358, prohibiting plaintiff from setting up a new cause of action on appeal from justice court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 870; Dec. Dig. § 174.*]

2. BROKERS (§ 63*)—TERMS OF SALE—BROKER'S AUTHORITY.

A broker, employed to sell land for one-half cash and balance on credit, cannot recover a commission on the owner refusing to consummate a sale for all cash, unless the term of credit required to be extended was so short as to make it, in effect, a cash payment.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 95; Dec. Dig. § 63.*]

3. BROKERS (§ 88*)—ACTION FOR COMMISSION—INSTRUCTIONS.

In an action for a broker's commission, an instruction that, if defendant told plaintiff or his partner to take the land off the market, and that it was not for sale, to find for defendant was improperly refused, though the court instructed, in a general way, that plaintiff could not recover if defendant had withdrawn authority to sell.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 121-127; Dec. Dig. § 88.*]

Appeal from Brown County Court; A. M. Brumfield, Judge.

Action by T. A. Read against L. H. Taylor. From a judgment of the county court for plaintiff, on appeal from justice court, defendant appeals. Reversed and remanded.

Arch Grinnan, for appellant.

FISHER, C. J. This is a suit by Read against Taylor, originally brought in the justice's court, for the sum of \$146.20, in which court Read recovered judgment. Upon appeal by appellant to the county court, judgment was there rendered in Read's favor for the amount sued for.

Plaintiff, in his pleadings in the justice's court, alleged as his cause of action "that under a contract with defendant, plaintiff sold his farm in Brown county, Tex., on which defendant lived, on or about August 1, 1906, the understanding and agreement being that plaintiff was to receive a commission of 5 per cent. for selling said farm"; then goes on to allege the amount he would be entitled to under this agreement. When the case reached the county court, plaintiff there amended his pleading, and relied upon and alleged the following as his cause of action: "Plaintiff, T. A. Read, alleges that on or about August, 1, 1905, he and one W. D. Woodruff were partners in the business of

selling land for commission; that on or about said day and year above mentioned the said defendant, L. A. Taylor, listed and contracted with the plaintiff to sell his said lands, consisting of two tracts, to wit, the home tract of 172 acres and the lower place of 349 acres, said land being situated near Bangs, in Brown county, Tex., and agreed to pay plaintiff a commission of 5 per cent. in case of sale. Plaintiff, acting under said listment or contract of sale, on or about August 1, 1906, sold defendant's home place of 172 acres for the sum of \$2,974, the price at which same was listed. Plaintiff alleges that in the winter and spring of 1906 he and the said Woodruff dissolved their said co-partnership, and the plaintiff acquired all the rights and interest of the said Woodruff in said land agency, and that he is now, and at the time of filing this suit, the sole owner of the above claim and cause of action." The defendant in the county court filed and presented a special demurrer to this amendment, on the ground that it asserted a new cause of action; or, in other words, that the cause of action there asserted was different from that relied on by the plaintiff in the justice's court. The court overruled this demurrer, and under the assignments of errors, this ruling is the first question to be disposed of. The substantial effect of the pleading of the plaintiff in the justice court is to allege a cause of action or contract between the appellant and the plaintiff in his individual capacity, and not with the firm of Read & Woodruff. The cause of action asserted by the plaintiff in the amendment filed in the county court substantially declared upon a contract between Read & Woodruff and appellant. It is clear from the statement made in this amendment that at the time the contract was made Read & Woodruff were partners in the land business, and Woodruff had an interest in the same as a partner, and subsequently upon dissolution, assigned this interest to Read.

There is a vast difference in a contract made with one as an individual and with the firm of which he may be a member, and there can be no sort of question that if he had sued upon a contract made with him as an individual, and it had been developed by the evidence that it was made with the firm of which he was a member, the variance would be fatal. Without further discussing the question, we are of the opinion that the amendment set up a new cause of action, and that the trial court erred in overruling appellant's special exception. *Bingham v. Talbot*, 63 Tex. 273; *Lutterloh v. McIlhenney Co.*, 74 Tex. 73, 11 S. W. 1063; *Letot v. Edens* (Tex. Civ. App.) 49 S. W. 109; *Stewart v. Gordon*, 65 Tex. 344. Article 353, Sayles' Ann. Civ. St. 1897, provides that either party may plead any new matter in the county or district court which was not presented in the court below, but no new cause of action shall be set up by the plaintiff, nor shall

any set-off or counterclaim be set up by the defendant which was not pleaded in the court below. This article is embraced in the chapter or title that refers to and relates to certiorari, but it is held in *Harrold v. Barwise*, 10 Tex. Civ. App. 138, 30 S. W. 498, *Gholston v. Ramey* (Tex. Civ. App.) 30 S. W. 713, and in other cases, that this provision of the statute applies as well to cases appealed from the justice's court as it does to cases taken up by certiorari.

We are also of the opinion that there is merit in appellant's second assignment of error. He requested, in writing the trial court, to instruct the jury that, if they believed from the evidence that the defendant employed the plaintiff to sell the land for one-half cash and the balance on time, and that the plaintiff did not so sell the same, but sold for an all cash consideration, and defendant refused to consummate the sale, they will find for defendant. There was evidence upon the trial which justified this instruction. In fact the evidence of both parties is to the effect that the agreement was that the land should be sold for one-half cash and the balance on time, and the evidence is to the effect that the terms of the sale as agreed upon between appellee Read and the prospective purchaser called for a cash consideration. It is the right of the owner of the land to prescribe the terms upon which it may be sold; and, when he directs the agent to sell on credit, or partly on credit, the latter has no power or right to depart from this instruction, and if he does so, the owner can decline to consummate the sale. The fact that the agent can procure the entire consideration in cash does not justify him in violating the instructions of the owner, for it may be to the advantage of the owner to invest the consideration in a vendor's interest-bearing paper, and the agent is powerless to substitute his judgment or discretion in this matter for that of the owner. There may be such an immaterial departure from the instructions or the terms under which he is authorized to sell as would justify the conduct of the agent in failing to literally observe them. The evidence does not inform us as to the length of time credit was to be extended, and we cannot say, from the facts upon this subject, that the time of the maturity was so short as to make it equivalent to a cash payment. In other words, if the time of the credit was merely fixed at the same day upon which the transaction occurred, or the next day, it might be regarded as of such a short period as not to materially affect the rights of the seller; but in the nature of things, and in accordance with the usual course of transactions of this character, we can safely assume that the credit was not to be extended for such a short period, but was evidently for a longer time. But, however this may be, this question will be further developed upon another trial.

It would be proper for the trial court to give the instruction requested as set out in the fourth assignment of error. The court did, in a general way, instruct the jury that the plaintiff could not recover if he had withdrawn the authority of the agent to make the sale. The charge requested, and which was refused, was a direct instruction to the effect that if the defendant informed either Read or his partner Woodruff to take the land off the market, and that the same was not for sale, to find for the defendant. There was evidence to support this instruction. The plaintiff testified that such direction was given before the sale was made to the prospective purchaser.

In disposing of the fifth assignment of error it is sufficient to say that the trial court did instruct the jury specifically to the effect that, in order to entitle the plaintiff to recover, the sale must be made within a reasonable time after the contract was entered into by the defendant, and left to the jury the question as to what would be a reasonable time.

The sixth assignment of error raises a question of fact proper to be passed upon by the jury.

The questions of fact raised in the seventh, eighth, and ninth assignments will be passed upon on another trial, the reversal having afforded the appellant the opportunity to procure the evidence which he stated, in his motion for new trial, that he could procure on another trial.

For the reasons stated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

SULLIVAN v. BITTER et al.

(Court of Civil Appeals of Texas. Oct. 14, 1908. Rehearing Denied Nov. 11, 1908.)

1. TAXATION (§ 467*)—ASSESSMENT—BOARD OF EQUALIZATION—JURISDICTION.

Under Rev. St. 1895, tit. 104, c. 3, providing the method of making tax assessments, the commissioners' court, sitting as a board of equalization, has no power to assess property for taxes; such authority, save in exceptional cases, being vested in the county assessors.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 831-834; Dec. Dig. § 467.*]

2. TAXATION (§ 408*)—"ASSESSMENT"—REQUISITES.

An assessment of property for taxation includes a list of the property to be taxed in some form and an estimate of the sums which are to guide in apportioning the tax.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 408.*]

For other definitions, see Words and Phrases, vol. 1, pp. 549-555; vol. 8, pp. 7583, 7584.]

3. TAXATION (§ 317*)—ASSESSMENT—NECESSITY.

An assessment of property for taxes by the properly constituted authority is essential to support a tax.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 317.*]

4. TAXATION (§ 467*)—BOARD OF EQUALIZATION—PROPERTY NOT LISTED AND VALUED.

In the absence of statutory authority, a board of equalization cannot assess property not listed and valued by the assessor.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 831-834; Dec. Dig. § 467.*]

5. TAXATION (§ 467*)—BOARD OF EQUALIZATION.

Rev. St. 1895, art. 5124, as amended by Acts 1907, p. 439, c. 11, provides that the board of equalization shall supervise the assessment of their respective counties, and, if satisfied that the valuation of any property is not in accordance with law, increase or diminish it, and affix a proper valuation of the same, and that, when the assessor shall furnish the commissioners' court with the rendition as provided in article 5123, it shall be the court's duty to hear evidence and fix the value of the property in accordance therewith. *Held*, that a board of equalization has no power to add to the rolls property not previously assessed, nor to take from the rolls property contained therein.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 831-834; Dec. Dig. § 467.*]

6. TAXATION (§ 609*)—BOARD OF EQUALIZATION—VOID ACTS—INJUNCTION—OTHER RELIEF.

The addition of alleged omitted property to plaintiff's assessment by a board of equalization being void, he was not required to show that he had applied to the board for relief in order to have the assessment of such property annulled, and the collection of the tax enjoined.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1243; Dec. Dig. § 609.*]

7. PLEADING (§ 49*)—PETITION—EQUITABLE RELIEF—ADEQUATE REMEDY AT LAW.

Where a petition shows that plaintiff is entitled to the equitable relief prayed for, he need not allege that he has no adequate remedy at law.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 49.*]

Appeal from District Court, Bexar County;

J. L. Camp, Judge.

Suit by Daniel Sullivan against John A. Bitter and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Newton & Ward, for appellant. T. J. Newton, for appellees.

NEILL, J. This suit was brought by the appellant against P. H. Shook, county judge of Bexar county, D. M. Poor, D. A. Meyer, Frank Sommers, and W. C. Kroeger, county commissioners of Bexar county, in their capacity as board of equalization, and John A. Bitter, as tax collector of said county, for the purpose of obtaining a decree against the five parties first named, in their capacity of such board of equalization, to set aside, annul, and declare void an order alleged to have been made by said county judge and county commissioners adding to the sum of money assessed by the tax assessor of Bexar county for state and county taxes the further sum of \$230,000, and assessing such additional sum for such taxes against the plaintiff, and against John A. Bitter for an injunction restraining him from collecting the taxes al-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

leged to have been assessed upon said additional sum of money. Exceptions were interposed by defendants to plaintiff's first amended petition, and, upon his declining further to amend, final judgment was entered dismissing his petition and denying him the relief prayed for. From which judgment, this appeal is prosecuted.

Plaintiff's first amended petition is as follows:

"In this cause now comes the plaintiff, leave of the court first being had and obtained, and files this, his first amended original petition, in lieu of his original petition filed herein on January 15, 1908, and for amendment doth say:

"First. That plaintiff resides in the city of San Antonio, in Bexar county, Tex. That the defendants are all citizens of the county of Bexar and state of Texas and reside therein. That P. H. Shook is county judge of Bexar county, Tex., and that D. M. Poor, D. A. Meyer, Frank Sommers, and W. C. Kroeger are county commissioners of said Bexar county, Tex., and, together with said county judge, constitute the commissioners' court of said Bexar county, Tex. That John A. Bitter is the tax collector of Bexar county, Tex.

"Second. That plaintiff has for a long time resided in the city of San Antonio, Bexar county, Tex., and has conducted a business under the name of D. Sullivan & Co., a partnership composed of plaintiff, D. Sullivan, and W. C. Sullivan, and has heretofore and up to and including the year 1907 always rendered all property owned by him, as well as the property of said D. Sullivan & Co., for assessment for taxes in the name of D. Sullivan & Co., and for the year 1907, acting by J. C. Sullivan, rendered all his property for assessment for taxes to Albert V. Huth, assessor of Bexar county, state of Texas; said rendition for assessment being made on or about the 24th day of April, A. D. 1907, and was accepted by said Albert V. Huth, so plaintiff is reliably informed and believes.

"Third. That thereafter, the exact date of which is not known to plaintiff, the said Albert V. Huth, tax assessor of Bexar county, assessed to this plaintiff individually on the unrendered rolls the sum of twenty thousand (20,000) dollars under the head 'Money on Hand, Credits, etc.' That said assessor in making said assessment knew, and had known for a number of years, that all of plaintiff's property had been assessed in the name of D. Sullivan & Co., and, in the rendition of property in the name of D. Sullivan & Co., there had been assessed to said D. Sullivan & Co. the sum of twenty-five thousand (25,000) dollars, amount of moneys on hand or on deposit in or out of the state with banks, trust companies, corporations, firms, or individuals, and subject to order by check or draft, including certificates of deposit, January 1, 1907, subject to taxation, which

assessment plaintiff is reliably informed and believes had been accepted by the said Albert V. Huth.

"Fourth. That thereafter the said commissioner's court assembled as a board of equalization, as required and authorized by law so to do, and thereafter, on August 22, 1907, said board of equalization added to said assessment made by the said Albert V. Huth of unrendered property of twenty thousand (20,000) dollars the sum of two hundred and thirty thousand (230,000) dollars. That under and by virtue of the laws of the state of Texas the said board of equalization has not now, and did not have at the time of the addition to said assessment, authority to add to or take from an assessment made by the assessor or an individual accepted by the assessor any property; their rights and duties under the law being confined to the raising or decreasing of values of property already assessed. That, in adding said sum of two hundred and thirty thousand (230,000) dollars to said assessment so made by the said Albert V. Huth, the said board of equalization, aside from acting without authority of law, acted capriciously and arbitrarily, without seeking or obtaining any evidence to support their action.

"Fifth. And plaintiff would further aver that said assessment is void, for this: That there is no description of the property attempted to be assessed, and no statement as to how much money and how much credits were so assessed and what the 'et cetera' in said assessments mean.

"Sixth. That the rate of taxation fixed by the said county and state for the year 1907 is and was 72½ cents on each \$100 of assessed valuation. That the amount of the tax, both state and county, on the \$20,000 so assessed by the said Albert V. Huth, tax assessor, is \$145. That the amount of the tax unlawfully added to plaintiff's assessment by said commissioners' court is and was the sum of \$1,667.50.

"Seventh. Plaintiff would further aver that he has tendered to the said John A. Bitter, tax collector of Bexar county, the sum of \$145, the amount of taxes due on the assessment of \$20,000 so made by the said Albert V. Huth, but that the said Bitter has refused and still refuses to accept the same, and which said amount he has deposited and now deposits as a continuing tender in the registry of this court.

"Eighth. Plaintiff would further aver that under the law, unless said taxes are paid on or before January 31, 1908, the same become in default, and a penalty of 10 per cent. will be added thereto, and that, in addition thereto, the said collector is authorized to seize and sell plaintiff's property in satisfaction of said unlawful taxes, and, in addition thereto, he is reliably informed and believes that it is made the duty of the county attorney to institute suits to collect the same.

which would greatly harass and embarrass plaintiff and cause him to expend large sums of money in the defense thereof. That, by reason thereof, he has no adequate remedy at law to protect himself from the unlawful and capricious action of said commissioners' court in adding to the said assessment so made by said Huth the said sum of \$230,000.

"Wherefore, premises considered, plaintiff prays that the order of said commissioners' court sitting as a board of equalization in adding to said assessment the said sum of \$230,000 be declared void, and for your honors' most gracious writ of injunction to compel the said John A. Bitter, tax collector, to accept the said amount of \$145, paid into court, in full of his taxes for the year 1907, and perpetually enjoining him from collecting the said sum of \$1,667.50 increase of taxes caused by the void order of said board as aforesaid, and for costs and general and special relief."

The defendants' exceptions to the petition are as follows:

"First. Now come the defendants in the above-entitled and numbered cause and except to plaintiff's first amended original petition filed herein, and say that the same is insufficient in law, in that the facts therein stated are insufficient to entitle plaintiff to the relief prayed for, no valid ground for the exercise of the equitable jurisdiction of this court by the writ of injunction prayed for being alleged; and, further, because the allegations in plaintiff's petition contained do not constitute a cause of action against these defendants. Wherefore defendants pray judgment of this court as to the sufficiency of said petition to entitle plaintiff to the relief prayed for.

"Second. And, should the foregoing demurrer be overruled, then these defendants deny each and every allegation in plaintiff's first amended petition contained, and of this they put themselves upon the country."

We are of the opinion that the court erred in sustaining the exceptions and dismissing plaintiff's petition. The commissioners' court sitting as a board of equalization has no power under the law to assess property for taxes. The authority to assess property, save in exceptional cases, is vested in the assessor of taxes of the several counties of the state, and the method of making such assessments is plainly pointed out by statute. See title 104, c. 3, Rev. St. 1895. "An assessment of necessity involves at least two things, to wit, a listing of the property to be taxed in some form, and an estimation of the sums which are to be a guide in the apportionment of the tax." *Cooley on Taxation* (4th Ed.) 596. An assessment by the properly constituted authority is absolutely essential to support a tax. *Galusha v. Wendt*, 114 Iowa, 604, 87 N. W. 512; *Judy v. National Bank*, 133 Iowa,

252, 110 N. W. 608. In the absence of a statute authorizing it, a board of equalization cannot assess property not listed and valued by the assessor. *Cooley on Taxation*, 776, 777. In this state such board "has no power to add to the rolls property not previously assessed or to take from them property which they embrace." See article 5124, Rev. St. 1895, as amended by Acts 1907, p. 459, c. 11; *Davis v. Burnett*, 77 Tex. 4, 13 S. W. 613; *Galveston County v. Gas Co.*, 72 Tex. 509, 10 S. W. 583; *San Antonio St. Ry. v. City of San Antonio*, 22 Tex. Civ. App. 341, 54 S. W. 907; 1 *Cooley on Taxation*, 777. The addition and assessment of the \$230,000 by the board of equalization was absolutely void, and it was not necessary for the plaintiff to show that he had applied to such board for relief in order to have such illegal assessment annulled and the collection of the tax enjoined. *Davis v. Burnett*, 77 Tex. 4, 13 S. W. 613; *Court v. O'Connor*, 65 Tex. 334; *George v. Dean*, 47 Tex. 73; *Bank v. Rogers*, 51 Tex. 606; *S. W. Teleg. & Tel. Co. v. City of San Antonio*, 32 Tex. Civ. App. 101, 73 S. W. 859; *Johnson v. Holland*, 17 Tex. Civ. App. 210, 43 S. W. 71; *Schmidt v. G., H. & S. A. Ry. Co.* (Tex. Civ. App.) 24 S. W. 547; 2 *Cooley on Taxation*, 1414; *High on Inj.* § 494. Where the facts alleged in a petition show that the plaintiff is entitled to the equitable relief prayed for, it is not necessary for him to allege that he has no adequate remedy at law; for this is merely a conclusion drawn from the matters pleaded.

The judgment of the district court is reversed, and the cause remanded.

SISK et al. v. GRAVITY CANAL CO.

(Court of Civil Appeals of Texas. Oct. 21, 1908. Rehearing Denied Nov. 11, 1908.)

1. WATERS AND WATER COURSES (§ 254*)—IRRIGATION — CONTRACTS — DUTY TO DELIVER WATER ON LAND.

Under the contract of plaintiff, an irrigation company, with defendants, lessees of land from L., to use its best endeavors to furnish enough water through its canals and laterals to properly irrigate the land, in the absence of any understanding or agreement that it was defendants' duty to furnish laterals to connect the land with the canal, or to keep the lateral of L. in repair, it was the duty of plaintiff to furnish facilities for delivering the water on the land; and it was not enough to turn it into the lateral of L., insufficient from defects and want of repair to take it to the land.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 311; Dec. Dig. § 254.*]

2. WATERS AND WATER COURSES (§ 261*)—IRRIGATION — DAMAGES FROM INSUFFICIENT SUPPLY.

The evidence showing that defendants planted their land to rice; that it came up to a good stand; that all except 35 acres of it died because of failure to receive water at the proper time; that the land, if properly watered, would have made from 15 to 20 sacks of rice per acre;

and that the loss, without fault on defendants' part, was caused by plaintiff's breach of its contract to furnish the water necessary for cultivation of the crop—they are entitled to recover all damages sustained.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 323, 324; Dec. Dig. § 261.*]

Appeal from Matagorda County Court; Jesse Matthews, Judge.

Action by the Gravity Canal Company against O. L. J. Sisk and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

W. C. Carpenter and J. W. Conger, for appellants. Gaines & Corbett, for appellee.

RICE, J. In 1904 appellants rented from Lewis & Robertson a certain tract of land in Matagorda county, Tex., shown to contain 128½ acres, for the purpose of engaging in rice culture, which tract of land was situated about one-half mile from the canal of appellee, and no part thereof bordered thereon. During the spring of said year appellants made a written contract with appellee, an irrigation company engaged in the business of furnishing water for growing rice in said county, to supply them with sufficient water for the cultivation of a crop of rice, to be grown by them on said land during said year, by which contract appellee agreed to use its best endeavors to furnish a sufficient quantity of water through its canals and laterals, in addition to the natural rainfall, to properly irrigate the rice planted by appellants on said land, and appellants, in consideration of the performance of said obligation on the part of appellee, promised to pay, as full compensation for the water so furnished, one-fifth of the rice grown on said land. It was shown from the evidence that appellants in due season planted all of said land to rice, obtaining a good and sufficient stand thereon, and that during the growing season appellee failed to furnish and deliver upon said land a sufficient quantity of water, as occasion required, for the proper irrigation of said crop, by reason of which the rice so planted and growing died out, except about 35 acres thereof, upon which a crop was grown and harvested. Appellants having failed to pay the appellee any portion of the crop so raised on the 35 acres, the latter brought this suit in its original petition for the recovery of 200 sacks of rice, alleging same, in its original petition, to be one-fifth of said crop, and of the value of \$2 per sack, or, in case it could not be found, then for its value, to wit, \$400, setting up said contract, and alleging a compliance therewith. Defendants filed their answer, admitting the execution of the contract, but alleged a breach thereof by plaintiff, pleading in reconvention, for damages sustained by them thereby, in the sum of \$800. On a

trial plaintiff failed to recover, but defendants obtained verdict and judgment against it on their plea in reconvention for the sum of \$600, from which an appeal was taken to the Court of Civil Appeals of the First District, and will be found reported in 95 S. W. 724, 15 Tex. Ct. Rep. 984, where the judgment of the court below was reversed and remanded; but, as that decision does not affect the questions arising upon this appeal, it will not be necessary to consider the rulings there made, except as hereinafter noticed. After the case was reversed, the parties amended their pleadings in the court below. The amendment on the part of plaintiff consisted chiefly in suing for the value of a less number of sacks than in its original petition, to wit, for 61 sacks of rice, valued at \$3 per sack. Defendants again answered substantially as before by admitting the execution of the contract, and setting up plaintiff's breach thereof in failing to furnish the water required under its contract, with a prayer in reconvention for damages at the rate of \$4 per acre for 128½ acres of said land planted by them to rice. Upon a jury trial plaintiff recovered a verdict against the defendants for \$79.60, for which judgment was entered, and from which this appeal is prosecuted.

Appellants assign error on the giving by the court, at the instance of appellee, of the following charge to the jury: "At the request of plaintiff you are charged that the undisputed evidence shows that the plaintiff had no control over the lateral through which the defendants were to receive water, and that such lateral belonged to the landlord of defendants, and was under the control of such landlord, or his tenants, and that the contract made between plaintiff and the defendants provided only for the furnishing of water through the canals and laterals owned by the plaintiff. You are therefore instructed that, if you believe from the evidence that the plaintiff had at all times a sufficient quantity of water in its canals and laterals adjacent to the lateral owned by the landlord of the defendants to properly irrigate the land of defendants, and that the defendants could have obtained sufficient water at any time, but that, by reason of the condition of the lateral or of the flume across the lateral owned by the defendants' landlord, the defendants failed to procure a sufficient quantity of water to irrigate the land cultivated by them, and that such failure was not the fault of the plaintiff, then you are instructed to find against the defendant on his cross-bill; and you will also find for the plaintiff the value of one-fifth of the rice grown by defendants on the land cultivated by them during said year." By their second proposition under said assignment appellants contend that the contract between them bound appellee to furnish water through its canals and laterals to irrigate

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the land cultivated by defendants, and that, there being no evidence to show any understanding, express or implied, that plaintiff should not be held liable for its failure on account of defects in the Lewis & Robertson lateral, the charge was erroneous in instructing the jury that plaintiff was not liable. And by their third proposition under said assignment they urge that, as plaintiff had bound itself to furnish water through its canals and laterals to irrigate defendants' land, and there being no understanding between them about conveying it through the Lewis & Robertson lateral, it was plaintiff's duty to build a lateral of its own, through which to convey the water.

It will be seen from the contract above referred to that plaintiff bound itself to use its best endeavors to furnish water through its canals and laterals which, together with the natural rainfall, should be sufficient to properly irrigate the defendants' land planted to rice. When appellants rented the land in question from Lewis & Robertson, it is shown that there was no agreement concerning the furnishing of water for irrigating same; Lewis remarking that the canal company was bound to furnish it. It does not appear from the evidence that when the contract sued upon was made, there was any other or different understanding than the one contained therein relative to how the water should be furnished by the canal company, nor is it shown by what means the canal company should deliver the water upon the land, nor was there any understanding relative to the Lewis & Robertson lateral. And, while it appears from the evidence that the land is about a half mile from the canal, and that, at the time the land was rented by appellants from Lewis & Robertson, there was a lateral extending from appellee's canal to this tract of land, still it is not shown that appellants had any knowledge of it, nor that they knew who owned or controlled it, nor that the canal company expected to deliver water through said lateral. While it is shown that the canal company, at all times during the season, had plenty of water in its canal to have watered the land in question, and that the failure to furnish a sufficient quantity to water appellants' crop was due to a leaky flume across a creek between the canal and appellants' tract of land, by reason of which much of the water was wasted before reaching the same, and that the Lewis & Robertson lateral was in bad repair, still there is nothing in the evidence to show, or tend to show, that there was any agreement, at the time of the execution of said contract, on the part of appellants, binding themselves to repair the same. This being the state of the record, it seems to us that the only question for our determination is whether or not the contract in evidence required plaintiff to use its best endeavors to actually deliver the water upon the land in question, or whether

it could be held to have complied therewith by simply showing that the Lewis & Robertson laterals were leaky and out of repair, and that it had at all times plenty of water within its canal to water said crop. Recurring again to the contract upon which this suit must stand or fall, it will be seen that its provisions required plaintiff to use its best endeavors to furnish a sufficient quantity of water through its canals and laterals, in addition to the natural rainfall, to properly irrigate the rice planted by the defendants on the lands described therein. It therefore seems immaterial to us in the construction of this contract to determine whether appellee owned, or did not own or control, the Lewis & Robertson lateral, if in fact it was their duty to have furnished the water by delivering the same upon the land in question.

A similar question to the one here involved has been considered and determined in a Louisiana case, wherein a canal company sued for the recovery of water rents upon a certain tract of land, planted to rice by defendants under a contract which, as in this case, failed to specify whether or not the water was to be delivered upon the land to be irrigated, the court holding that "the question of the place of delivery was one which was entirely within the control of the parties; but, in the absence of any convention or particular agreement, it seems to us that the obligation rested upon the plaintiff to make the delivery at such a point, within or upon the borders of the land to be irrigated, as to enable the defendants to utilize it with the greatest facility and at the least expense." The same doctrine is stated with approval in *Farnham, on Waters and Water Rights*, vol. 3, p. 1920. In the absence of any understanding or agreement between the parties indicating that it was the duty of appellants to furnish laterals to connect their land with the canal of appellee, or to keep the lateral of Lewis & Robertson in repair, so as to receive and discharge waters from said canal upon their land, we are inclined to believe that it was the duty of appellee, under its contract, to use its best endeavors to deliver the water upon the premises in question in sufficient quantities to enable defendants to irrigate their crop of rice growing upon said tract of land; and, if at the time of the execution of said contract they had not facilities for so delivering said water, it became their duty to provide the same, and a failure so to do was a breach of their contract in this respect, subjecting them to liability therefor. We therefore hold that the trial court erred in giving the charge complained of.

We do not believe the views here expressed are in conflict with the former opinion of the Court of Civil Appeals of the First District in this case. It is true that said court remarked that the contract under consideration did not in express terms require plaintiff

to provide the means of conveying the water to the land leased by defendants, but this statement was only made incidentally, and in connection with their ruling upon the offer, on the part of appellee herein, to show that appellants had a contract with their landlord, by which he obligated himself to keep in repair the laterals connecting the land rented by them with appellee's canal; and that the contract between appellee and appellants only contemplated that plaintiff should furnish water to defendants through this lateral, and therefore the question of the construction of the contract was not properly before the court, nor did the court undertake to say what was or could be implied from the terms of said contract.

By their second and fifth assignments of error appellants urge that the court erred in overruling defendants' motion for new trial, because the verdict of the jury was contrary to the evidence, in that the evidence showed that defendants were damaged in a sum largely in excess of \$4 per acre on the land cultivated by them, by reason of the failure of plaintiff to furnish the water necessary for the cultivation of said crop of rice, as it was bound to do under said contract. It appears from the evidence that the crop was planted by defendants, that it came up to a good stand, and that all except 35 acres thereof died on account of a failure to receive water at the proper time. It is further shown under the evidence that said land would have made, if it had received sufficient water in time, from 15 to 20 sacks of rice per acre. We, therefore, think that appellants are right in this contention, and sustain these assignments because they, having been damaged without any fault on their part on account of the breach of the contract by appellee, were entitled to recover whatever damages they may have sustained, if any, not to exceed \$4 per acre, however, upon the land planted to rice, and the court erred in refusing to grant them a new trial.

For the errors indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

FT. WORTH & D. C. RY. CO. v. CUSHMAN.
(Court of Civil Appeals of Texas. June 13, 1908. Rehearing Denied Oct. 17, 1908.)

1. RAILROADS (§ 282*)—INJURIES TO PERSONS ON OR ABOUT TRACKS—ACTIONS—INSTRUCTIONS.

An instruction that if plaintiff caught and held on to a moving train, and while doing so fell under the wheels and was injured, and if defendant's employes knew that plaintiff had caught and was holding on to the train, and if plaintiff was incapable, by reason of his age, of appreciating the danger, then to find for plaintiff, was erroneous, as withdrawing from the jury the issue of whether, if any warning had been given or effort made to prevent the injury it would have been availing, and making defendant's liability conclusive if, under the other

circumstances submitted in the instruction, any of the employes knew that plaintiff had caught and was holding on to the train.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 282.*]

2. RAILROADS (§ 276*)—INJURIES TO PERSONS ON OR ABOUT TRACK—CHILDREN.

A railroad company is required to exercise at least ordinary care to avoid injuring a child, though a trespasser, where a reasonable probability of such injury is, or, in the exercise of ordinary care would be, known.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 880; Dec. Dig. § 276.*]

3. RAILROADS (§ 282*)—INJURIES TO PERSONS ON OR ABOUT TRACK—QUESTION FOR JURY.

In an action for injury to a child about six years old while attempting to ride on a moving train, whether the railroad company was negligent *held* for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 917-919; Dec. Dig. § 282.*]

Appeal from District Court, Dallam County; J. N. Browning, Judge.

Action by Aaron Cushman, by next friend, against the Ft. Worth & Denver City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Spoons, Thompson & Barwise, J. M. Chambers, and D. B. Hill, for appellant. Stephens & Miller and Hyde & Stalcup, for appellee.

CONNOR, C. J. This suit was instituted by the father of Aaron Cushman, as next friend, for damages to his said son, a minor, about eight years old. It was alleged that Aaron Cushman had one of his feet cut off by one of appellant's trains on a transfer track in Dalhart, Tex., and it was charged that appellant was guilty of negligence in permitting children to play on its right of way, to ride on its cars while switching and moving, and in failing to keep a watchman in the switchyards, etc. The defense consisted of pleas of denial and pleas of contributory negligence.

Briefly stated, the evidence shows that the line of appellant's railway at the point in question extends from the southeast to the northwest; that the Chicago & Rock Island Railway extends from the northeast to the southwest, crossing appellant's line at about a right angle; that from a point on the Rock Island Railway, some distance south of the crossing of the two lines, a transfer track extends in a semicircle north and west to a connection with the Ft. Worth & Denver north of said crossing, this transfer track being about half a mile in length; that Aaron Cushman, then a child of about six years of age, together with three or four other small boys, ranging from eight to twelve years old, was sitting near what is designated in the testimony as the "ice-house"; that this icehouse is on the east side of the Rock Island Railway, south of the crossing of the two railways and a short distance north of the south end of said transfer track; that this transfer track was used

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for the purpose of transferring cars from one line of railway to the other, and on the occasion in question one of appellant's train crews was engaged in so transferring a number of cars that were standing on the southern end of the transfer track. The testimony shows that a brakeman was standing on the south end of the string of cars and another located about the center of the train. The engineer testifies that, as he came down from the Ft. Worth & Denver track to get the cars, he saw the little boys about the icehouse, but that after coupling on to the train and proceeding back toward the Ft. Worth & Denver main line he soon passed out of their vision. The evidence further indicates that several, perhaps all, of the little boys, including Aaron Cushman, left their position at the icehouse and ran across to the transfer track, some 20 feet away, and boarded the moving train. Some of the boys clung to ladders, but Aaron Cushman grasped some slight projection in the open doorway of one of the cars, and swung his feet to and upon a supporting rod extending from the front to the back end of the car, and, after riding a short distance in this position, he slipped and fell off, as he testified, and had one of his feet severed. He testified that he had ridden but some 5 or 6 steps, but there was other testimony indicating that he had perhaps ridden to a point about 90 feet from the appellant's main line. Aaron testified that at the time he got upon the car, as stated, it was going slow enough to enable him by running along the side to get upon it, but that a little later it began to go more rapidly, when he slipped and fell off. The approach of the boys to the train was on the convex side of the curve, and out of view of the fireman, and of the engineer, as he testifies, and perhaps of the middle brakeman; the testimony showing that this brakeman was sitting on top of one of the cars about the center of the train on the western or concave side of the train. Neither of the brakemen testified upon the trial, but appellant's car foreman, Osborne, testified that at the time the boy was hurt he was "something like 90 feet away from him," that he did not see the boy at the time he fell off, but saw him as he was struggling to get up from the ground. The testimony of this witness also develops that one Scott, one of appellant's track walkers, was also there working with Osborne, and it does not appear that Scott testifies. There was also testimony tending to show that for several years the transfer track and adjacent grounds were frequented by little boys of the town, which was practically bisected by appellant's line of railway, and that it was a very common occurrence for them to ride moving trains and play upon the cars, and there was evidence that no watchman had been stationed at the playground in question, and that no objection to this practice had been made. The country was level and the view generally unobstructed.

The court, after giving definitions of negligence and contributory negligence, and after defining appellant's duty to exercise ordinary care to avoid injury to children in the habit of playing upon and riding moving cars, if the jury found there was such custom, the court further gave the following charge, which is objected to: "Bearing in mind the foregoing definitions and instructions, if you believe and find from the evidence that the plaintiff, Aaron Cushman, at the time and place alleged in his petition, caught and held on to a moving train then and there being operated by the servants and employes of defendant, and while so holding on to said moving train he fell under the wheels of the moving cars, and received the injuries complained of, and you further find from the evidence that the servants and employes operating said train, or any of them, knew that the plaintiff had or would catch and hold on to said moving train, and if you further find and believe that the plaintiff at that time was incapable, by reason of his age, to understand and appreciate the danger incident to his catching and holding on to said moving train, then and in such case, if you so find and believe, you will find for the plaintiff, and assess his damages as hereinafter directed. If you do not so find and believe from the evidence, you will find for the defendant." It seems apparent without discussion that the clause of the charge quoted is subject to the objection urged, "that it authorized a verdict for plaintiff for his injuries, regardless of whether or not such injuries resulted from any negligence on the part of defendant or its employes." It is evident that the court made appellant's liability conclusive if under the other circumstances submitted in the charge any of the employes operating the train "knew that the plaintiff had or would catch and hold on to said moving train." The evidence perhaps raises the inference that one or more of the operatives of the train either did or might in the exercise of ordinary care have seen the boys after they left the icehouse with the evident purpose of getting upon the train, and, if any halt in the movement of the train, any warning or other thing to avoid injury to the boys was done, it was not developed in the evidence, but nevertheless it was for the jury, and not the court, to say whether any warning or effort under the circumstances would have availed. In other words, a necessary element of plaintiff's recovery was negligence on appellant's part proximately causing the final result, and the charge manifestly took this issue from the jury, because of which the judgment must be reversed.

Appellant further insists with much force that the evidence conclusively shows that it was not guilty of any negligence, and that the judgment, therefore, should be reversed and here rendered against appellee. The subject of a railway's duty to trespassing child-

ren has been so frequently and variously discussed in adjudicated cases that it seems profitless to review the decisions or attempt to draw distinctions available here. In many cases it has been held that it is not the duty of a railway company to guard its cars against them. See 3 Elliott on Railways, § 1260, and authorities cited in note 116, and appellant cites in support of its contention the case of *St. Louis Southwestern Ry. Co. v. Davis* (recently decided by the Court of Civil Appeals for the Sixth District) 110 S. W. 939. Every case, however, we think must depend for the most part on its own peculiar circumstances. Many authorities, and, as we think, the better reason, always require those engaged in a dangerous business to at least exercise ordinary care in conducting such business to avoid loss of life or limb of a trespasser even when a reasonable probability of such injury is known, or where in the exercise of ordinary care it would have been known; and we think that such rule is unquestionably to be applied in the protection of a trespassing child of such tender years as to be devoid of discretion, and that might be reasonably contemplated to act upon the childish impulse to assume a position of danger. *Railway Co. v. Abernathy*, 28 Tex. Civ. App. 613, 68 S. W. 539; *Ollis v. Railway Co.*, 31 Tex. Civ. App. 601, 73 S. W. 30; *Davis v. Railway Co.*, 92 S. W. 831; *Railway Co. v. Edwards*, 90 Tex. 65, 36 S. W. 430, 32 L. R. A. 825; *North Tex. Const. Co. v. Bostick*, 98 Tex. 239, 83 S. W. 12.

While the case of *Railway Co. v. Davis* so strongly pressed upon us in behalf of appellant is forceful, we yet think it distinguishable from the case before us in several particulars. The minor there in question was at the time of his injury of somewhat more mature age. He had been warned against riding the moving train, and the court finds that it conclusively appears that the operatives of the train did not know that he had boarded it. In the case we have, however, Aaron Cushman was but about six years old at the time of his injury, and it is not even contended before us that a child of such tender age has sufficient discretion to understand the danger of his undertaking, and, when the evidence tending to show the long-continued practice of the little boys of Dahlart to jump upon and ride trains is considered, together with the unobstructed view of the situation, the testimony of the engineer that he saw the boys so near, the situation of the brakeman upon the train, the absence of any denial on their part of the want of observation or knowledge, thus raising perhaps an inference that they not only saw the little boys at the icehouse, and hence could have reasonably contemplated the action taken by them, but further saw them after a manifestation of their purpose to get upon

the moving train, with other circumstances, all render in our judgment the question of negligence chargeable to appellant one for the jury.

For the error in the court's charge, the judgment is reversed, and the cause remanded.

ST. LOUIS, I. M. & S. RY. CO. v. GILBREATH.

(Supreme Court of Arkansas. Oct. 26, 1908.)

1. CARRIERS (§ 298*)—CARRIAGE OF PASSENGERS—OBLIGATION OF TRAINMEN.

Trainmen, operating a freight train carrying passengers, must, after the caboose has been drawn up to a station to receive passengers, anticipate the presence of passengers in the caboose and exercise care not to injure them.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1205, 1206; Dec. Dig. § 208.*]

2. CARRIERS (§ 347*)—PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a passenger on a freight train, injured by a car striking the caboose while uncoupled from the train, was guilty of contributory negligence because he was standing up in the caboose at the time of the accident, notwithstanding a notice posted therein warning passengers of the danger of standing up, *held* for the jury.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 347.*]

3. NEGLIGENCE (§ 135*)—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Contributory negligence must be proved, either by direct evidence or by evidence of circumstances from which it may be inferred.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 275; Dec. Dig. § 135.*]

4. CARRIERS (§ 344*)—INJURIES—PASSENGERS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF.

A bare admission of a passenger on a freight train that he was standing up in the caboose when injured does not create a prima facie case of contributory negligence, so as to cast on him the burden of proving his freedom therefrom.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1399; Dec. Dig. § 344.*]

5. CARRIERS (§ 344*)—PASSENGERS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Where negligence of a carrier, resulting in injury to a passenger, is established, the burden is on it to prove the contributory negligence of the passenger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1399; Dec. Dig. § 344.*]

6. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE.

It is not error to refuse requested instructions covered by the instructions given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 651; Dec. Dig. § 260.*]

Appeal from Circuit Court, Franklin County; Jephth H. Evans, Judge.

Action by L. P. Gilbreath against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Lovick P. Miles, for appellant. Sam R. Chew, for appellee.

McCULLOCH, J. Appellee boarded, at Ozark, Ark., the caboose of a local freight train, which carried passengers, for the purpose of taking passage to Altus, the next station on appellant's road. When he entered the caboose it was standing at the station, but was soon pulled down to the east end of the yards and uncoupled from the train while switching was being done. A car was backed or kicked in on the track where the caboose was standing, and struck it with such force that appellee was thrown down and received serious injuries to his person, for which he sues to recover damages. He testified that when he entered the caboose he sat down on one of the stationary seats running lengthwise of the car, and remained seated until the violent impact of the cars threw him off the seat to the floor. It threw him a distance of six or eight feet, and severely bruised his head, shoulder, and hip on the left side of his body. He testified, also, that the cars came together with great and unusual force.

Appellant proved that a printed notice was posted in the caboose warning passengers of the danger of standing up while switching was being done. The conductor and one of the brakemen testified that appellant stated to the former, immediately after the accident, that he was standing up in the caboose when the shock came, and he was thrown down. He denied having made this statement. The evidence tends to establish the fact that the conductor knew that appellee had entered the caboose as a passenger, and was in there when the other car was backed or kicked against it with extraordinary violence. But whether he actually knew of appellee's presence or not, he was operating a train which carried passengers, the caboose had just been drawn up to a station for the purpose of receiving passengers, and he, as well as all of the other trainmen, were bound to anticipate the presence of passengers aboard the caboose, and to exercise care not to injure them. *St. Louis, Iron Mountain & South. Ry. Co. v. Harmon*, 85 Ark. 503, 109 S. W. 295.

The court refused to instruct the jury, at appellant's request, that, "if the plaintiff was standing up at the time the cars came together, then, in the absence of any explanation of why or how long he was standing, he cannot recover." The instruction was properly refused. This court has repeatedly held that it is not necessarily negligence for a passenger on freight train to stand up, but that it is generally a question for the jury to decide under the circumstances disclosed in each case. *Pasley v. Railway Co.*, 83 Ark. 22, 102 S. W. 387; *Railway v. Brabbzson*, 112 S. W. 222; *Same v. Richardson*, 112 S. W. 212.

Contributory negligence is never presumed from the mere silence of the record as to the

particular circumstances, but must be proved, either by direct evidence or by evidence of circumstances from which it may be inferred. A bare admission on the part of a passenger that he was standing up when injured does not make a case of negligence per se, nor create a prima facie case of negligence, so as to cast upon him the burden of proving the circumstances and clearing himself of the charge. When negligence on the part of the carrier is established by evidence, the burden is upon the carrier to prove contributory negligence of the injured passenger. *Railway Co. v. Eubanks*, 43 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245; *Same v. Cavenesse*, 48 Ark. 106, 2 S. W. 505; *Hot Springs St. Rd. v. Hildreth*, 72 Ark. 572, 82 S. W. 245; *C. O. & G. Ry. Co. v. Dougherty*, 77 Ark. 1, 91 S. W. 768.

Complaint is made at the refusal of the court to give certain other instructions asked by appellant; but we think the matters therein contained were sufficiently covered by other instructions given, and no error was committed.

Judgment affirmed.

WRIGHT v. BOLTZ.

(Supreme Court of Arkansas. Oct. 26, 1908.)

1. VENDOR AND PURCHASER (§ 33*)—MISREPRESENTATIONS BY VENDOR—RIGHTS OF PURCHASER.

A purchaser, seeking to rescind for false representations, must show that he was induced to purchase thereby, that he relied thereon, and had a right to do so.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 33.*]

2. VENDOR AND PURCHASER (§ 33*)—MISREPRESENTATIONS—RIGHT TO RESCIND.

A purchaser is not entitled to rescind for misrepresentations by the vendor and his agents as to the quantity or kind of timber on the land and as to the land's value and productiveness, where he availed himself of abundant opportunity to inspect the land and timber, including a visit during a crop season.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 33.*]

Appeal from White Chancery Court; Jesse C. Hart, Judge.

Suit by W. L. Wright against S. E. Boltz. From a decree for defendant on his cross-bill, plaintiff appeals. Reversed and remanded, with directions.

Cypert & Cypert, for appellant. Rachels & Johnston, for appellee.

McCULLOCH, J. Appellant owned a tract of land in White county, Ark., containing 861.55 acres, farm and timber land, and sold it to appellee for \$17,600, taking in exchange a farm in Illinois owned by appellee at the estimated value of \$7,000, which was credited on the purchase price of the Arkansas land. There was a mortgage on the land for \$6,750, executed by appellant, which ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

pellee assumed, and that, too, was credited on the purchase price. The balance of the purchase price is evidenced by notes executed by appellee, which are recited in the deed and constitute a lien on the land conveyed. Appellant instituted this suit in the chancery court of White county to enforce his lien on the land, as vendor, for unpaid accrued interest on the notes and for taxes on the land, which he had paid in order to protect it from sale; and appellee filed his cross-complaint against appellant, seeking to cancel the sale on the alleged ground of fraudulent misrepresentation on the part of the vendor and his agent concerning the value of the land and quantity and value of timber thereon. The chancellor granted the relief prayed in the cross-complaint.

Appellee, up to the time that he purchased the Arkansas land, resided in Clay county, Ill., where he owned and occupied a small farm. Appellant lived in Missouri, but owned the Arkansas land, and placed it for sale in the hands of a real estate agent or broker named Martin, at Searcy, Ark.; the land being situated only a few miles distant from that place. Correspondence began in February, 1904, between appellee and Martin concerning the sale of the land, and continued up to the consummation of the trade, which occurred on November 23, 1904, at a meeting in St. Louis appointed for that purpose between appellant and appellee. Appellee came to Arkansas in March, 1904, and looked at the land, and returned again in September, 1904, when he spent two or three days and nights on the place inspecting it. Appellant met him there by appointment. The allegations of the cross-complaint concerning misrepresentations made by appellant and his agent, Martin, take a very wide range, including, not only matters affecting the lands sold, but also the manifold superior advantages afforded to those who are fortunate enough to live in this state, and particularly in the locality where these lands are situated. The chancellor, however, based his decree on a finding that misrepresentations were made concerning the quantity and value of the timber on the lands.

We are of the opinion that the decree is not correct. It is well settled that a vendee of land, seeking a cancellation of the sale on account of alleged false representations of his vendor, must show that the representations induced him to purchase, that he relied upon them, and had the right to rely upon them in belief of their truth. *Yeates v. Pryor*, 11 Ark. 58; *Matlock v. Reppy*, 47 Ark. 148, 14 S. W. 546; *Neely v. Rembert*, 71 Ark. 91, 71 S. W. 259. This court, in *Yeates v. Pryor*, supra, laid down the rule that "misrepresentations, in order to affect the validity of the contract, must relate to some matter of inducement to the making of the contract, in which, from the relative position of the parties and their means of information, the one must necessarily be pre-

sumed to contract upon the faith and trust which he reposes in the representations of the other, on account of his superior information and knowledge in regard to the subject of the contract; for if the means of information are alike accessible to both, so that with the ordinary prudence or vigilance the parties might respectively rely upon their own judgment, they must be presumed to have done so." And this court, in *Neely v. Rembert*, supra, speaking of the rule charging a purchaser of land who has had an opportunity to inspect for himself with "all the knowledge which he might have obtained had he pursued the inquiry to the end," said: "One ground of the rule is stated to be the practical impossibility, in any judicial proceeding, of ascertaining exactly how much knowledge a party who has examined before purchase has obtained by his inquiry, and the opportunity which a contrary rule would give to a party of repudiating an agreement or other transaction, fairly entered into, with which he had become dissatisfied."

The evidence discloses the fact that appellee twice visited the lands for the purpose of inspecting them in contemplation of a purchase, that he had abundant opportunity to examine the lands and timber, and did examine them. It is not claimed that any definite representation was made to him as the quantity or kind of timber on the land. He merely states: "Mr. Martin said there was enough on the place to pay for it, and Mr. Wright said in St. Louis there was enough timber on the place to pay half of the purchase money." These statements were obviously only expressions of opinion, not intended to be taken literally, as appellee knew that less than half of the land was unimproved, and could not have relied on the statement that the timber was worth the whole of the purchase price, or even half of it.

The same may be said of the alleged misrepresentation concerning the value and productiveness of the land. At least one of his visits to the land was during the crop season, and he was invited to make the visit in order to see the land and judge of its productiveness. That he availed himself of the opportunity shows that he traded on his own judgment, rather than that of the vendor and his agent. That he was influenced to some extent by the too favorable opinion expressed by the agent concerning the value of the land and its future possibilities is very probable; but that is not sufficient to justify a court of equity in setting aside the contract of sale. Upon the whole, we think the evidence does not entitle appellee to the relief sought.

The decree is therefore reversed, and the cause is remanded for further proceedings, and with directions to enter a decree in favor of appellant for the amount found to be due him.

HART, J., disqualified.

ST. LOUIS & S. F. R. CO. v. STATE.

(Supreme Court of Arkansas. Oct. 26, 1908.)

1. COMMERCE (§ 33*)—DOMESTIC COMMERCE OF STATES.

To bring a transportation of freight within the control of a state as a part of its domestic commerce, the subject transported must be for the entire distance carried under the exclusive jurisdiction of the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 33.*]

2. COMMERCE (§ 33*) — "INTERSTATE COMMERCE."

A continuous transportation of freight between points within a state is "interstate commerce," free from the interference of the state, where a part of the route is outside of the state because of the unsafe condition of a bridge forming a part of the line of road in the state between such points.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

Appeal from Circuit Court, Randolph County; J. W. Meeks, Judge.

Action by the state against the St. Louis & San Francisco Railroad Company. From a judgment for the state, defendant appeals. Reversed, and action dismissed.

W. F. Evans and W. J. Orr, for appellant.

BATTLE, J. The state of Arkansas seeks to recover, by this action, of the St. Louis & San Francisco Railroad Company the penalty prescribed by statute for transporting freight at a greater rate than is allowed by the laws of this state. The issues in the case were tried upon an agreed statement of facts, which is as follows:

"It is stipulated and agreed that at all the times mentioned in the complaint the defendant was and now is a railroad corporation, organized under the laws of the state of Missouri and operating a line of road in and through the counties of Clay, Greene, Randolph, Mississippi, Poinsett, Lawrence, Craighead, Sharp, and Fulton, in Arkansas, and through many counties in Missouri.

"That prior to May 3, 1907, it operated a line of road through Hoxie and Cape Girardeau, via a bridge over and across Black river near Pocahontas, Ark.; also a line between Hoxie and Jonesboro, this forming a line between Cape Girardeau, Mo., and Jonesboro, Ark.; that Pocahontas and Biggers are stations on said line.

"That prior to May 3, 1907, defendant received and transported car load shipments over the said line between the stations of Biggers, Pocahontas, and Jonesboro, and other stations, over said bridge.

"That said bridge is the property of the Randolph County Bridge Company, a corporation organized under the laws of Arkansas.

"That on May 3, 1907, said bridge was

condemned by the civil engineers as unsafe for the passage of trains, and was unsafe for the passage of trains to the present time; that since May 3, 1907, defendant has transported all car load shipments between Biggers and Jonesboro and Pocahontas and Jonesboro via Poplar Bluff, Cape Girardeau, or Chaffee, stations in Missouri, and via Big Creek, Ark., over a line operated by this defendant via said last-named station, and it has refused to route any car load shipments via the Pocahontas bridge over Black river because of the unsafe condition of said bridge.

"That it has applied the tariff rates established between Pocahontas and Jonesboro, and Biggers and Jonesboro, via Poplar Bluff and Cape Girardeau, and not the tariff which would apply between Biggers, Pocahontas, and Jonesboro via the bridge.

"That it has not since May 3, 1907, routed any car load shipments between the last-named places via the Pocahontas or Black River bridge, or via Hoxie, Ark.

"That the rates charged by the defendant since May 3, 1907, on car load shipments via its line through Missouri and between Biggers, Pocahontas, and Jonesboro exceeds the rates fixed by the Railroad Commission of Arkansas and in force during said period between said stations via the Pocahontas or Black River bridge."

The plaintiff recovered a judgment for \$500, and the defendant appealed.

The only question in the case is, were the charges appellant was authorized to make and collect for transporting freight between the points named above controlled by the laws of Arkansas? This question was decided in *Hanley v. Kansas City Southern Railway Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333. The facts in that case as stated in the opinion were as follows: "The plaintiff owns a road running through several states and territories. The road, after leaving Missouri, runs for 28 miles and a fraction through Arkansas to the dividing line between that state and the Indian Territory, then nearly 128 miles in the territory, and then over 117 miles in Arkansas again to Texas. There is also a branch line running from Ft. Smith, in Arkansas, to Spiro, in the Indian Territory, about a mile of which is in the state and 15 in the territory; and there are other branches. Goods were shipped from Ft. Smith, by way of Spiro and the road in the Indian Territory, to Grannia, in Arkansas, on a through bill of lading; the total distance being a little more than 52 miles in Arkansas and nearly 64 in the Indian Territory. For this the railroad charged a sum in excess of the rate fixed by the railroad commissioners, and was summoned before them under the state law. The commissioners decided that the company was liable to a penalty under the state statute,

assert their right to fix rates for continuous transportation between two points in Arkansas, even when a large part of the route is outside the state, through the Indian Territory or Texas, and intend to enforce compliance with these rates." The court held that the transportation of the goods in that case was interstate commerce, and was under the regulation of Congress, free from interference by the state of Arkansas, and that "to bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be" for the entire distance carried "under the exclusive jurisdiction of the state."

Following *Hanley v. Kansas City Southern Ry. Co.*, we hold that the transportation of goods in this case was interstate commerce, and was under the regulation of Congress, free from the interference of the state of Arkansas, and that no penalty is recoverable in this action.

Judgment is reversed, and the action dismissed.

ST. LOUIS, I. M. & S. RY. CO. v. LAVENDUSKY.

(Supreme Court of Arkansas. Oct. 26, 1908.)

1. RAILROADS (§ 392*)—INJURY TO PEDESTRIANS—UNAUTHORIZED ACTS—LIABILITY OF COMPANY.

A railroad company is not liable for injury to a pedestrian walking through its yards, caused by a yard master throwing coal from a freight car in violation of company rules; that act being beyond the scope of his employment and not being beneficial to the company.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 902; Dec. Dig. § 392.*]

2. RAILROADS (§ 359*) — TRESPASSERS ON TRACKS—WHO ARE.

One walking along a path in a railway yard, not a public highway, was a trespasser.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1238; Dec. Dig. § 359.*]

3. RAILROADS (§ 392*)—TRESPASSERS—DUTY OF COMPANY.

The rule making railway companies liable for injuries to trespassers caused by failing to exercise ordinary care to avoid injuring them after their perilous situation has been discovered does not apply, where the servant's acts causing the injury are beyond his authority.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 902; Dec. Dig. § 392.*]

Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

Personal injury action by Stanley Lavendusky, by his next friend, Antony Lavendusky, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for new trial.

Walter Lavendusky, a lad about nine years old, was walking by the side of appellant's railroad track in its yards at the town of Denning, Ark. While Lavendusky was thus walking, the yard master of appellant threw

from one of its freight cars as it passed along the track a large lump of coal, which struck the lad upon his head, severely injuring him. An eyewitness testified that the yard master was looking down towards young Lavendusky when he threw the coal off. It was shown that the switch or yard crew of appellant threw coal off its cars near where one Kelly lived "pretty often," and that this had been done for a year or two. The witness explained that the crew would throw the coal off "sometimes every day, and then again they would check up, and not throw off any for a few days, and then they would go to throwing it off again." It was shown that after the cars were loaded with coal they were taken down into appellant's yard. The cars were under the supervision of appellant's yard master. The coal on the cars did not belong to the yard master, but to the parties to whom it was billed. Neither the yard master, nor any switchman, nor any one connected with the yard service, had any authority to throw coal from the cars. When this was done, it was in direct violation of the rules of the company. It was not done for the benefit of appellant. When Lavendusky was injured, he was in a path along the railroad "where all the people passed." He was about 10 or 15 yards from the public road. These are the undisputed facts, upon which appellee recovered a judgment against appellant for \$2,500, which this appeal seeks to reverse.

Lovick P. Miles, for appellant.

WOOD, J. (after stating the facts as above). It was beyond the scope of the employment of the yard master to throw coal from appellant's car in the manner shown by the evidence. Appellant had not invested him with such authority, either real or apparent. The act was not for the benefit of appellant, and was a tort, for which appellant was not liable. *St. L., I. M. & S. Ry. Co. v. Grant*, 75 Ark. 579, 88 S. W. 580, 1133; *St. L. S. W. Ry. Co. v. Bryant*, 81 Ark. 369, 99 S. W. 693; *Railway Co. v. Bolling*, 59 Ark. 395, 27 S. W. 492.

The evidence does not show that Lavendusky was upon the public highway. It is not shown that the path where he was at the time of his injury was a part of the public highway. He was therefore a trespasser. *Adams v. St. L., I. M. & S. Ry. Co.*, 83 Ark. 300, 103 S. W. 725; *St. L., I. M. & S. Ry. Co. v. Wilkerson*, 46 Ark. 513. The appellant owed him no positive duty to exercise ordinary care to protect him from injury. The doctrine that railway companies are liable for injuries to trespassers caused by failing to exercise ordinary care to avoid injuring them after their perilous situation has been discovered can have no application in cases where the servant's acts causing the injuries

are beyond the scope of their employment.

The case of *Fletcher v. Baltimore & P. Ry. Co.*, 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411, relied upon by appellee, is not in point. Fletcher, the plaintiff in error, at the time of his injury was upon a street crossing, where he had the right to be, and where the company owed him the duty to exercise ordinary care to avoid injuring him. Likewise, in the case of *St. L. S. W. Ry. Co. v. Underwood*, 74 Ark. 610, 86 S. W. 804, the party injured was upon the public street. Other reasons, also, distinguish these and other cases, relied upon by counsel for appellee in his oral argument, from the case at bar.

For the reasons expressed, the judgment is reversed, and the cause is remanded for a new trial.

BAKER v. STATE.

(Supreme Court of Arkansas. Oct. 26, 1908.)

1. PERJURY (§ 33*)—FALSITY OF TESTIMONY—EVIDENCE.

On a trial for perjury, based on accused falsely testifying that a note executed by him was accommodation paper, the recital in the note that it was given for a valuable consideration is not sufficient to establish the falsity of the testimony, though it may be considered in corroboration of direct evidence of falsity.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 123; Dec. Dig. § 33.*]

2. PERJURY (§ 31*)—FALSITY OF TESTIMONY—EVIDENCE.

On a trial for perjury, the falsity of the testimony, which is the basis of the accusation, must be affirmatively proven.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 31.*]

3. PERJURY (§ 33*)—FALSITY OF TESTIMONY—EVIDENCE.

On a trial for perjury, based on accused falsely testifying in a civil action that at the time he executed a note to a bank he obtained a receipt from the cashier stating that the note was accommodation paper, the state offered no evidence that a receipt was not given, but showed that after the cashier had absconded the attorney for accused procured a duplicate receipt. Accused testified that he had found the original and had exhibited it at the trial of the civil action. It was not proved that this testimony was false and that he had exhibited the duplicate. One who had been attorney in the civil action testified that the copy of the receipt exhibited by accused varied from the duplicate produced by the state. *Held*, that the failure of accused to exhibit on his trial either the original or duplicate receipt affected only the credibility of his testimony, and was not evidence of the falsity of the testimony in the civil action.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 123; Dec. Dig. § 33.*]

Appeal from Circuit Court, Sevier County; Jas. S. Steel, Judge.

H. N. Baker was convicted of perjury, and he appeals. Reversed, and remanded for new trial.

Wm. F. Kirby, Atty. Gen., and Daniel Taylor, Asst. Atty. Gen., for the State.

McCULLOCH, J. Appellant, H. N. Baker, was indicted by the grand jury of Polk county for the crime of perjury, alleged to have been committed by giving material false testimony in the trial of a civil action pending in the circuit court of that county wherein J. H. Skillern, as receiver of the Howard County Bank, was plaintiff, and said H. N. Baker was defendant. A trial of the case, on change of venue, in the circuit court of Sevier county, resulted in conviction of the accused, and he appealed to this court.

The facts of the case are as follows: On September 2, 1902, appellant executed to the Howard County Bank, of Nashville, Ark., his negotiable promissory note in due form for the sum of \$568.30, payable 90 days after date. The bank was subsequently adjudged to be insolvent and its assets were placed in the hands of a receiver. Skillern was appointed as receiver, and instituted an action at law against appellant to recover the amount of the note. On the trial of that case appellant, in support of his defense to the action, testified that there was no consideration for the note, that he executed it to the bank as accommodation paper to enable it to use the note as collateral to borrow money on, and that at the time of the execution of the note the cashier of the bank, one D. P. Terry, executed to him a written receipt, which he exhibited to the trial jury, stating that the instrument was an accommodation note. This is the testimony that is alleged to be false, and its material bearing upon the issue involved in that case is obvious. It is sufficiently proved that the appellant gave the testimony above recited in the trial of said civil action, and that he exhibited to the jury a writing which he testified was the receipt given him by Terry, the bank cashier, at the time he executed the note, stating that the note was executed as accommodation paper. The defect in the evidence is in its failure to establish the falsity of appellant's testimony.

It will be seen that the alleged false testimony consists of two statements: One, that the note was executed for accommodation; and the other, that the cashier gave appellant at the time a written receipt showing that it was accommodation paper. There is no evidence at all in this record that the statement in the first-named particular was false. No testimony at all was introduced by the state tending to show that the note was not in fact given as accommodation paper. The note was introduced, reciting on its face that it was given for a valuable consideration, and that would have been legally sufficient in a civil action to sustain a recovery for the amount of the note, even in the face of appellant's testimony that it was in fact given as accommodation paper and without consideration; but in a criminal prosecution for perjury the recitals of the note do not

prove the falsity of appellant's testimony. It will not do to say that the mere recitals of the note are sufficient to convict the appellant of falsely swearing in contradiction of those recitals. The recitals might be considered in corroboration of some direct testimony of the falsity of appellant's testimony; but they are not sufficient to establish its falsity. In prosecutions for perjury, the falsity of the testimony which is the basis of the accusation must be affirmatively proved. In *Blevins v. State*, 85 Ark. 195, 107 S. W. 893, we said: "The falsity of the testimony is a material ingredient of the offense. It is the gist of the offense, and must be proved as alleged. The mere improbability of the truth of the testimony given, without affirmative proof of its falsity, is not sufficient, in a prosecution for perjury, to establish its falsity."

Nor is there any proof that the cashier did not give the receipt testified to by appellant. Neither Terry, the cashier, nor any other witness, was introduced to show that a receipt was not given. The state introduced testimony to the effect that, after Terry absconded and fled to Mexico, appellant, through the latter's attorney (who was also appellant's attorney in the civil action), procured from Terry a receipt, which he claimed was a duplicate of the one given at the time of the execution of the note, and paid him \$50 to execute the duplicate. But appellant testifies that he found the original, and that it was the original which he exhibited at the trial of the civil action. It is not proved that this was false, and that appellant exhibited the so-called duplicate, which he obtained from Terry while in Mexico. One of the attorneys for the plaintiff in the civil action testified in the trial of the present case that at the former trial he copied precisely the receipt exhibited by appellant; but the copy which he made varies from the copy of the duplicate adduced by the state in evidence, in that the former copy contains several words which do not appear in the latter. The identical paper which appellant exhibited at the trial of the civil action was not filed as a part of the record of that case, and appellant did not, at the trial of the present case, produce either the original, which he claimed that Terry gave him when he executed the note, or the duplicate, which Terry sent him from Mexico. His failure to do so, however, affected only the credibility of his testimony in the present trial, and did not tend to establish the falsity of his testimony in the trial of the civil action. It gives his story an appearance of improbability, but does not furnish affirmative proof of its falsity. It might serve as corroboration, if there was any direct evidence of the falsity of his testimony; but it is not affirmative evidence of the falsity of the testimony given at the trial of the civil

action. We therefore find no evidence upon which the verdict of conviction can be sustained, and the judgment must be reversed.

There are numerous other assignments of error in the motion for new trial; but, as appellant's counsel has not favored us with an argument of the other question relied on for a reversal, we need not discuss them.

On account of the legal insufficiency of the evidence, the judgment of conviction is reversed, and the cause is remanded for a new trial.

MULLINS et al. v. COLUMBIA COUNTY BANK.

(Supreme Court of Arkansas. Oct. 26, 1908.)

1. TRIAL (§ 412*)—RECEPTION OF EVIDENCE—SECONDARY EVIDENCE—WAIVER OF CONDITIONS OF ADMISSION.

Plaintiff waived the conditions precedent to the admissibility of secondary evidence of the contract evidencing the transaction in question on the part of defendant, where it introduced copies of the contract, which were competent secondary evidence; it not having possession of the original.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 976; Dec. Dig. § 412.*]

2. APPEAL AND ERROR (§ 802*)—RESERVATION OF GROUNDS OF REVIEW—MOTION FOR NEW TRIAL—SUFFICIENCY OF STATEMENT OF GROUNDS.

Where an exception was taken to a ruling excluding from the jury part of a deposition after it had been read, which was the only evidence excluded, and the motion for a new trial urged error in excluding "Exhibit C," attached to the deposition, but concluded "that the evidence excluded was admission (adduced) by the plaintiff, which could not be withdrawn and became a part of the evidence in the cause when filed," the motion was sufficiently specific to include as a ground the court's ruling in excluding all the portion of the deposition not admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1747; Dec. Dig. § 302.*]

Appeal from Circuit Court, Columbia County; G. W. Hays, Judge.

Action by the Columbia County Bank against J. E. Mullins and another. There was a directed verdict for plaintiff, and defendants appeal. Reversed, and remanded for a new trial.

Stevens & Stevens, for appellants. McKay & Lile, for appellee.

BATTLE, J. The Columbia County Bank instituted an action against J. E. Mullins and U. C. Mullins on two promissory notes executed by the defendants to the order of J. C. Karner for \$147 each and transferred by payee to the plaintiff. The defendants answered, and alleged, in part, as a defense thereto, that the notes were given by them in payment of "patent right territory" and "were not executed upon a printed form showing upon their faces that they were executed in consideration of said patent right territory,"

as is required by sections 512, 513, and 514 of Kirby's Digest of the Statutes of Arkansas.

The issues in the case were tried by a jury. The notes sued on did not show on their faces for what they were given. The deposition of J. C. Karner, to whom the notes were executed, which was taken by agreement, upon interrogatories, to be read as evidence in behalf of plaintiff, was read as evidence by plaintiff in the trial. He testified that the notes sued upon were executed by the defendants to him, and further testified upon interrogatories, in part, as follows:

"Q. Did you execute to him [them] a receipt for these two notes?

"A. Yes.

"Q. Does this receipt show in full for what these notes were given?

"A. Yes.

"Q. If you executed to them a receipt, will you attach a copy of same, marked 'Exhibit B,' and make it a part of your deposition?

"A. I have done so.

"The following is the receipt, marked 'Exhibit B':

"Received from J. E. and U. C. Mullins two hundred and ninety-four dollars in full payment for seventy royalty checks for \$4.20 each, being advanced royalty on Karner sash locks, the purpose of which is to carry locks in stock ready for shipment to such points in the United States as they may direct.

"[Signed] Jo C. Karner."

"Q. Did you employ them to represent you in the sale of Karner sash locks?

"A. Yes.

"Q. Did you have a written contract to that effect?

"A. Yes.

"Q. If so, will you please attach a blank copy of that contract, marked 'Exhibit C,' and make it a part of your deposition?

"A. I have done so; that is, I attach an exact copy of the printed part, which contains the terms of the agreement. I do not remember names of counties, etc., and cannot fill blanks.

"Exhibit C is in the following words and figures:

"This is to certify that Jo C. Karner, of Mexia, Texas, is the exclusive owner of letters patent No. 686,673, for an improved automatic window lock to be hereafter known as the "Karner sash lock." I have therefore this day appointed or legal representatives, sole and exclusive agents for the sale of the Karner sash lock in the county of, state of, in which to begin work, and from one year from date hereof I hereby authorize said agent to order locks from Nickel Manufacturing Co., of Morris, Ill., and I join said manufacturers in agreeing to furnish said agents all the sash locks may order at the price of one dollar and seventy cents (\$1.70) per dozen, according to my contract with them for furnishing the goods, a copy of which is hereto

attached. I further agree that for every sixty dozen locks ordered by said agent shall have exclusive control of an additional county for one year from date of selection, such election to be made by and upon any unoccupied county in the United States, and I agree to furnish with well-settled counties to select from five years from date hereof. Said agent having full authority to sublease any field accumulated under this contract for one year from date of selection. shall also have equal privilege with other agents of selling the Karner sash locks in the counties of, state of, for one year from date.

"I further agree to furnish free of charge one perfect model, one hundred order blanks, and one hundred cards with which to begin work on or before day of, A. D. 19...

"It is understood that for having leased the above field, and for any privileges which said agent may enjoy under this contract, I make no requirement of whatever further than that agrees to use ordinary diligence in selling said goods, and for not less than the established retail price of fifty cents.

"Given under my hand this day of, A. D. 19..."

"Q. For what were these notes given by them to you?

"A. For coupons.

"Q. Did you furnish them with coupon checks upon the Nickel Manufacturing Company, of Morris, Ill., for the amount of these notes with which to pay the said Nickel Manufacturing Company as much as 35 cents per dozen on every dozen 'Karner sash locks' that might be ordered by them from the Nickel Manufacturing Company?

"A. Yes.

"Q. If so, will you please attach a copy of said book of coupon checks, marked 'Exhibit D,' and make same a part of your deposition?

"A. I have so marked and attached one out of said book containing 70. They are all alike.

"Exhibit D is as follows:

"Morris, Ill.,

"Nickel Manufacturing Co., Morris, Ill.

"Upon presentation of this check, duly indorsed by one of my authorized managing agents, you will accept the same in payment of 35 cents per dozen, on 12 dozen Karner sash locks at the price of \$1.70 per dozen, and charge the same to my account on royalty.. [Signed] Jo C. Karner."

"Q. Who manufactured the Karner sash locks?

"A. The Nickel Manufacturing Co., of Morris, Ill.

"Q. Are they the sole manufacturers of this lock?

"A. Yes.

"Q. Is the Nickel Manufacturing Company under contract with you to manufacture the

Karner sash lock for you and your agents, under your special manager's contract, and to furnish same to you and your agents at \$1.70 per dozen, receiving your coupon check for \$4.20 as part payment on each 12 dozen locks so ordered?

"A. Yes."

J. C. McNeill, cashier of the plaintiff, was then introduced by plaintiff as a witness, and he testified substantially as follows: "Said he was cashier of the Columbia County Bank, and had been for some years; * * * was cashier of the bank in April, 1904; said the two notes executed on the 27th day of April, 1904, by J. E. & U. C. Mullins to J. C. Karner, were bought by the Columbia County Bank for a valuable consideration before maturity, in the regular course of business, without any notice that they were given for a patented instrument or for patent right territory, and that the bank was the owner of the notes, and was at the time the suit was brought." The plaintiff then closed.

The defendants then introduced U. C. Mullins, one of them, as a witness, and asked him what was the contract between defendants and Karner upon which the notes sued upon were based; and he said there was a written contract, but he did not have it, but J. E. Mullins did, and he (witness) did not know what had become of it. Upon objection of the plaintiff the court refused to allow him to answer the question. Defendants then asked witness "if J. C. Karner furnished a model and 100 order blanks with which to begin work as set out in Exhibit C to his deposition. The court refused to permit defendants to ask the witness any question pertaining to the contract between the parties, or of the consideration of the notes as testified to by J. C. Karner, and the court, of its own motion, took from the jury all of J. C. Karner's deposition," and Exhibits B, C, and D thereto, which are set out in this opinion, except that which says the notes were executed to him. To the exclusion of this evidence, and the refusal to allow the defendants to ask witness the questions, the defendants at the time excepted.

No other evidence being adduced, the court instructed the jury to return a verdict for plaintiff, and they did so for \$363.85.

The defendants moved for a new trial, in part, upon the following grounds:

"Because the court erred in excluding from the jury the paper, Exhibit C, attached to J. C. Karner's deposition in answer to question 15, where he says that he had a written contract with J. E. & U. C. Mullins to represent him in the sale of the Karner sash locks. The question propounded to him in question 14 is, in substance: 'Did you have a written contract with them to represent you in the sale of Karner sash locks? A. Yes. Question 15. If so, will you please attach a blank copy of the contract, marked "Exhibit C," and make it a part of your deposition. A. I have done so; that is, I at-

tached an exact copy of the printed part, which contains the terms of the agreement. I do not remember names of the counties, etc., and cannot fill blanks.' The court erred in excluding this evidence, the court's reason being that the original contract was not in the hands of the plaintiff, and that this evidence was the same as parol evidence to establish the contents of the contract. The court erred because this evidence had been introduced by plaintiff and had become part of the record in this case, to which there had been no exceptions filed, and on which evidence the defendants had relied in the trial of this case, and for it to be withdrawn in the trial of the cause works a hardship on the defendants and was a surprise to them, and because the court erred in not permitting the defendants to show the contents of the original agreement between J. C. Karner and them in the transaction made at the time of the execution of the notes sued on.

"That the evidence excluded was admissions (adduced) by the plaintiff, which could not be withdrawn, and became a part of the evidence in the cause when filed."

The court denied the motion, and the defendants appealed.

Evidence substantially the same as that excluded in this case was held by this court in *Columbia County Bank v. Emerson*, 110 S. W. 214, to be sufficient to sustain a good and valid defense to the action upon notes in that case, and to show that the notes were void, because in violation of section 513 of Kirby's Digest. But it seems the court excluded it in this case because it was an effort to prove the existence of writings by copies, instead of introducing the originals. But the copies were competent secondary evidence. The plaintiff had the right to waive the conditions on which their admissibility depended, and did so by adducing the evidence, and thereby gave to it its full force as evidence, and virtually admitted what he sought to prove. *Allen v. Ozark Land Co.*, 55 Ark. 549, 555, 18 S. W. 1042. The trial court erred in excluding the evidence.

But appellee contends that the only part of the exception to the exclusion of a part of the deposition of Karner that was made a ground of the motion for a new trial is that which relates to Exhibit C, and that the other part of the exception was waived. This is not true. There were only four exceptions to the rulings of the court, and they were to the exclusion of a part of the deposition of Karner, to the refusal to allow witness to answer questions, to the instruction to the jury directing them to return a verdict in favor of the plaintiff, and to the overruling of the motion for a new trial. The part of the deposition of Karner which was excluded is set out in full in the bill of exceptions, and stress is given to the error committed in excluding it. In enumerating in their motion for a new trial the reasons for

asking a new trial, the defendants say at the conclusion: "That the evidence excluded was admissions (adduced) by the plaintiff, which could not be withdrawn, and became a part of the evidence in the cause when filed." This appears among the reasons given for asking a new trial, and could mean only that the court erred in excluding the part of the deposition of Karner because it was read as evidence by the plaintiff and could not be withdrawn. It was sufficiently specific, because this was the only evidence excluded, and it could not refer to anything else. If it was not intended as a reason for asking a new trial, why did defendants say it? What place can it fill in a motion for a new trial? It can serve no other purpose.

Reversed, and remanded for a new trial.

AYER & LORD TIE CO. et al. v. GREER.
(Supreme Court of Arkansas. Oct. 19, 1908.)

1. APPEAL AND ERROR (§ 547*)—NECESSITY OF BILL OF EXCEPTIONS.

Refusal to transfer a cause to equity is not reviewable, in the absence of a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2427-2432; Dec. Dig. § 547.*]

2. APPEAL AND ERROR (§ 547*)—NECESSITY OF BILL OF EXCEPTIONS.

It cannot, in the absence of a bill of exceptions bringing before the court the evidence and instructions, on which, as shown by the record proper, the cause was heard, be said that the verdict and judgment were prejudicial to defendant, or that the result should have been different, had the motion to transfer to equity been granted.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 547.*]

3. TRIAL (§ 11*)—CAUSES FOR EQUITY DOCKET—ISSUE RAISED BY ANSWER.

The answer in replevin for cross-ties presents no matter of purely equitable cognizance, entitling defendant to a transfer to equity, the issue presented by the complaint and answer being the ownership and right to possession of the ties, and the title to the land from which the ties were cut being only incidental and a matter which could be shown at law, under the issue raised by such pleadings, and the issue raised by the cross-bill, to have title quieted as against an alleged void tax title, being entirely independent of and not germane to the question to be tried, the right to the ties.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 29; Dec. Dig. § 11.*]

4. EXCEPTIONS, BILL OF (§ 54*)—AUTHENTICATION BY BYSTANDERS—PRESENTATION TO JUDGE.

An attempted authentication of a bill of exceptions by two bystanders, under Kirby's Dig. § 6226, is insufficient, in the absence of a showing that the bill was first presented to and rejected by the judge.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 89; Dec. Dig. § 54.*]

Appeal from Circuit Court, White County; Silas D. Campbell, Special Judge.

Action by B. W. Greer against the Ayer & Lord Tie Company and others. Judgment for plaintiff. Defendants appeal. Affirmed.

This is a suit in replevin brought by appellee against appellants for certain cross-ties. The appellee claimed to be the owner of the ties by virtue of his alleged ownership of the lands from which the ties were cut. The appellants answered, setting up title to the land in appellant L. A. Smith, from whom the timber was bought, and averring that appellee held under a void tax deed, that the deed was void because the land was sold for the taxes of 1892 at a sale in June, 1893, and the clerk failed to authenticate the delinquent list by making the affidavit required by law and failed to record same, and failed to publish the delinquent list as required by law, and alleged various other illegalities in the tax sale. Appellants asserted that such alleged void tax deed was a cloud on the title of L. A. Smith to such an extent that his title was not merchantable. They asked that Smith's title be quieted, and that the cause be transferred to equity, so that appellee's tax deed might be canceled, etc. A motion was made to transfer the cause to equity, which was overruled, and to which ruling the appellant excepted, and had his exceptions noted of record. The record shows that the cause then progressed at law, the issues being submitted to the jury, "who, after hearing the testimony of witnesses, arguments of counsel, and the instructions of the court," returned a verdict for the appellee. The record shows that a motion for new trial was filed and overruled, and the record recites that "the defendants [appellants] are given sixty days to file their bill of exceptions." The record does not show that any bill of exceptions was presented to and signed by the trial judge and filed by the clerk as a part of the record. On the contrary, there is an affidavit in the transcript by one of the attorneys for appellants showing why a bill of exceptions was not duly authenticated by the trial judge and filed within the time allowed for its presentation and filing, and there are affidavits to the effect that "the foregoing and annexed statement called bill of exceptions is a true transcript of the evidence in said case which was taken down by the official stenographer of the First judicial circuit, and that same contains all the evidence and exceptions made in the trial of the cause." But there is no "foregoing and annexed statement" called "a bill of exceptions" in the record.

Cypert & Cypert, for appellants. S. Brundidge, Jr., for appellee.

WOOD, J. (after stating the facts as above). There is no bill of exceptions, and the alleged error of the trial court is therefore not before us for review. *Adler v. Conway Co.*, 42 Ark. 488; *Toliver v. State*, 35 Ark. 395; *Watson v. Watson*, 53 Ark. 415,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

14 S. W. 622; *Stinson v. Shafer*, 59 Ark. 110, 23 S. W. 651. The record proper shows that the cause was heard upon the evidence and instructions of the court. In the absence of a bill of exception: bringing the evidence and instructions before us for review, it is impossible for us to say that the verdict and judgment were prejudicial to appellant. The result, for aught that appears to the contrary, should have been the same, even if the cause had been transferred to the equity court. But the answer of appellants presented no matters of purely equitable cognizance as in *American Soda Fountain Co. v. Futrall*, 73 Ark. 464, 84 S. W. 505, 108 Am. St. Rep. 64. See *Daniel v. Garner*, 71 Ark. 484, 76 S. W. 1063. The issue involved on the complaint and answer was the ownership and right to possession of the cross-ties. The title to the land from which the timber was cut was only incidental and could have been shown at law under the issue raised by the complaint and answer. The cross-bill raised an entirely independent issue, one not germane to the question to be tried, namely, the right to the cross-ties.

The attempted authentication of the bill of exceptions by two bystanders, under section 6226 of Kirby's Digest, was insufficient. "A bill of exceptions signed by bystanders will not be considered on appeal where it does not appear that it was first presented to the circuit judge and was rejected by him." *Morris v. Thomasson*, 72 Ark. 264, 79 S. W. 790; *Vaughan v. State*, 57 Ark. 1, 20 S. W. 588; *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 597.

As appellants have not made it appear that there was any prejudicial error in the ruling of the lower court, its judgment must be affirmed. So ordered.

BLACKWOOD v. LIEBKE.

(Supreme Court of Arkansas. Oct. 28, 1908.)

DAMAGES (§ 79*)—LIQUIDATED DAMAGES.

Provision in a contract of sale, at \$3.50 per 1,000 feet, of ash trees, 14 inches in diameter, 12 feet above the stumps, on a large tract of land, to be cut clean as the land is gone over, not leaving isolated trees of the kind and size thereon, that, if any trees of the kind and size are left standing at expiration of time limited for cutting, the buyer shall pay the seller \$1 per tree therefor, is enforceable as one for liquidated damages, and not for a penalty; the evidence showing that the market value of such isolated trees is decreased by increased cost of logging, and difficulty of finding a purchaser therefor, and the measure of the damages being indeterminate and dependent on many conditions, and this, though the price of such timber has risen during the life of the contract, the validity of the provision depending on the status when the contract was made.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 164; Dec. Dig. § 79.*]

Appeal from Circuit Court, Phillips County; Hance N. Hutton, Judge.

Action by G. T. Blackwood against C. F. Liebke. From a judgment for plaintiff for less than claimed, he appeals. Reversed in part, and remanded for new trial.

This suit grew out of the following contract: "This agreement made this 7th day of August, 1905, between G. T. Blackwood, party of the first part, and C. F. Liebke, party of the second part, witnesseth: First party hereby grants, bargains, and sells to second party all the merchantable ash timber standing on first party's land in state and county aforesaid in consideration of the sum of three dollars and fifty cents (\$3.50) per thousand feet, and in further consideration of said sum grants to second party right of ingress to and egress from said land for the purpose of cutting, hauling, and removing said timber. First party hereby acknowledges receipt from second party of an advance cash payment of three hundred dollars (\$300.00); the first timber taken by second party shall be applied to said advance until same is balanced, after which payments shall be made as hereinafter specified. Second party hereby agrees to cut, haul, and remove said timber and to pay for same within the time and in the manner hereinafter specified. It is understood between the parties hereto that the term 'merchantable timber' means all ash timber measuring fourteen inches in diameter at small end and twelve feet above the stump. It is further agreed between the parties hereto that second party shall cut and haul the timber from said land without unnecessary delay; that said timber shall be dumped on the banks of Mound Lake or Arkansas river, as may be most convenient to haul; that when so dumped said logs shall be scaled by both parties; that in making said scale said logs shall be measured from bark to bark at small end; that the footage to be paid for by second party shall be thus ascertained; that all logs cut during the month shall be thus scaled at the end of the month; that as soon as the sale is completed and quantity thus ascertained second party shall pay first party for same. Second party agrees to cut said timber clean as he goes over the land, not leaving isolated merchantable trees thereon. If upon the termination of this agreement by limitation any merchantable trees are left standing on land, second party shall pay first party therefor the sum of one dollar per tree. If any timber has been cut, but not hauled to river or lake bank, same shall be scaled, as above provided, and paid for by second party at the rate of three and a half dollars per thousand feet. It is further understood and agreed between the parties hereto that second party's rights hereunder cease and determine on the 1st day of January, 1907, on which date second party shall quit said land and leave all timber standing thereon, but second party may have right of ingress for a period of 200 days after said 1st of January.

1907, for the purpose of removing such logs as have been cut, scaled, paid for, but no other purpose. In token of the assent of the parties hereunto witness their signature in duplicate, this day and date above written. G. T. Blackwood. C. F. Liebke. By W. C. Kirk, Agent."

Blackwood filed suit against Liebke in the Phillips circuit court on August 30, 1907, in which he alleged the execution of the foregoing contract; that the same expired by limitation on the 21st day of July, 1907; that the defendant had failed to comply with the contract, in that on the 1st day of January, 1907, there were left standing on the land covered by the contract 1,339 merchantable ash trees of the value of \$1,339, for which he had not paid \$1 per tree, and prayed judgment for said sum. He also alleged a violation of the contract, in that defendant had cut certain timber which he had failed and refused to scale and pay for as required by the terms of the contract, and prayed judgment for \$350 on that account. Defendant in his answer admitted the execution of the contract, but denied that the number of feet of timber alleged was cut and unpaid for, but admitted that a small amount of timber had been cut and left in the woods owing to weather conditions, for which he was ready to pay. He denied liability for the value of the trees left standing, asserting that the provision of the contract in reference to payment thereof is penal, and that plaintiff is not entitled to recover according to its terms, and that plaintiff had suffered no damages on this account, as the value of standing timber had greatly enhanced since the execution of the contract. While there is no acreage mentioned in the contract, the evidence shows that Mr. Blackwood's tract was about 2,800 acres, but does not show the extent of the cutting. Evidence was adduced to prove the amount of timber which had been cut remaining on the ground at the termination of the contract, and the value thereof. As there is no longer any controversy over that issue, the facts in regard thereto are unimportant on this appeal.

There was testimony tending to prove that there were 1,339 ash trees left standing upon the land of the size and quality called for as merchantable in the contract. There was testimony to prove that the value of the timber in said trees left standing was \$1.50 per 1,000 feet more than it was at the time of the execution of the contract. The following occurs in the testimony of one of defendant's witnesses, and is all the testimony upon the subject: "Q. If you find a tract of timber or land which is well covered with timber, and lying by the side of it there is a tract which is sparsely covered with the same kind of timber, is there not a difference in the market value of the timber on the two tracts? A. I would not think there would be, if the sizes would run the same. Q. If you were to find 160-acre tract of timber which would

run 2,500 feet of ash timber to the acre, would you not pay more per 1,000 feet for that timber than you would on another 160-acre tract which would only run about 500 feet per acre? A. I would pay a little more for the reason that it could be logged cheaper. Q. After a tract of timbered land has been cut over, and a large percentage of the merchantable ash timber cut therefrom, is not the remaining timber much depreciated in value by reason of the fact of its sparsity? A. It would, if it was cut all over. Q. Say, for instance, that 60 per cent. of the timber had been removed, would it not be a very difficult matter to obtain as great a price for the remaining 40 per cent., as for the original tract as an entirety? A. You might take a part of the land and cut on that and not all over it, and that would not hurt it, but you might cut on the lowland and leave the highland. That would be all right; or you could cut on the low and leave the high. That would not affect it. Q. Then, if it was pretty freely culled over in all parts, such isolated trees that were left would command a very low market value in comparison with what that originally had? A. About the only difference would be in the cost of logging. It depends a good deal on the character of the timber. Q. Is it not almost impossible to induce a lumberman to buy standing timber on land which has been pretty well culled over? A. Well, it depends on how bad he wants it."

The court refused to give the following instruction: "If you find from the evidence that on or after January 1, 1907, there were standing on plaintiff's land ash trees measuring 14 inches in diameter at small end 12 feet above the stump, you will find from the evidence the number of such trees, and return a verdict for the plaintiff therefor at the rate of \$1 per tree." The court instructed the jury on that issue as follows: "The jury are instructed that for the breach of the contract by the defendant in not cutting the trees mentioned in the contract the plaintiff is entitled to recover only nominal damages." The jury returned the following verdict: "We, the jury, find for the plaintiff to the amount of \$210 for 60,000 feet of timber cut and not hauled, and also find \$1 damages for failure of defendant to comply with the contract." Judgment was accordingly entered for the plaintiff for \$211. Plaintiff filed a motion for new trial, which was overruled and exceptions were saved, and has appealed.

R. P. Cary and F. M. Rogers, for appellant.
John I. Moore, for appellee.

HILL, C. J. (after stating the facts as above). The sole question presented on this appeal is whether the stipulation in the contract for the payment of \$1 per tree for all the merchantable trees of the dimensions mentioned in the contract is a penalty, or

whether it is stipulated damages. The circuit court held it was a penalty, and the plaintiff, appellant here, contends that it was stipulated damages.

A learned discussion as to when agreements in contracts will be treated as stipulated damages and when as penalties by Mr. Chief Justice Watkins may be found in the case of *Williams v. Green*, 14 Ark. 815. Summing up the matter, he says: "Our impression is that wherever the act to be done or abstained from is other than the payment of money the circumstance that the actual damages may be more or less easily susceptible of ascertainment ought not to influence the construction of an agreement to be one way or the other, a stipulation for damages or merely by way of penalty. Where the damages are at all uncertain or unliquidated, the parties ought to be allowed to anticipate and stipulate them, if they choose to do so. Whenever courts attempt to take a distinction among contracts of this class, where no uniform or intelligible rule can be laid down to govern the distinction, they not only assume a most vexatious jurisdiction to reform the contracts of weak or sanguine men, but it tends to impair the confidence which all men ought to have in the obligation of contracts." In *Lincoln v. L. R. Granite Co.*, 56 Ark. 405, 19 S. W. 1056, this statement was quoted from and approved. In *Nilson v. Jonesboro*, 57 Ark. 168, 20 S. W. 1093, the court said: "The authorities, however, show that, where the intention to liquidate the damages is not obvious, the stipulated sum will usually be given the effect of a penalty if it exceeds the measure of a just compensation and the actual damage sustained is capable of proof [citing authorities]. But, where the contract is of such a nature that the damage caused by its breach would be uncertain and difficult of proof, the sum named by the parties is generally held to be liquidated damages, if the form and language of the instrument are not unfavorable to that construction, and the magnitude of the sum does not forbid it." In *Stillwell v. Paepcke-Leicht Lumber Co.*, 73 Ark. 432, 84 S. W. 483, 108 Am. St. Rep. 42, the court said: "Usually the surest test of liquidated damages is where the actual damages caused by the breach would be uncertain and difficult of proof, and the sum stipulated appears to be reasonable compensation for the injury occasioned by the failure to perform the contract." A learned writer on the subject, after discussing the difficulties in applying the principles involved, says: "Notwithstanding the deplorable state of the decisions, it may be assumed, first, that if, by the terms of the contract, a greater sum is to be paid upon default in the payment of a lesser sum at a given time, the provision for the payment of a greater sum will be held a penalty; second, where, by the terms of a contract, the damages are not difficult of ascertainment according to such terms and the stipulated damages are unconscion-

able, the latter will be regarded as a penalty; third, within these two rules parties may agree upon any sum as compensation for the breach of a contract." 1 *Sutherland on Damages*, § 283.

Applying the foregoing principles to the facts in this record, the court is of opinion that the agreement was enforceable as one for stipulated damages, and was not a penalty. The evidence shows that this was a large body of land, and the contract called for the cutting of only one kind of trees thereupon, with the stipulation that the trees of merchantable size and quality must all be cut clean, so that isolated merchantable trees would not be left. The purpose of this was plain and reasonable. The landowner sold all of the merchantable ash timber upon this large body of land, and his compensation therefor was dependent upon the amount of timber cut. He desired it all cut, in order that he might obtain the full price for all of his ash timber on this tract. The evidence shows that where a tract is sparsely timbered, with just a few isolated trees of merchantable value left standing, that the market value thereof would be less than the market value of the same amount of timber on a heavily timbered tract on account of the increased expense of hauling it out, and, it might be added, on account of the difficulty to find purchasers for small quantities of timber. In order to avoid having isolated merchantable trees scattered over a large tract, the landowner exacted this clause in the contract. It would be difficult to find a more positive element of damage, and yet the measure of it is indeterminate and dependent on many conditions. Turning to Mr. Sutherland's test, which is a fair deduction from the authorities, the contract cannot be condemned as one requiring a greater sum to be paid in default of the payment of a lesser sum at a given time, nor as one where the damages are not difficult of ascertainment and the amount stipulated is unconscionable. It will not do to say that the amount is unconscionable because the price of ash timber had risen \$1.50 per 1,000 feet during the life of the contract. Had it fallen \$1.50 during that time, certainly there could be no claim that it was unconscionable, and the fluctuation in the market of salable commodities is just as liable to be on the one side as on the other. This fact furnishes a reason why the parties might contract for a fixed price, and thereby escape market fluctuations.

It is argued that the landowner is not damaged, that his trees have increased in value, and that he is seeking to exact a higher price therefor than they were worth at the time he made the contract and yet retain the trees. And it is further argued that, where the damages are capable of ascertainment, the amount fixed will be disregarded, although declared to be liquidated damages. But the question is not as to the status of the parties when the contract terminated, but as to the

status of the parties at the time they made the contract. It may be as the contract works out, that it would be easy to ascertain the damages for the breach of it, or to prove that there were none. But, if the status of the parties at the time of the contract was such that it would be difficult or impossible to have anticipated the damage for a breach of it, and there was a positive element of damage, then under the authorities there is no reason why that may not be anticipated and contracted for in advance. The Supreme Court of the United States have reviewed this subject fully in *Sun Ptg. & Pub. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366. Referring to the contention made in that case, which was sustained by some decisions, that, where actual damages can be assessed from testimony, the court must disregard any stipulation fixing the amount and require proof of the damage sustained, the court, speaking through Mr. Justice White, said: "We think the asserted doctrine is wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and it is not sanctioned by the decisions of this court." And then the court reviewed the authorities, seeking, as it said, to demonstrate the soundness of its repudiation of that asserted doctrine; and said: "The decision of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not bona fide in a case where the damages are of an uncertain nature, estimate, and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract." The contract for the \$1 per tree was valid, and should be enforced.

There was no error in the trial of the issue on the count for timber cut and not hauled, and the judgment on that count is affirmed. The judgment on the count for trees left standing is reversed, and cause remanded for a new trial on that count.

ELDRED et al. v. HART et al.

(Supreme Court of Arkansas. Oct. 19, 1908.)

USURY (§ 18*)—USURIOUS CONTRACT.

Money was borrowed under an agreement for 8 per cent. interest. Notes payable on or before five years, with coupon notes attached, for 5½ per cent. of the interest, payable semi-

annually, were secured by a mortgage. For the remaining 3½ per cent. interest 10 notes, one payable each six months, each for the amount of interest at that rate for six months, and bearing interest after maturity, were secured by second mortgage. At the end of a year the principal and all interest to that date was paid, the first mortgage was released, and all notes secured thereby and the first two secured by the second mortgage were surrendered. *Held*, that the remaining eight notes secured by the second mortgage were valid obligations; the contract, valid if the principal was not paid till maturity, not being rendered usurious by the exercise of the option, though more than 8 per cent. interest for the time the money was retained would thus be collected.

[Ed. Note.—For other cases, see Usury, Dec. Dig. § 18.*]

Appeal from Benton Chancery Court; T. H. Humphreys, Chancellor.

Action by John L. Eldred, administrator, and others, against C. L. Hart and others. Decree for defendants. Plaintiffs appeal. Reversed and remanded, with directions.

McGill & Lindsey, for appellants. Rice & Dickson, for appellees.

HART, J. This is an action brought by appellants in the Benton chancery court against appellees to foreclose a mortgage on certain lands situate in said county. In 1902 the appellees, C. L. Hart and Ella L. Hart, desired to procure a loan of \$2,500 and secure the same with a mortgage on the lands in controversy then owned by Ella L. Hart. She appointed the appellee C. L. Hart, her husband, as her agent to negotiate the loan. In furtherance of this purpose, he entered into the following contract: "Bentonville, Ark. April 28, 1902. To Holmes & Hibbard, Springfield, Mo. I hereby appoint you my agent to negotiate for me a loan of \$2,500.00 for five years, to be secured by note or notes and deeds of trust, in form required by you, upon my real estate described in my application herewith. I agree to pay 8 per cent. per annum interest, payable semiannually. Of the said interest it is understood that all the excess above 5 and ½ per cent. per annum (or 5 per cent., if you so elect) may be secured by separate notes and a second deed of trust, leaving the principal notes and deed of trust to draw only 5 and ½ per cent. interest (or 5 per cent. if you so elect). Upon said principal note I shall have the privilege to pay \$100.00 or any multiple thereof at the maturity of any coupon by giving the holder thirty days' notice. That part of the interest above specified which is secured by the second deed of trust shall be payable to Holmes & Hibbard, Springfield, Mo. (semiannually or in the annual installment). In consideration of your services in the negotiation of said loan, I hereby agree to pay you a commission of ——— per cent. on said sum, cash, payable out of said loan. I also agree to pay the actual cost necessary to procure an abstract of title, to perfect the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

same showing the deeds of trust to be the first lien, and to deliver said abstract to you to be held until the loan is paid off. I also agree to pay for recording the deeds of trust. And, further, in case I shall refuse or be unable to execute the papers in accordance with said application after the loan has been approved by you, I agree to pay the expenses which you have incurred in the examination of the title and security. And you are hereby authorized and instructed to pay off and discharge all existing liens on the above-described lands with the proceeds of the loan applied for, paying me or my appointee the balance, after deducting the above-named commission and charges and money advanced to remove existing liens. I make W. H. Conine, of Bentonville, Ark., my local agent in the negotiation of this loan. [Signed] C. L. Hart." Pursuant to this contract, C. L. Hart and Ella L. Hart received from Holmes & Hibbard the sum of \$2,500 in cash, and executed to Holmes & Gay or bearer their three promissory notes of the date of June 17, 1902—two for \$1,000 each and one for \$500, payable on or before July 1, 1907, and bearing interest at the rate of 5½ per cent. from date until paid, payable semiannually on the 1st day of January and July of each year; said interest being evidenced by coupons attached to said notes. The notes had stamped upon them "Privilege reserved to pay \$100.00 or any multiple thereof at the maturity of any coupon"; but this clause was not stamped upon the deed of trust, which was executed by them at the same time, conveying the lands in controversy to L. H. Holmes as trustee, to secure the payment of said notes and interest coupons. The deed of trust was duly recorded June 20, 1902. At the time of the execution and delivery of said notes and deed of trust, said C. L. Hart and Ella L. Hart also executed and delivered to said Holmes & Hibbard 10 promissory notes of the same date for \$31.25 each, payable to Harry Hibbard or bearer, and due each six months thereafter—that is, payable in January and July of each year from January, 1903, to July, 1907, inclusive—and each bearing 6 per cent. interest after maturity. The aggregate amount of these notes is \$312.50. They were secured by a second deed of trust conveying the same lands to L. H. Holmes, trustee, which was recorded on the same day as the first deed of trust, but after the first deed. Neither of these 10 notes nor the deed of trust given to secure the same contained the words "or before" as to time of payment, nor any privilege of paying any part of any note before it became due by its terms. After the notes and deeds of trust were delivered to Holmes & Hibbard, they delivered the first-mentioned three notes and deed of trust to Holmes & Gay, retaining the authority to collect the interest and principal as agents for said Holmes & Gay. The other notes payable to Harry Hibbard they retained as their own property. The interest coupons due on said

first three promissory notes January 1, 1903, and the first of said 10 notes due at that time, were paid to Holmes & Hibbard when due, and, shortly after the next interest coupons on the \$2,500 and the next note for \$31.25 became due, the said Ella L. Hart paid them with interest to time of payment, and also paid the principal sum of \$2,500. Said Holmes & Hibbard delivered up to them the note of \$31.25, and procured from Holmes & Gay and delivered up to her said three notes for \$2,500. They also had Holmes & Gay to execute a deed of release thereof. The remaining eight notes of \$31.25 each and the second deed of trust given to secure the same were retained by said Holmes & Hibbard. Afterwards, in a division of notes between the said L. H. Holmes and Harry Hibbard, said eight notes and deed of trust fell to Harry Hibbard as his individual property. On the 11th day of December, 1903, he sold and assigned them to H. G. Peabody, of Green county, Ill., who afterwards died intestate. Appellant John L. Eldred was duly appointed administrator of her estate by the probate court of said county. After the execution of the deeds of trust, and before the commencement of this action, Ella L. Hart and C. L. Hart, her husband, conveyed the lands to other parties, who were duly made defendants. The court held that the contracts and agreements in evidence constituted one transaction, and was a loan of \$2,500 at 8 per cent. interest per annum, payable on or before five years from date; that the payment of \$2,500 with 8 per cent. interest from date of notes till time of payment discharged the entire indebtedness represented by all obligations executed by them; that the notes sued on were thus paid off and discharged, and are not enforceable for want of consideration; that, if the notes sued on are considered a separate obligation from other notes and enforceable after the payment of the principal obligation of \$2,500 and a further sum equal to 8 per cent. per annum thereon to date of such payment, such contract would be usurious, and void. Accordingly the complaint was dismissed for want of equity, and an appeal has been taken to this court.

It will be observed that the parties to the contract by its terms made the principal sum of \$2,500, with interest on it at 5½ per cent., should become due on or before five years after date. In other words, it was payable within the prescribed time at the option of the borrower. The balance of \$312.50 consisted of 10 notes of \$31.25, payable semiannually without any conditions whatever. The intention of the parties as shown by their written contract was to provide for a loan for five years, with interest at the rate of 8 per cent., and the time of payment was fixed by the notes. It is well settled that the interest which will accrue during the period of the loan may be divided up to suit the parties and separate obligations given for all or any part of it, and this is usually done.

Scruggs v. Scottish Mortgage Co., 54 Ark. 566, 16 S. W. 563; *Banks v. Flint*, 54 Ark. 40, 14 S. W. 769, 16 S. W. 477, 10 L. R. A. 459. If the parties had the right to divide up the principal sum and the interest which would accrue into separate obligations to suit their convenience, it necessarily follows that the time of payment of these separate obligations might be fixed at a given date, or an option might be given the makers within which to pay the notes, or some of the notes might be made payable on or before a given date, and the remainder payable on fixed date. The latter plan was adopted in the present case. So then, each note became a binding obligation payable according to its own terms. It is claimed by appellees that this construction renders the contract usurious and void. If it appears that the contract in its inception was a result of a device or subterfuge by which the borrower was compelled, in order to get the money, to pay a larger amount of interest than is allowed by statute, the notes will be determined to be usurious. *Jordan v. Mitchell*, 25 Ark. 258. In the present case Hart had the option to let the loan run for the entire period of five years, and, if he had done so, the undisputed facts show that he would have paid 8 per cent. interest. The parties had the right when the contract was made to divide up the payments for interest to suit their own convenience and to have separate obligations given for all or any part of it. This seems to have been the plan adopted. If Hart had let the loan run for the full period of five years, he does not claim that he would have paid more than 8 per cent. interest. He could not have been compelled to have paid it before that time. He did not obligate himself to do so. He only obligated himself to pay the interest as it accrued before the principal sum fell due. So, then, it is undisputed that, by the terms of the contract as it could have been enforced against him, it was not affected with usury. The payment made by appellee Hart was voluntary, and

was in the exercise of an option given him by the contract. "When a debt, including both principal and interest and due by installments, if paid according to the terms of the contract, is free from usury, the transaction is not rendered usurious by the voluntary payment of the debt in full before some of the installments matured, although as a result the creditor would receive, in the aggregate, a sum amounting to more than the principal and the maximum legal rate of interest." *Savannah Savings Bank v. Logan*, 99 Ga. 291, 25 S. E. 692; *Keckley v. Union Bank*, 79 Va. 458. If the lenders had exercised their option to declare the whole indebtedness due for failure of the borrower to fulfill a certain stipulation of the deed of trust, still there would have been no usury, but in such a case a court of equity would treat the stipulation as a penalty, and refuse to enforce it except upon a cancellation of the unearned interest notes, as was done in the case cited by appellees of *Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024, 12 L. R. A. 93, 23 Am. St. Rep. 332. This salutary rule was applied in this court in the case of *Chaffe & Sons v. Landers, Admr., et al.*, 46 Ark. 364, and in earlier cases cited therein. As stated by Judge Riddick in the case of *Leonhard v. Flood*, 68 Ark. 162, 56 S. W. 781: "Our law visits on a lender who contracts for usurious interest, however small, a forfeiture of his entire loan and the interest thereon. It follows from the plainest principles of justice that such a defense should be clearly shown before the forfeiture is declared. For this reason usury will not be inferred where, from the circumstances, the opposite conclusion can be reasonably and fairly reached." We are of the opinion that the chancellor erred in refusing to hold that the notes sued on were valid obligations of the appellees, C. L. Hart and Ella L. Hart, and in dismissing the complaint for want of equity.

The decree is therefore reversed and the cause remanded, with directions to enter a decree in accordance with this opinion.

BAIRD v. BAIRD et al.

(St. Louis Court of Appeals. Missouri. Oct. 6, 1908.)

1. APPEAL AND ERROR (§ 537*)—BILL OF EXCEPTIONS—FILING OUT OF TIME—EFFECT.

A bill of exceptions, filed out of time, cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2404, 2405; Dec. Dig. § 537.*]

2. APPEAL AND ERROR (§ 238*)—REVIEW OF RECORD—MOTION IN ARREST OF JUDGMENT—NECESSITY.

The record proper cannot be reviewed, where no motion in arrest of judgment was filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1390; Dec. Dig. § 238.*]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by Mollie Baird against T. J. Baird and others. From the judgment, defendants appeal. Affirmed.

J. P. Trebble and Duncan & Bragg, for appellants. Ward & Collins for respondent.

BLAND, P. J. The bill of exceptions in this cause was filed out of time; hence it cannot be considered. No motion in arrest of judgment was filed, and for this reason the record proper cannot be reviewed.

There is, therefore, nothing before the court for review, and the judgment, on motion of respondent, is affirmed. All concur.

SMITH v. ST. LOUIS TRANSIT CO.

(St. Louis Court of Appeals. Missouri. Oct. 20, 1908.)

1. DAMAGES (§ 159*)—PERSONAL INJURIES—LOSS OF EARNINGS—PLEADING.

Plaintiff was injured in July, 1904, when he was a guard at the St. Louis Exposition, and suffered no loss of earnings until the close of the Exposition, on December 1, 1904. *Held*, that plaintiff was entitled to recover for loss of earnings due to his injury from that date to the trial under an averment that he "had or would lose" them.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 443; Dec. Dig. § 159.*]

2. PLEADING (§ 252*)—AMENDMENT—EFFECT.

Where an amended petition was not objected to as pleading a new cause of action, it related back to the commencement of the action, so that an allegation that plaintiff would lose earnings in the future was not a waiver of any claim for loss of earnings prior to the filing of the amendment.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 252.*]

3. DAMAGES (§ 208*)—PERSONAL INJURY—LOSS OF EARNINGS—EVIDENCE.

Evidence *held* to justify submission of the issue of loss of earnings resulting from plaintiff's injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 533, 534; Dec. Dig. § 208.*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by Vasco V. Smith against the St. Louis Transit Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Boyle & Priest and T. E. Francis, for appellant. Jos. A. Wright, for respondent.

GOODE, J. This plaintiff recovered a judgment of \$2,000 against the defendant company for the fracture of his arm. The accident occurred on July 25, 1904. Plaintiff was on said date a passenger on one of defendant's west-bound cars on Market street. He was seated on the south side of the car, next to a window, with his elbow resting on the window sill. According to the petition, his elbow projected two inches outside the car he was in, and a car passing in the opposite direction on a parallel track struck his elbow, and broke the arm.

The main propositions involved in the case were considered and settled on a former appeal. 120 Mo. App. 328, 97 S. W. 218. But one question is presented for decision on the present appeal, and this is an assignment of error relating to the instruction given on the measure of damages. Said instruction is as follows: "If the jury find for plaintiff, they should assess his damages at such sum as they believe from the evidence will be fair compensation to him (1) for any pain of body and mind that plaintiff has suffered, or will suffer by reason of his injuries, and directly caused thereby; (2) for any loss of earnings of his labor that he suffered, or will suffer, by reason of his injuries and directly caused thereby." Two grounds are urged against the propriety of the foregoing instruction. One is that it authorized an award of damages for a loss of earnings previously sustained by plaintiff, when there was no proof he had lost any earnings in consequence of his injury, and the other is that the petition does not allege plaintiff had lost earnings, but only that he would lose them in the future. This portion of the petition may be quoted: "That, as a direct result of the injuries thus sustained, plaintiff's arm has been rendered permanently stiff, and its use greatly and permanently impaired; that he has and will suffer great pain of body and mind. He has incurred and become obligated for, and will incur and become obligated for, large expenses for medical attention, medicines, and nursing, and his earning capacity has been permanently impaired, and he will in the future lose greatly from the earnings of his labor, all to his injury and damage in the sum of four thousand five hundred dollars (\$4,500), for which sum he prays judgment against defendant and for his costs." We have quoted from the second amended petition, which was filed after the case was reversed and remanded on the first appeal. What the previous petitions alleged regarding loss of earnings we do not know, as they

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have not been preserved in the record. As has been stated, the accident occurred in July, 1904, and, according to the testimony, plaintiff had suffered no loss of earnings prior to the date the case was begun. When hurt he was employed as a guard on the grounds of the Louisiana Purchase Exposition, and he swore his salary as guard was paid, notwithstanding his injury, until the close of the Exposition, December 1, 1904. Therefore it appears plaintiff could not have alleged truly when he began the action he had suffered loss of earnings. But, though he had lost no salary or earnings by said date, he was entitled to a verdict for whatever earnings he had lost from then to the trial in consequence of his injury on an averment either that he had or would lose them. *Cook v. Redman*, 45 Mo. App. 497; 1 *Sutherland*, Damages (3d Ed.) § 113. The true question is whether the allegation that plaintiff "will in the future lose greatly from the earnings of his labor," contained in the amended petition filed long after the suit was brought, ought to be regarded as waiving any claim for loss of earnings prior to the date it was filed. Was it apt to lead defendant to believe no demand was made on account of earnings except such as would be lost subsequent to said date, and thereby prevent defendant from getting ready to contest a claim for a loss of that kind sustained before the filing of the amended petition? We think this view ought not to be accepted. It has not been shown or asserted the amended petition filed December 10, 1906, set up a new cause of action. Hence it related back to the date of the commencement of the action, to wit, September 7, 1904, when the first petition was filed in the office of the clerk of the circuit court. 1 *Ency. Pl. & Pr.* 621; *Fleenor v. Taggart*, 116 Ind. 189, 18 N. E. 606; *Mann v. Schroer*, 50 Mo. 306; *Wheeler v. Milling Co.*, 73 Mo. App. 672.

It is insisted the evidence has no tendency to prove plaintiff had lost any earnings in consequence of the accident to his arm. The injury was a permanent one. At the time of the trial plaintiff could not move his arm easily, and the physician swore the condition would be permanent. Besides, the arm was shrunken in size in comparison with the uninjured one. It is conceded these facts tend to prove a loss of earning capacity, but counsel insist they do not prove actual loss of time or earnings. Before plaintiff came to St. Louis in March, 1904, and took employment as an Exposition guard, he lived in Bellingham in the state of Washington, and was engaged as a salesman in a shoe store. His salary was \$20 a week. His salary as guard was \$55.25 a month. After the Exposition closed, he went to his home in Ohio, stayed there three months with his father; then came to St. Louis for the first trial of the case, afterwards went to Bellingham again

and accepted employment in a drug store where he worked for four months at \$2 a day, or, at most, \$14 a week. Subsequent to that employment he had rheumatism in his injured arm for a month and did nothing. He went to Medical Lake, Wash., and took treatment; working, however, in caring for the baths there for three months. He then went to Marion, Ind., where he was idle a year; but the reason for his idleness was not stated, defendant's counsel objecting to plaintiff's stating the reason. We think the foregoing testimony conduces to prove plaintiff had lost time from work and earned less while at work in consequence of his injury. It is a fair inference that he was forced into idleness by rheumatism in his injured arm, and what wages he received when employed were less than had been paid him before.

The judgment is affirmed. All concur.

T. S. HOLLENBECK & CO. v. MERCANTILE TOWN MUT. FIRE INS. CO.

(St. Louis Court of Appeals. Missouri. Oct. 6, 1908.)

1. INSURANCE (§ 335*)—FIRE INSURANCE—INVOICES—FAILURE TO KEEP—EFFECT.

A fire policy covering merchandise was voided for insured's failure to keep a cash account of goods sold, an invoice of goods purchased, and an inventory, as required by the policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 853; Dec. Dig. § 835.*]

2. INSURANCE (§ 283*) — FIRE INSURANCE — MORTGAGES—FAILURE TO DISCLOSE—EFFECT.

A fire policy is voided by insured's failure to disclose a mortgage in his application, when asked whether any existed.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 636, 640, 641; Dec. Dig. § 283.*]

3. INSURANCE (§ 379*) — APPLICATION — ANSWERS BY INSURER'S AGENT—EFFECT.

Insured is not bound by the answers to the questions propounded in the application, unless when he signed it he knew of the questions and answers as written by insurer's agent.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 999; Dec. Dig. § 379.*]

4. INSURANCE (§ 668*) — APPLICATION — CONTENTS—INSURED'S KNOWLEDGE—JURY QUESTION.

In an action on a fire policy, held, under the evidence, a jury question whether, when insured signed the application, he knew the nature of the questions and answers written therein by insurer's agent.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1735, 1758; Dec. Dig. § 668.*]

5. INSURANCE (§ 559*) — PROOFS OF LOSS — WAIVER—DENIAL OF LIABILITY.

By denying any liability, insurer waives formal proof of loss, as required by the policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1391; Dec. Dig. § 559.*]

Appeal from Circuit Court, New Madrid County; Henry C. Riley, Judge.

Action by T. S. Hollenbeck & Co. against the Mercantile Town Mutual Fire Insurance Company. From a judgment for plaintiff, defendant appeals. Partly reversed and partly affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Brown & Hubbard and Barclay & Fauntleroy, for appellant. H. C. Riley, Jr., and Ward & Collins, for respondent.

BLAND, P. J. Defendant company by its policy, dated May 30, 1904, insured plaintiff against loss by fire as follows: Six hundred dollars on his one-story frame building, situated on lot 11, block 18, in the town of Portageville, New Madrid county, Mo.; \$400 on his stock of merchandise, consisting principally of drugs and medicines, located in said building. In December, 1904, and during the life of the policy, the building was totally destroyed by fire, as was the greater part of the merchandise covered by the policy. The action is on the policy, to recover the fire loss. Plaintiff recovered the full amount of the insurance. The policy contained the following provisions: "Book and Inventory Clause.—It is expressly stipulated and made a condition of this contract that: First. The assured will take an itemized inventory of stock hereby insured at least once in each calendar year, and unless such inventory shall have been taken within twelve (12) calendar months prior to the date of this policy, the same shall be taken in detail within thirty (30) days after said date, or this policy shall be null and void from and after the expiration of said thirty (30) days, and upon demand of the assured the unearned premium for the unexpired time of this policy shall be returned. Second. The assured will keep a set of books, which shall clearly and plainly present in detail a complete record of the business transacted, including all purchases, sales and shipments of said stock, both for cash and credit, from the date of the inventory provided for in the first section of this clause, and during the continuance of this policy. Third. The assured shall keep such books and inventory, and also the last preceding inventory, securely locked in fireproof safe at night, and at all times when the building mentioned in this policy, or the portion thereof containing the stock described therein, is not actually open for business; or, failing in this, the assured will keep such books and inventories, at night and at all such times, in some place not exposed to a fire which would ignite or destroy the aforesaid building; and, in case of loss, the assured specifically warrants, agrees and covenants to produce such books and inventories for the inspection of said company. Fourth. In the event of failure on the part of assured to keep and produce such books and inventories for the inspection of said company, this entire policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

1. Plaintiff's evidence shows affirmatively that he failed to comply with the iron-safe clause of the policy, in this, that he kept no cash account of goods sold, no invoice of

goods purchased, nor did he have on hand any invoice taken before or after the policy was issued. This was a failure to comply with the substantial provisions of the iron-safe clause, and takes the case out of the ruling of *Malin v. Ins. Co.*, 105 Mo. App. 625, 80 S. W. 56, cited and relied on by plaintiff, and brings it within the ruling of *Gillum & Co. v. Fire Ass'n*, 106 Mo. App. 673, 80 S. W. 233, and *Johnson v. Fire Ins. Co.*, 120 Mo. App. 80, 96 S. W. 697. The policy was voided as to the merchandise, for failure to comply with the provisions of the iron-safe clause (*Johnson v. Fire Ins. Co.*, supra; *Gillum & Co. v. Fire Ass'n*, 106 Mo. App., loc. cit. 679, 80 S. W. 233; *Bruer v. Kansas Mut. Life Ins. Co.*, 100 Mo. App. 540, 75 S. W. 380; *Gibson v. Mo. Town. Mut. Ins. Co.*, 82 Mo. App. 515; *Origler v. Ins. Co.*, 49 Mo. App. 11), and the court should have given defendant's instruction to the effect that plaintiff could not recover for the loss of the merchandise.

2. The following printed interrogatories appear in the application for insurance: "(1) Are you the sole and absolute owner of the property to be insured?" The answer in writing is "Yes." "(2) Is the property mortgaged or otherwise incumbered?" The answer in writing is "No." The policy contained the following clause: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." Plaintiff's evidence shows he was the owner of the building, but that it was mortgaged to the county of New Madrid, to secure a school note, for the sum of \$450, at the time the application for insurance was made, and that the debt had not been paid at the time of the trial. Plaintiff testified that defendant's agent came to the premises and solicited the insurance; that he inquired about the dimensions of the building, asked about the flues, etc., but asked no questions about mortgages or incumbrances; that after he (plaintiff) had agreed to take the insurance, and had truthfully answered such questions as he was asked about the property, the agent went away, and in a few hours returned with the application for insurance, with the blanks filled in, and asked him to sign it, but did not read or offer to read the application to him; that he (plaintiff) "skimmed" over it, and then signed it. Plaintiff testified that he did not see the answer "No" to the question, "Is the property mortgaged or otherwise incumbered"; that the agent did not call his attention to it, and at no time asked him any such question; that the answer to the question was not his

answer, was not in his handwriting, and he did not know it was in the application at the time he signed it; that he made truthful answers to all questions asked him by the agent; that he did not think the fact that the property was mortgaged was material to the risk; that if he had thought so, he would have volunteered the information to the agent, and testified that all he did to secure the insurance was done in good faith. The agent testified that his wife wrote the answers to the questions (not in plaintiff's presence) as dictated by him (the agent), and the answer "No," to the question in regard to the mortgage was in the application when plaintiff signed it. On this evidence the court gave the following instructions: "(2) The court instructs the jury that, if you believe and find from the evidence that plaintiff's application for insurance was prepared by defendant's agent, not in the presence of, and without the assistance of, plaintiff, and that said agent, after preparing the said application, presented the same to the plaintiff, and requested the plaintiff to sign the same, which plaintiff then and there did, then you are instructed that the fact that said property was mortgaged or incumbered at the time plaintiff signed said application for insurance constitutes no defense to this action provided that you further find from the evidence that the answer 'No,' relative to the question in said application as to whether or not said property so insured was mortgaged or incumbered, was the act of defendant's agent, and without the knowledge or consent of the plaintiff, and the answer 'Yes' to the question, 'are you the sole and absolute owner of the property to be insured.'" "(4) The court instructs the jury that all that was required of plaintiff in making his application for insurance was to make truthful answers to all questions asked him by the agent of defendant, and to make known to defendant's agent any fact, known by plaintiff to be material, touching said application and insurance not inquired of by the agent or defendant, and if you believe from the evidence that plaintiff made truthful answers to all questions put to him by the agent of defendant at the time said application for said insurance was made, and the plaintiff did not intentionally fail to communicate any material fact to said agent of defendant touching said application and insurance, and that said application for insurance was prepared by the agent of defendant, by said agent writing the answers to the questions contained in said application, and that said agent, after having so prepared said application, presented the same to plaintiff, and at the same time represented and stated to plaintiff that the said application was properly and correctly prepared, and requested the plaintiff to sign the same, and that plaintiff, confiding in the honesty and veracity of the statements and representations of the de-

fendant's agent, thereupon signed said application for insurance without reading the same, or having the same read to him, then your verdict should be for the plaintiff." The mortgage was material to the risk, and, if plaintiff failed to disclose it (if he was requested to do so), his failure voided the policy as to the building. *Cagle v. Ins. Co.*, 78 Mo. App. 215; *Baxter v. Ins. Co.*, 65 Mo. App. 255. But the undisputed evidence is that plaintiff was not required to disclose the mortgage, and that the application for the insurance was prepared by defendant's agent in the absence of plaintiff, and that, after being prepared, it was not read to him; therefore the application was the act of defendant, not of plaintiff. *Bushnell v. Ins. Co.*, 110 Mo. App., loc. cit. 227, 228, 85 S. W. 103, and cases cited therein. Plaintiff is not bound by the answers to the questions propounded in the application, unless he had knowledge of the questions and answers thereto, as written in the application, when he signed it. Whether or not he had such knowledge was a question of fact for the jury, which they found in plaintiff's favor, under proper instructions given by the court and set out above.

3. Timely proofs of loss were not furnished, and defendant sets up this fact as a defense. In his reply plaintiff pleads that defendant waived proofs of loss by denying all liability on the policy, assigning as a ground therefor that plaintiff made false statements in his application for insurance. The evidence shows that defendant denied all liability for the reasons stated in the reply. On this feature of the case the court gave the following instruction: "The court instructs the jury that, if you believe from the evidence that within 60 days after the destruction of said building, merchandise, and drugs the defendant was notified thereof, and that the defendant denied any liability upon the policy of insurance, on the sole ground of an alleged false statement as to a mortgage upon said property in procuring said policy, and has continued to deny all liability for said reason, then this amounted to a waiver of formal proof of loss, and defendant's failure to keep a set of books and inventory is waived, and the jury will find the issues for the plaintiff." This instruction is in accord with sound reasoning, and in harmony with the ruling of *Weber v. Ins. Co.*, 35 Mo. App. 521; *Hooker v. Ins. Co.*, 60 Mo. App. 141.

4. Exceptions were saved to the giving of other instructions, as well as to the admission of evidence tending to show plaintiff acted in good faith in applying for the insurance. We deem it unnecessary to discuss these exceptions, for the reason the evidence is clear and convincing that plaintiff is entitled to recover for the loss on the building.

The judgment for the loss of the merchan-

dise is reversed. The judgment for the loss of the building is affirmed. All concur.

GOODE and NORTONI, JJ., concur.

CENTRAL MANTEL CO. v. THALER et al.
(St. Louis Court of Appeals. Missouri. Oct. 20,
1. PLEADING (§ 139*)—COUNTERCLAIM—NECESSITY.

Where plaintiff sued on a quantum meruit for the reasonable value of certain mantels and materials furnished, and defendant pleaded only defects in the work, an instruction that if plaintiff failed to furnish proper mantels, or did not properly set them, the jury might deduct from the balance owing plaintiff such an amount as would compensate defendant owner for the damage he had sustained from plaintiff's default, was erroneous, as permitting defendant to recover on a counterclaim not pleaded for breach of contract.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 287; Dec. Dig. § 139.*]

2. CONTRACTS (§ 305*)—PERFORMANCE—PAYMENT—EFFECT.

Where defendant, after having made specific objections to plaintiff's work in installing certain mantels, agreed to pay plaintiff the balance due on the contract if he would alter the work in accordance with the objections, that defendant gave plaintiff an order for the balance on the belief that the objections had been obviated would not estop him from thereafter objecting that the alterations had not been properly made.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 305.*]

3. CONTRACTS (§ 349*)—ACTIONS—EVIDENCE—RES INTER ALIOS ACTA.

Where defendant objected to plaintiff's work in installing certain mantels because of broken tiles, evidence that other floor contractors whom plaintiff claimed had broken the tiles had agreed to pay plaintiff for relaying them was irrelevant.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 349.*]

Appeal from St. Louis Circuit Court; Jesse McDonald, Judge.

Action by the Central Mantel Company against Solomon Thaler and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

S. N. & S. C. Taylor, for appellant. E. E. Schnepf, for respondents.

GOODE, J. This action was instituted to enforce a mechanic's lien for a balance alleged to be due plaintiff for furnishing and setting mantels and tiling in four flat buildings. The total charge for the mantels and the tiling around them was \$900, and of this sum the owner of the premises, Thaler, paid \$850. He refused to pay the balance because he found three faults in the material and workmanship after the mantels had been set. These faults were a patch glued on an upright column of one of the mantels, a warp or bend away from the wall of the room in one column of another mantel, and corners broken off some of the tiles. Thaler called

attention to those faults, and plaintiff agreed to correct them and sent workmen to the building for the purpose. Testimony for plaintiff shows all the matters of which Thaler complained were altered to his satisfaction, and on May 15, 1906, he gave a written order for the balance of \$50 to one of the Murphys, who are the other defendants in the case, and whose interest grows out of a deed of trust held by them on the premises. The order was given pursuant to an arrangement by which the Murphys were to advance money to pay obligations incurred by Thaler in building the houses. Thaler admitted giving the order, but sought to obviate the force of the circumstance as showing an acceptance of the work. He swore, as did plaintiff's witnesses, it was agreed between him and plaintiff the defects in the tiles and mantels should be made good, and that while he was on the premises one day a workman of plaintiff's came there to make the proper alterations, and he (Thaler), taking it for granted they would be made according to the agreement, signed the order for the balance of the price and sent it to plaintiff; but, on subsequently finding the defects had not been corrected, he stopped payment of the order. There is a conflict of evidence regarding whether the faults in the tiles and mantels were corrected as agreed, and also whether Thaler gave the order under the circumstances he swore and then stopped payment of it, or gave it after he had fully examined the alterations and expressed satisfaction with them. The action is quantum meruit for the reasonable value of the work and materials done and furnished by plaintiff, after crediting the lien account with the amount defendant has paid. No counterclaim was filed, but at the trial counsel for Thaler offered testimony of the amount of damage sustained by Thaler in consequence of defects in the job. This evidence was excluded by the court, and, as far as the reception of testimony was concerned, the case was tried on the theory that the essential issue was the reasonable value of plaintiff's work and material. This theory was adopted, too, in the instructions granted on plaintiff's request, but at the instance of defendant the court gave the following instruction, of which complaint is made: "The court instructs the jury that if you believe from the evidence that the Central Mantel Company failed to furnish material and work for said mantel work for Solomon Thaler for furnishing mantels for the building No. 4530-32 Washington avenue, St. Louis, and furnished inferior mantels or failed to properly set same, or all the above, then the jury may, if in your judgment you see fit, deduct from the balance owing said plaintiff company under said claim such an amount or amounts as you believe from the evidence will compensate the said Thaler for damage,

if you so find, he has sustained from the failure of said company to furnish work and materials of the reasonable value of \$900."

1. The language of that instruction is confused; but plainly it diverged from the issue of the reasonable value of the work and material, and threw into the case the question of damage sustained by Thaler on account of a breach by plaintiff of either an express or implied contract to furnish a certain quality of material and do a certain quality of work. No contract of either sort was declared on by plaintiff or interposed as a counterclaim by defendant. It appears from the evidence the original agreement between plaintiff and Thaler called for mantels of medium grade, and it was not shown those furnished were inferior to this grade, but only that there were defects in two of them. Neither ~~was~~ it said or proved the tiling was of an inferior kind, but only that the corners of some of the tiles were broken off. Therefore the jury was permitted to find against the plaintiff on a counterclaim not pleaded, and of which there was no evidence. It was competent for defendant to show the faults of which he complained, not as proof of damages suffered from a breach of contract, but as bearing on the reasonable value of the work and material. As the instruction under review submitted the cause on a question not presented by either the pleadings or the proof, it is erroneous. *McClure v. Feldmann*, 184 Mo. 710, 84 S. W. 16.

2. Counsel for defendant maintain that, because the instructions given for plaintiff advised the jury they should return a verdict in plaintiff's favor if they believed the material furnished and labor performed were reasonably worth \$900, the proper view is that the above instruction given for defendant left it to the jury to say whether, if plaintiff furnished inferior or defective mantels or failed properly to set them, the job was of the reasonable value of \$900. This interpretation cannot be accepted without disregarding the language of the instruction, which implies the breach of a contract to furnish material and do work of a certain quality, thereby entitling defendant to compensation for his damages. In other words, the charge proceeded on the theory that defendant ought to recover whatever damage he had sustained to his property as a whole on account of plaintiff's breach, instead of having the defects taken account of in arriving at the reasonable value of the work and material. The instructions for plaintiff and the one given for defendant are inconsistent, and, in view of the pleadings, the latter should not have been given. *Demoyers Shoe Co. v. Lisman*, 85 Mo. App. 840.

3. Plaintiff asked the court to instruct that if the jury found defendant made specific complaint of the tiling and mantels after they were in place, and agreed with plaintiff

to pay the balance of \$50 if plaintiff would alter the work in accordance with defendant's objections, and further found plaintiff, pursuant to this agreement, made the requested alterations, and thereafter Thaler gave a written order for the \$50 balance, he was estopped to assert the work was defectively done. The order under those conditions would not estop Thaler, at least, unless he knew fully the character of the alterations when he gave it. But, if he agreed, if plaintiff would make certain changes in the work, he would pay the balance claimed, and those changes were made, he was, of course, liable for the balance. The order was simply an item of evidence tending to show the alterations were made as agreed.

4. The corners of some of the tiles were broken by the men who laid the hardwood floors, and the evidence tends to prove the contractor to lay the floors paid the mantel company to replace the broken tiles with whole ones. Evidence of these facts was received over the objection of plaintiff's counsel, for the purpose, the court said, of showing the feeling existing between the parties to this cause. We think it was not competent for any purpose, as it was a transaction between the contractor for the floors and the mantel company, with which Thaler had no concern. Both parties to this action concede plaintiff agreed to fix the tiles; and the question of whether or not some third party paid the expense of fixing them is immaterial. The true question at this point was whether plaintiff did fix them in accordance with its agreement to do so.

The judgment is reversed, and the cause remanded. All concur.

STATE v. WALKEN

(St. Louis Court of Appeals. Missouri. Nov. 5, 1908.)

1. LARCENY (§ 55*)—PETIT LARCENY—EVIDENCE—SUFFICIENCY.

Evidence examined, and held to support a conviction of petit larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 149-178; Dec. Dig. § 35.*]

2. INDICTMENT AND INFORMATION (§ 189*)—PETIT LARCENY—CONVICTION UNDER INDICTMENT FOR GRAND LARCENY.

Under the express provisions of Rev. St. 1899, § 1911 (Ann. St. 1906, p. 1304), a conviction of petit larceny may be had under an indictment for grand larceny, where the evidence shows the value of the property to have been less than \$30.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 594; Dec. Dig. § 189.*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Millie Walken was convicted of petit larceny, and she appeals. Affirmed.

Jno. T. Murphy, for appellant. Arthur N. Sager, for the State.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

GOODE, J. This appellant was convicted of the crime of petit larceny for stealing rugs, portieres, scarfs, towels, napkins, and other similar articles from the Usona Hotel in the city of St. Louis. The indictment was for grand larceny, and the evidence shows the property stolen was worth several hundred dollars; but the jury returned a verdict for petit larceny. Appellant's name is spelled sometimes in the record before us as Wolken, but as Walken in the indictment. No briefs or abstracts have been submitted, and we only know the errors relied on for reversal from the motion for new trial, which says the verdict is against the evidence and that the court erred in rulings on the evidence and in giving instructions.

We have gone through the entire record of more than 400 pages, and find the evidence leaves no doubt of appellant's guilt. She was housekeeper for six months prior to April 15, 1907, at the Usona Hotel in St. Louis, of which Mrs. Elizabeth Boogher was proprietor. As housekeeper, appellant had charge of the bed linen and napers of the establishment and keys to all the rooms. It was her duty to take care of the linen and distribute it as needed to the different rooms. Prior to April 15th she had rented a house at No. 4000 Delmar avenue wherein to take lodgers—a rooming house it is called. When she left the Usona Hotel she took away, or had sent after her, three trunks and several boxes, and besides had a negro boy, who worked at the hotel, carry away a wash basket full of stuff. This negro went with her to her rooming house and worked for her a short time. When the trunks and boxes were opened, several rugs and various articles of linen, like napkins, tablecloths, etc., were taken out of them. The boy recognized these articles as property of the Usona Hotel, and, indeed, the name of the hotel was on many of them. He reported the fact to Mrs. Boogher, and on May 7th she and her son and two officers went to the lodging house on Delmar avenue to search it. Mrs. Walken at first said, on being accused of taking the articles, that she had taken nothing but two napkins. Some rugs were found on the floors, and she admitted taking them, but said they were all. Afterwards table linen was discovered with the name of the Usona Hotel on it, and she said she had taken that, but no more; and so as the searching party went through the establishment, finding articles in each room, she admitted taking them, but protested against further search, saying her lodgers would be disturbed and she had nothing more.

According to the testimony of the officers, and of Mrs. Boogher and her son, appellant admitted she had taken away the various pieces they had discovered and offered no explanation of her act. Circumstances besides those narrated, and tending to prove

appellant's guilt, were put in evidence. A physician, who was put on the stand by appellant, apparently to account for her admissions, testified her nervous condition, when the searching party was going through her house, was such that she could not make clear answers to questions. Her own explanation, when on the witness stand, as to how she came to take table linen with the name of the Usona Hotel on it, was about as follows: She had arranged, several weeks before she left the Usona, to keep the rooming house on Delmar, and another woman was going to be her partner in the enterprise. This woman had advanced her money with which to buy rugs and linen to be used in their business. She used the money to buy napkins, and perhaps other pieces, and these became mixed with the Usona linen in laundering, while she was still housekeeper there, and when she was leaving she did not think it was necessary to select her own articles from among the Usona linen, but thought it would be all right to take the same number of pieces with the Usona's name on them. Appellant also swore the rugs she had at the Delmar house had been sent to her by the woman who was to be her partner. It is useless to pursue the evidence in this case, for it amply supports the verdict.

We have examined the instructions given by the court, which covered the entire case, and find no error in them. It is permissible to convict a defendant of petit larceny under an indictment for grand larceny, if the evidence shows the value of the property stolen was less than \$30. Rev. St. 1899, § 1911 (Ann. St. 1906, p. 1304). The jury must have found the property taken by appellant was less than \$30 in value, and this was a merciful verdict.

The judgment is affirmed. All concur.

TOWER GROVE PLANING MILL CO. v. HORNBERG et al.

(St. Louis Court of Appeals. Missouri. Nov. 5, 1908.)

APPEAL AND ERROR (§ 271*)—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW —EXCEPTIONS—NECESSITY.

The denial of a motion to amend a notice of appeal from a justice's court to the circuit court, and the granting of a motion to dismiss the appeal because sufficient notice had not been given, cannot be reviewed, where no exceptions were saved to either ruling, notwithstanding a motion for rehearing was thereafter filed and overruled, and exception saved thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1446; Dec. Dig. § 271.*]

Appeal from Circuit Court, St. Louis County; J. W. McElhinny, Judge.

Mechanic's lien foreclosure in a justice's court by the Tower Grove Planing Mill Company against R. J. Hornberg and others. There was a judgment in the justice's court

for plaintiff, and defendants appealed to the circuit court, which appeal was dismissed, and defendants appeal. Affirmed.

F. M. Kittrell, for appellants. Lubke & Lubke, for respondent.

GOODE, J. This was an action instituted before a justice of the peace to enforce a mechanic's lien. It went on appeal to the circuit court, where the appellee filed a motion to dismiss the appeal because sufficient notice of it had not been given. This motion was sustained, and a motion filed by appellants in the appeal from the justice for permission to amend the notice of appeal was overruled. The rulings on those two motions, to wit, the one for leave to amend notice of appeal and the other to dismiss the appeal, have been brought to this court for examination; but we are of the opinion they cannot be reviewed here, because appellants saved no exception to the ruling of the court on either of the motions. Afterwards a motion for rehearing was filed and overruled, and appellants saved an exception to that; but this was not enough. It was necessary to except to the rulings on the motions when made, if appellants desired to have them examined here. This very point was determined in *Am. Wine Co. v. Scholer*, 13 Mo. App. 345.

There being no error in the record proper, the judgment is affirmed. All concur.

HEIDBRINK v. UNITED RYS. CO.

(St. Louis Court of Appeals. Missouri. May 28, 1908. Rehearing Denied Oct. 20, 1908.)

1. JURY (§ 97*)—DISQUALIFICATION OF JURORS—BIAS.

In a personal injury action against a street railway, a juror on his voir dire stated that his mother had been struck by one of defendant's cars and that a claim had been presented to defendant, but that it was "not exactly settled satisfactorily"; that the settlement made "would not exactly" influence him against defendant, but he thought it would "almost cause" him to give plaintiff "the benefit of the doubt"; that he thought he could give a fair decision. To the question whether he would lean toward plaintiff on account of the accident to his mother, he answered that if the testimony was about equally balanced he supposed that he would give the benefit of the doubt to plaintiff; and to the question whether he would have a feeling of partiality toward plaintiff, "No, not exactly." *Held*, that he was disqualified because of bias.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 436; Dec. Dig. § 97.*]

2. TRIAL (§ 252*)—INSTRUCTIONS—MATTERS NOT SUPPORTED BY EVIDENCE.

An instruction in a personal injury action to allow any expense necessarily incurred for nursing was improperly given, where there was no evidence that any such expense had been incurred.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 610; Dec. Dig. § 252.*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action for personal injuries by Lizzie Heidbrink against the United Railways Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Boyle & Priest, for appellant. Thos. D. Cannon, for respondent.

BLAND, P. J. Olive street runs east and west through the center of the city of St. Louis. Sarah street is in the western part of the city, and runs north and south, crossing Olive street at right angles. In 1906 defendant operated a street railroad over Olive street, and the St. Louis & Suburban Railway Company operated one over Sarah street. The usual place to stop cars running west on Olive street, to receive and discharge passengers, is the west corner of the street crossing. On February 11, 1906, plaintiff, in company with her sister, boarded a west-bound Olive street car, at about 10 o'clock p. m., to be carried to Sarah street. She and her sister occupied the back seat in the car. Just before the car reached Sarah street, plaintiff's sister signaled the conductor to stop the car at the Sarah street crossing. The conductor gave the motorman a bell to stop, and the speed of the car was slackened before it reached the railway tracks on Sarah street, and plaintiff arose from her seat and walked out of the door to the rear platform. After reaching the platform she was either thrown off by a lurch of the car, or walked off and fell upon the street. Plaintiff was badly injured, and the action is to recover her damages.

The petition alleges, and plaintiff's evidence tends to show, that plaintiff arose from her seat when the car was entering the Sarah street crossing, walked to the platform, and stopped and stood at the door, holding to the door handle, waiting for the car to reach the corner and stop, to allow her to get off; that as the car crossed the Sarah street tracks it was given a sudden propulsion, from which an unusual jolt and jerk resulted, causing plaintiff to lose her hold on the door handle and to be thrown off the car to the street. The evidence for defendant, coming from passengers standing on the back platform and a bystander on the street, tends to show there was no spurt of speed and no unusual jerking or jolting of the car as it crossed over the Sarah street tracks, and that plaintiff did not stop on the platform, but walked off the car while it was in motion and fell to the street. Ten of the jurors signed a verdict for plaintiff, and assessed her damages at \$2,500.

1. Error is assigned in the action of the court in overruling defendant's challenge for cause of juror Meyer. The examination of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

this juror on his voir dire disclosed the fact that his mother, about one year previous to the trial, was accidentally struck by one of defendant's cars and injured; that she and the juror presented a claim to the company on account of the injury, and it was settled, but, to use the language of the juror, "not exactly settled satisfactorily." The juror stated that the settlement as made "would not exactly" influence him against the company in any way; but he thought it would "almost cause" him to give plaintiff "the benefit of the doubt"; that he thought he could give a fair decision in the case, and could consider the testimony of both sides, and give the evidence the same consideration as he would any controversy between man and man. On further examination of this juror, the following occurred: "Q. I understood you to state a while ago that you would lean toward the plaintiff in this case on account of that accident having occurred to your mother. Didn't you state that? A. Well, I suppose, if the testimony was about equally balanced, I would have to lean on one side. Q. So that, if the evidence for the defendant would equally balance the evidence for the plaintiff in your judgment, you would give the benefit of the doubt to the plaintiff, and vote to return a verdict in her favor, would you not? A. Well, I suppose I would. I would have to put the doubt either one way or the other. Q. So you will go into the jury box, if selected as a juror, with a feeling of partiality in favor of the plaintiff? A. No, not exactly."

We think the examination of this juror clearly shows that his mind was biased against defendant to such an extent as to disqualify him. He stated over and over that if the evidence was equally balanced he would give the plaintiff "the benefit of

the doubt"; in other words, that to his thinking the plaintiff would not be required to prove her case by a preponderance of the evidence, as the law requires she should to entitle her to a verdict. Lord Mansfield said: "A juror should be as white as paper and know neither plaintiff nor defendant, but judge of the issue merely as an abstract proposition upon the evidence produced before him. He should be superior even to a suspicion of partiality." Judge Marshall, in *Theobald v. St. Louis Transit Co.*, 191 Mo., at page 428, 90 S. W., at page 363, after reviewing many cases, said: "The streams of justice should be kept pure and free from prejudice. In the administration of justice, the courts and all judges, as well as the jurors, should, as far as human precaution can avail, be kept free from bias or prejudice." Although Meyer's answers to some of the questions propounded to him were to the effect that he would be governed by the evidence and instructions of the court if selected as a juror, yet his examination as a whole shows he was biased against defendant and could not be a fair juror, though he might be an honest one, and we think the court erred in overruling defendant's challenge.

2. The third clause of the instruction on the measure of damages is as follows: "For any expenses necessarily incurred for medicines, medical attention, or nursing, which the jury may believe from the evidence the plaintiff has sustained or will hereafter sustain by reason of said injuries and directly caused thereby." There was no evidence that plaintiff incurred any expense for nursing, and for this reason the instruction is erroneous.

The judgment is reversed, and the cause remanded. All concur.

BAUM v. STEPHENSON.

(St. Louis Court of Appeals. Missouri. Oct. 20, 1908.)

1. PLEADING (§ 8*)—ALLEGATIONS—CONCLUSIONS—EXISTENCE OF PARTNERSHIP.

An allegation that plaintiff and defendant were partners is only a conclusion of the pleader; whether a partnership existed being a question of law, to be determined from the facts alleged and proved.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 8.*]

2. PARTNERSHIP (§ 20*)—EXISTENCE OF RELATION.

Plaintiff and defendant agreed to purchase the majority of the shares of a turnpike corporation, and the shares were purchased and divided equally between themselves, each holding the stock in his individual right, and they were afterwards elected officers of the corporation and directed its business, their ultimate purpose in securing control of the turnpike being to construct an electric railroad over the road. *Held*, that they did not carry on the business as partners, but acted for the corporation, even though they agreed to and did work for the ultimate benefit of each other.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 20.*]

3. PARTNERSHIP (§ 1*)—RELATION.

A "partnership" is a status resulting from contract, its essential elements being a contract to share, as common owners, the profits of the business.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5191-5202; vol. 8, pp. 7746, 7747.]

4. JURY (§ 12*)—RIGHT TO TRIAL BY JURY—LEGAL OR EQUITABLE ACTIONS—RECOVERY OF MONEY ONLY.

Even if plaintiff and defendant were partners, the action not being for a settlement or accounting, but for a money judgment for defendant's fraud in secretly retaining a part of the purchase price of partnership property, the action was one at law, and hence, was triable by jury, within Rev. St. 1890, § 691 (Ann. St. 1906, p. 700), requiring issues of fact in actions for money only to be tried by jury.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 12.*]

Appeal from St. Louis Circuit Court; Jas. R. Kinealy, Judge.

Action by William Baum against Lloyd Stephenson. From a judgment in part for plaintiff, both parties appeal, defendant being designated as appellant. Reversed and remanded.

Geo. B. Webster, for appellant. W. J. N. Mayer and Lee Sale, for respondent.

BLAND, J. Omitting captions and signatures, the pleadings are as follows:

Petition.

"Plaintiff states that prior to the month of November, 1890, plaintiff and defendant had been associated together in business for several years; that between the years 1884 and 1889 he and the said defendant had been engaged as partners in the practice of law at the city of Shelbyville, in the state of Illi-

nois; that in or about the month of November, 1897, plaintiff and defendant agreed to form a partnership for the purpose of obtaining or controlling a right of way between the cities of East St. Louis and Belleville, in the state of Illinois, over the turnpike between said cities, with a view to the construction and operation of an electric railway between the said cities; that in pursuance of said agreement, and as part thereof, plaintiff and defendant agreed to attempt to obtain a controlling interest in the St. Clair County Turnpike Company, a corporation organized under the laws of the state of Illinois, owning and operating a turnpike road between said cities of East St. Louis and Belleville; that it was further agreed between said parties that all stock so to be purchased should be divided equally between them; each party paying his one-half of the cost thereof, and that all stock so to be purchased should be held and managed in common and by the parties hereto as partners; that neither of said parties should, without the consent of the other, sell any portion of the stock so purchased. Plaintiff further states that, in pursuance of said agreement, plaintiff and defendant did, in November, 1890, purchase three hundred and fifty-seven (357) shares of the capital stock of the said St. Clair County Turnpike Company, each of said parties paying one-half of the purchase price thereof. Plaintiff states that thereafter, in pursuance of said partnership agreement, shares of the capital stock of said St. Clair County Turnpike Company were purchased, from time to time, by said plaintiff and defendant, severally, and that the shares of stock so purchased were thereupon divided equally between plaintiff and defendant, and paid for by the plaintiff and defendant, share and share alike; that the amount of stock so purchased and owned by plaintiff and defendant in the year 1897 aggregated the sum of six hundred and twenty-five (625) shares; that the entire capital stock of said St. Clair Turnpike Company aggregated twelve hundred and seventy (1,270) shares, of which two hundred and seventy (270) shares were at all times herein mentioned retained in the treasury thereof as treasury stock of said company; that for some years prior to the year 1897, in pursuance of said agreement, defendant had occupied the position of president of the said St. Clair County Turnpike Company, and plaintiff during the same time had occupied the position of secretary and treasurer of said company, both plaintiff and defendant receiving the same salary as such officers; that during the entire period prior to 1897, during which plaintiff and defendant were connected with the said turnpike company, plaintiff had active control and management of said company, and devoted all the necessary attention to the business of said company, defendant being, during all said period

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in poor health, and unable to give his time and attention to the business of the said company. Plaintiff further states that for several years prior to the year 1897, he and the defendant, in conjunction with one D. P. Alexander, had made efforts to obtain franchises that would enable them to build an electric railway over the said turnpike road, and during the said years had respectively obtained various franchises with the view and purpose of building said electric railway from East St. Louis to Belleville, and that each of the said parties had during said period made efforts to interest capitalists in the building of said electric railway, but that prior to the month of November, 1897, all of the efforts of said parties had been of no avail; that in the month of November, 1897, the firm of Townsend, Reed & Co., being desirous of constructing and operating an electric railway between the said cities of East St. Louis and Belleville, over the turnpike then owned by the said St. Clair County Turnpike Company, entered into negotiations with the defendant for the purchase of the six hundred and twenty-five (625) shares of the capital stock of the St. Clair County Turnpike Company, then owned and held by plaintiff and defendant as partners in the manner and upon the terms hereinbefore set out; that all of said negotiations were had by the said firm of Townsend, Reed & Co., with defendant, who was acting on behalf of himself and plaintiff in the city of St. Louis, while plaintiff was residing in the city of Shelbyville, Ill., and attending to the business of said St. Clair County Turnpike Company.

"Plaintiff further states that, in pursuance of said negotiations, plaintiff and defendant did, on November 12, 1897, enter into a contract with said firm of Townsend, Reed & Co., by the terms of which plaintiff and defendant agreed to sell the said six hundred and twenty-five (625) shares of stock so held by them in the St. Clair County Turnpike Company for the sum of forty thousand dollars (\$40,000), payable one thousand dollars (\$1,000) in cash, and the balance of thirty-nine thousand dollars (\$39,000) in one year from the date of the making of said contract, and did further agree to obtain for the said firm of Townsend, Reed & Co. the right to construct and operate a double track railroad on the property and right of way of the St. Clair County Turnpike Company from East St. Louis, Ill., to Belleville, Ill.; that thereupon, and in pursuance of said contract, the sum of one thousand dollars (\$1,000) was paid by the said Townsend, Reed & Co. to plaintiff and defendant, each of whom received one-half of the amount so paid, to wit, the sum of five hundred dollars (\$500). Plaintiff further states that all of the negotiations leading up to the making of the said contract with Townsend, Reed & Co. were conducted by the defendant Stephenson, acting for himself and plaintiff, and that during the whole of said negotiations the defendant acted as the

representative and agent of plaintiff, and of the joint interests held by plaintiff and defendant in the said turnpike company as hereinbefore set out. Plaintiff further states that, at the time of entering into said contract, and as part of the consideration moving from said firm of Townsend, Reed & Co. to plaintiff and defendant for the making of said contract, the said firm of Townsend, Reed & Co. had orally agreed with the defendant that they would deliver to him individually, as an additional consideration, five thousand dollars (\$5,000) of first mortgage bonds in a railroad company thereafter to be organized under the laws of the state of Illinois for the purpose of owning and operating a double track railroad between the cities of East St. Louis and Belleville. Plaintiff states that at the time of the making of the contract aforesaid, and during all of the negotiations leading up to the execution of the said contract, defendant concealed from plaintiff the fact that he was to receive the said additional consideration, and for the purpose of concealing said fact did enter into a separate agreement in writing with the said firm of Townsend, Reed & Co. for the delivery to the defendant individually of the said five thousand dollars (\$5,000) of bonds. Plaintiff further states that the said agreement so made by defendant was a secret agreement, entered into by defendant in fraud of the rights of plaintiff; that plaintiff at the time of the making of the contract was ignorant of the said secret agreement between defendant and said firm of Townsend, Reed & Co., and did not learn of the making of same until some time during the year 1900.

"Plaintiff further states that after the making of the agreements, hereinbefore recited, said firm of Townsend, Reed & Co. proceeded to organize a corporation for the purpose of building an electric railway between East St. Louis and Belleville, and did, in pursuance of the secret agreement hereinbefore mentioned between them and the defendant, deliver to defendant five thousand dollars (\$5,000) of first mortgage bonds issued by said corporation. Plaintiff further states that said five thousand dollars (\$5,000) of first mortgage bonds so delivered to defendant were sold by the defendant some time during the year 1899, the exact date being unknown to plaintiff; that defendant received therefor the sum of twenty-five hundred dollars (\$2,500), no part of which has ever been paid to plaintiff. Plaintiff states that, by reason of the premises, there is due to him from defendant the sum of twelve hundred and fifty dollars (\$1,250), together with interest thereon from date when the said sum of twenty-five hundred dollars (\$2,500) was received by the defendant. Plaintiff further states that on, to wit, the 7th day of November, 1898, the said firm of Townsend, Reed & Co., finding that they would be unable to carry out their contract with plaintiff and defendant to pay them the sum of thirty-nine thousand dollars

(\$39,000) on November 12, 1898, as hereinbefore set out, did enter into a new agreement with plaintiff and defendant, in cancellation of the agreement theretofore entered into by them, dated November 12, 1897; that in and by said new agreement, it was provided that the said firm of Townsend, Reed & Co. should pay to plaintiff and defendant, on or before twelve (12) months from date, the sum of thirty-five thousand dollars (\$35,000). Plaintiff states that after the making of said new agreement, the defendant represented to plaintiff that, in order to obtain the said new agreement, he and defendant had been compelled to surrender to Townsend, Reed & Co. all bonus that he had received from said firm on account of moneys loaned by defendant to assist said firm of Townsend, Reed & Co. in the building of an electric railway, and that he (the defendant) had received nothing whatever from said firm of Townsend, Reed & Co. in return for the surrender of said bonus. Plaintiff further states that thereupon, and by reason of the representations so made by defendant to plaintiff, plaintiff was induced to agree, and did then and there agree, to give to defendant the sum of five hundred dollars (\$500) out of the seventeen thousand five hundred dollars (\$17,500) thereafter to be received by plaintiff under the new contract of November 7, 1898, hereinabove referred to.

"Plaintiff further states that on said seventh day of November, 1898, and at the time when he agreed to give to defendant the said sum of five hundred dollars (\$500), as aforesaid, the defendant had in his possession the five thousand dollars (\$5,000) of first mortgage bonds hereinbefore referred to; that plaintiff at the time he agreed to give defendant the said sum of five hundred dollars (\$500) was ignorant of the fact that defendant had received the said mortgage bonds, or that he then had the same in his possession, and that plaintiff did not learn until a long time thereafter that defendant had received anything from the said firm of Townsend, Reed & Co. other than what plaintiff himself had received, and that he entered into the said agreement with defendant in utter ignorance of the fact that defendant had theretofore received any consideration from the firm of Townsend, Reed & Co. in addition to what plaintiff had received. Plaintiff further states that thereafter, to wit, on November 28, 1899, he received from the firm of Townsend, Reed & Co. the sum of seventeen thousand five hundred dollars (\$17,500), as provided in said contract of November 7, 1898, and that he paid to defendant out of said amount the sum of five hundred dollars (\$500) as theretofore agreed; that the payment of said sum of five hundred dollars (\$500) by plaintiff to defendant was paid as a gratuity wholly in consideration of the representations theretofore made by defendant to plaintiff, and in ignorance of the fact that defendant had received, and then had

in his possession, the five thousand dollars (\$5,000) of mortgage bonds referred to; that the defendant at the time he induced plaintiff to agree to give him said five hundred dollars (\$500) and for the purpose of inducing plaintiff to agree to give the said five hundred dollars (\$500) as a gratuity, concealed from the plaintiff the fact that he had received, and then had in his possession, the said five thousand dollars (\$5,000) of mortgage bonds. Plaintiff further states that the conduct of the defendant in inducing plaintiff to agree to give him the said sum of five hundred dollars (\$500), and in concealing from plaintiff the fact that he had received, and then had in his possession, said mortgage bonds, contrary to equity and good conscience and of the acceptance by defendant from plaintiff of the sum of five hundred dollars (\$500), so paid by plaintiff was and is in fraud of the rights of plaintiff. Plaintiff avers that by reason of the premises there is due to plaintiff from defendant the further sum of five hundred dollars (\$500), together with interest thereon from the 28th day of November, 1899. Wherefore, the premises considered plaintiff prays that defendant may be adjudged to pay to plaintiff the said sums of twelve hundred and fifty dollars (\$1,250) and of five hundred dollars (\$500), together with interest thereon and costs of suit."

Answer.

"Now comes the defendant in the above-entitled cause and for his answer to the plaintiff's petition denies each and every allegation therein. And, further answering, the defendant avers that on or about the seventeenth day of November, 1899, he and the plaintiff had a full and complete accounting and settlement between themselves, and struck a balance, and that he thereupon paid the amount thereof to the plaintiff, and that since said date he has had no dealings or transactions whatever with the plaintiff. Wherefore, having fully answered, defendant prays to be dismissed with his costs."

On the next day plaintiff filed his reply in the nature of a general denial. Defendant's counsel demanded trial by jury. The court ruled that the petition stated an action in equity, and denied the request for a jury trial, from which ruling defendant's counsel saved an exception. After hearing the evidence, and making a special finding of the facts, the court rendered judgment on the first count of the petition for plaintiff, assessed his damages at \$1,565, and found the issues on the second count for defendant. Both parties appealed from this judgment.

The action is for the sole purpose of recovering a money judgment. The allegation that plaintiff and defendant were partners is but the conclusion of the pleader. Whether or not they were partners is a question of law, to be determined from the facts alleged in the petition and shown on

the trial. We do not think the facts alleged in the petition show that plaintiff and defendant were partners. The gist of the first count is that plaintiff and defendant agreed to purchase, and did purchase, the majority of the capital stock of the turnpike company, a corporation, and divided it equally between themselves, each holding his stock in his individual right; that after procuring a majority of the stock, they caused themselves to be elected chief officers of the corporation, thereafter managing and controlling its property and business; that the ultimate object plaintiff and defendant had in view in acquiring the capital stock of the turnpike company was to interest other capitalists, and build an electric railway over the turnpike road from East St. Louis to Belleville, Ill.; that they did not succeed, and defendant, acting for himself and plaintiff, with plaintiff's consent, sold the stock of both to Townsend, Reed & Co., and by a secret and fraudulent agreement with that company secured for himself, over and above the money consideration for the stock, \$5,000 in bonds, which he afterwards sold for \$2,500 in cash; that said secret agreement was in fraud of plaintiff's rights, and he is entitled to one-half the amount realized on the bonds. The gist of the second count is that defendant, by false and fraudulent representations, in respect to the second deal concerning the stock, induced plaintiff to part with \$500, for which judgment is asked. The answer put these allegations in issue. The issues thus raised were cognizable at law; and, as only a money judgment is asked, the petition stated a cause of action at law.

The evidence offered by plaintiff shows that he and defendant bought, from time to time, 630 shares of the capital stock of the St. Clair County Turnpike Company, a corporation, for the purpose of getting a controlling interest in that corporation, with the view of promoting the construction of an electric railway over the turnpike road, running from East St. Louis to the city of Belleville, in the state of Illinois; that the stock purchased was at the equal expense of both parties, and each received and had transferred to himself an equal number of the shares so purchased; that no share or shares were held in common as the joint or partnership property of plaintiff and defendant; that they agreed to hold their stock and work together, and plaintiff was elected secretary and treasurer of the turnpike company, and defendant president, each receiving the same salary, and having the exclusive management and control of the business of the company; that they expended equal amounts in making repairs on the road and acquiring franchises for the contemplated electric railroad, and worked together, as they had agreed, to a common end; that they were unsuccessful in their effort to organize a company, or to raise the necessary capital to build an electric railroad, and in Novem-

ber, 1897, sold their stock to Townsend, Reed & Co. for \$40,000, \$1,000 in cash, the balance to be paid in 12 months; that defendant, with plaintiff's consent, acting for himself and plaintiff, negotiated the sale of the stock in St. Louis, Mo., in plaintiff's absence; that Townsend, Reed & Co. agreed to build the electric railroad from East St. Louis to Belleville, over the turnpike road, but on the same day, and about the same time, said company made a supplemental contract with defendant, whereby they agreed to give him \$5,000 par value of certain first mortgage bonds to be thereafter issued; that Townsend, Reed & Co. were unable to carry out their contract to build the electric railroad or pay the balance of the purchase price for plaintiff's and defendant's turnpike stock; that a new company was formed, which took over all the turnpike stock, and agreed to pay, and did pay, plaintiff and defendant \$35,000 in full for the balance due them from Townsend, Reed & Co.; that the \$5,000 in bonds were at some time delivered to defendant, in pursuance of the supplemental contract of November, 1897, and defendant afterwards surrendered these bonds in consideration of \$2,500 in cash; that plaintiff ratified the sale of stock made in November, 1897, to Townsend, Reed & Co. by signing the contract. Plaintiff testified that at the time of signing the contract, and for a long time thereafter, he was totally ignorant of the supplemental contract, or that defendant had received the \$5,000 in bonds under said contract, and his evidence tends to show the \$5,000 in bonds was given as an additional consideration for his and defendant's stock in the turnpike company.

In regard to the second count, plaintiff's evidence shows Townsend, Reed & Co. began the construction of the electric road in 1897, got into financial difficulties, and defendant let them have \$13,000 in money, for which they agreed to give him a bonus of \$60,000 par value capital stock, and to pay him 10 per cent. interest on the money advanced; that in order to carry out the agreement of 1898 (stated in the petition), it was necessary that defendant surrender the \$60,000 in stock received as a bonus for the advancement made to Townsend, Reed & Co., which he did, receiving nothing therefor; that in consideration of this surrender, plaintiff agreed to take \$17,000, and let defendant take \$17,500 of the \$35,000 agreed to be paid for the balance due them for their turnpike stock, and the money (\$35,000) was paid over to defendant, and he in turn paid plaintiff \$17,000. Plaintiff transferred 25 shares of his turnpike stock to his wife, one to his brother-in-law, and one to another person, for the purpose of qualifying them to be directors in the turnpike company. Defendant's evidence puts a different phase on the transaction with respect to the bonds, and tends to show, as does also the supplemental contract, that when the contract of 1897

was entered into, whereby the turnpike stock of plaintiff and defendant was transferred to Townsend, Reed & Co., it was agreed that plaintiff and defendant should have an interest in the construction company organized, or to be organized, to build the electric railway, and that plaintiff declined to become interested in that company, and the \$5,000 in bonds was given defendant in consideration of his surrendering his right to become a partner or stockholder in said company. In respect to the second count, plaintiff's own evidence clearly shows he was not entitled to recover. A partnership is said to be "a status resulting from contract." Its essential elements are a contract between the partners to share as common owners in the profits of the business. Plaintiff's evidence clearly shows he and defendant held no property as partners, and carried on no business as partners. Their management of the turnpike road was for the benefit of the St. Clair County Turnpike Company, a corporation, and their acts in the management of the road were done as president and secretary of the company, not as partners; and, there being other stockholders than plaintiff and defendant in said corporation, whatever profits were made inured to the benefit of all the stockholders, not to the exclusive benefit of plaintiff and defendant, and this is so, notwithstanding the fact they agreed to and did work especially for the benefit of each other. What they did was in the name of the corporation, and not in their names, as partners, and if defendant is liable at all, it is on the theory that in negotiating the sale of his and plaintiff's stock, he acted as agent of plaintiff and is liable to him as such. But even if it be conceded that plaintiff and defendant were in some ways partners, the action is not for an accounting and settlement of such partnership affairs as was conceded by plaintiff's counsel on the oral argument. The action is for the recovery of money only, and was triable by jury. *Rev. St. 1899, § 691 (Ann. St. 1906, p. 700); Donovan v. Barnett, 27 Mo. App. 460; Whetstone v. Shaw, 70 Mo. 575; Van Raalte v. Epstein, 202 Mo. 173, 99 S. W. 1077.*

For the reason defendant was erroneously refused a trial by jury, the judgment is reversed and the cause remanded. All concur.

CONSERVATIVE REALTY CO. v. ST. LOUIS BREWING ASS'N.

(St. Louis Court of Appeals. Missouri. Oct. 20, 1908.)

1. LANDLORD AND TENANT (§ 134*)—LEASES—CONSTRUCTION—USE OF PREMISES.

A lease bound the lessor not to lease "to another saloon or dramshop on said block during this lease," and that, if a saloon license could not be secured on the premises, the lease

should be null and void on 90 days' notice. *Held* to show that the premises were let for a dramshop.

[Ed. Note.—For other cases, see *Landlord and Tenant, Dec. Dig. § 134.**]

2. APPEAL AND ERROR (§ 1051*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where a lease shows on its face that the premises were let for a dramshop, the admission of extrinsic evidence to show that that was the purpose, if error, is harmless.

[Ed. Note.—For other cases, see *Appeal and Error, Cent. Dig. § 4168; Dec. Dig. § 1051.**]

3. LANDLORD AND TENANT (§ 37*)—LEASES—CONSTRUCTION—INTENTION OF PARTIES.

In construing a lease, the court must give an effect to each clause which will promote the general purpose, if possible, in view of the language used, and to that end the intention of both parties regarding the purpose of the demise must be given great weight.

[Ed. Note.—For other cases, see *Landlord and Tenant, Cent. Dig. § 98; Dec. Dig. § 37.**]

4. LANDLORD AND TENANT (§ 39*)—LEASES—CONSTRUCTION.

If the language of a lease is clear, its meaning will be obligatory on the parties, though the consequences may be harsh and the stipulation contrary to the mode in which men ordinarily bind themselves by contract.

[Ed. Note.—For other cases, see *Landlord and Tenant, Dec. Dig. § 39.**]

5. CONTRACTS (§ 147*)—CONSTRUCTION—PATENT AMBIGUITIES.

The old rule that a patent ambiguity in a clause of a contract might render the stipulation void is no longer strictly observed, and, whether an ambiguity be patent or latent, a court will endeavor to glean the parties' intentions from the whole instrument, and the incidents attendant on its execution.

[Ed. Note.—For other cases, see *Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.**]

6. LANDLORD AND TENANT (§ 42*)—LEASES—CONSTRUCTION—EVIDENCE.

Evidence held to show that a provision in a lease for five years that, if a saloon license should not be secured on the premises, the lease should be null and void on 90 days' notice, gave the lessee the right at any time during the term to terminate the lease on 90 days' notice, whenever it became impossible to obtain a license, and not merely in the event a first license could not be procured.

[Ed. Note.—For other cases, see *Landlord and Tenant, Dec. Dig. § 42.**]

7. INTOXICATING LIQUORS (§ 58*)—CONTRACTS—VALIDITY—LEASE OF PREMISES FOR SALE OF LIQUOR.

That a corporation cannot be licensed to keep a dramshop, does not make it unlawful for a brewing corporation to lease premises so as to have its beer sold in them.

[Ed. Note.—For other cases, see *Intoxicating Liquors, Dec. Dig. § 58.**]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by the Conservative Realty Company against the St. Louis Brewing Association. Judgment for defendant, and plaintiff appeals. Affirmed.

This appeal involves the interpretation of the following lease:

"This indenture made the twelfth day of October, in the year of our Lord nineteen hundred and three, between J. H. McClure of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the one part and the St. Louis Brewing Association, a corporation, of the other part, witnesseth:

"That the said J. H. McClure in consideration of the rents, covenants and agreements hereinafter mentioned and reserved on the part of the said J. H. McClure, executors, administrators and assigns, has leased, and by these presents does lease to the said St. Louis Brewing Association, a corporation, building situated on the northwest corner of Twentieth and O'Fallon streets and known as No. 1301 North Twentieth street, in block No. 2302, in the city of St. Louis, to commence on the first day of December, 1903, for and during the term of five years at the yearly rental of nine hundred dollars, payable in equal monthly instalments in advance, seventy-five dollars.

"Said lessee to make all inside repairs necessary inside of building, pay water license assessed against the property.

"Any failure to pay each month's rent when due, and after a demand of the same, to produce a forfeiture of this lease, if so determined by said lessor or his successors. The lease of said tenement, or any part of it, is not assignable, under penalty of forfeiture, without the written consent of said lessor, and it is hereby covenanted that at the expiration of this lease, the said tenement and premises are to be surrendered to said lessor, his heirs, assigns or successors, in the condition received, only excepting natural wear and decay, or the effects of fire. All inside repairs deemed necessary by the lessee to be made at the expense of said lessee, with the consent of said lessor, and not otherwise.

"The said lessee, and all holding under it, hereby engage to pay the rent above reserved, and double rent for every day it or anyone else in its name, shall hold onto the whole or any part of said tenement after the expiration of this lease, or of its forfeiture for nonpayment of rent, etc.

"This tenement and premises to be kept free of any nuisance thereon, at the expense of said lessee. Said lessor agrees not to lease, rent, etc., to another brewery, saloon or dramshop, on said block, during this lease. Should said saloon license be not secured on said premises in said block, then this lease is null and void on ninety days' notice from said lessee.

"Made and signed in duplicate this twelfth day of October, 1903.

"J. H. McClure [Seal.]

"St. Louis Brewing Association,

"Per Henry Nicolaus, President. [Seal.]

"Attest: Philip Stock, Secy. [Seal of St. Louis Brewing Association.]"

After the quoted lease had been executed, Henry Wuertenbacher conducted a dramshop on the premises under two licenses of six months each. Wuertenbacher had been an employe of the defendant company, and the record is doubtful as to whether he occupied the premises as a subtenant of the brewing com-

pany and was a bona fide proprietor of the saloon, or an agent of defendant. At the end of a year a petition was circulated among the property owners in the block for a third license to be issued to August Gorka, but, as the majority remonstrated against the saloon, the license was refused by the excise commissioner. Subsequent to the date of the lease, and on September 28, 1903, J. H. McClure, the lessor, sold and conveyed the premises to Amanda Twelker, who sold and conveyed them to plaintiff, the Conservative Realty Company, in June, 1905. Mrs. Twelker was the owner of the fee and the landlord early in 1905, when the effort to procure a third license failed; wherefore defendant served a written notice on her April 25, 1905, that, as it had been found impossible to procure a license for the keeping of a dramshop on the lot, the lessee (St. Louis Brewing Company) elected, under the terms and provisions of the lease, to terminate the tenancy on the 1st day of August, 1905, and would then surrender possession of the premises to her. Two men took the keys of the building to the office of plaintiff's agent July 31, 1905, and on the refusal of the agent to accept them threw them on the floor. The Conservative Realty Company, which, as said, had become the owner of the premises, notified plaintiff in writing on August 1, 1905, of the acts of the men who had brought the keys, of plaintiff's refusal to accept the keys or possession of the premises or a surrender of the lease, and, further, that the keys were subject to plaintiff's disposal. This action was brought before a justice of the peace for \$75, the rent for August, 1905, and was appealed to the circuit court. On the trial in the latter court evidence was received, over the objection of plaintiff, to show that at the expiration of the second license it was impossible to procure another, that the rental reserved was more than the property would bring for any other purpose than a saloon, and it was rented by defendant to have a saloon conducted on it. At the instance of defendant, the court declared the intention of the parties to the lease, and all the facts and circumstances attending its execution were matters for consideration, and, if the court found from the evidence the parties entered into the lease with the understanding a saloon should be kept on the demised premises during the term, and further found this was the inducement to defendant to enter into the lease and it otherwise would not have done so, and that at the time stated in the evidence defendant was unable, after an honest effort, to procure a license to conduct a dramshop, and thereafter defendant served on the owner of the premises 90 days' notice of its intention to terminate the lease, then the verdict must be for defendant. Plaintiff requested the court to declare the law to be that, if defendant paid one or more monthly instalments of rent and the installment for August had not been paid, the finding must be for

plaintiff; and that, if the court found defendant caused a saloon to be conducted in the premises under a license granted to one Wuertenbacher after the beginning of the term fixed in the lease, to wit, December 1, 1905, and at the end of six months an additional license was procured, defendant thereafter had no right to declare the lease terminated on account of failure to procure a license. The court found the issues of fact for defendant, and plaintiff appealed.

Kinealy & Kinealy, for appellant. Marlon C. Early, for respondent.

GOODE, J. (after stating the facts as above). If evidence to prove the purpose for which defendant leased the premises was incompetent, its admission was harmless, because the lease document shows on its face what was understood by both the parties to it to be defendant's purpose. The lessor (McClure) bound himself not to lease or rent to another saloon or dramshop in said block during the existence of the lease in question. That proviso not only shows the premises were let for a dramshop, but that the lessor agreed to protect the lessee against competition in the block. The next clause, which provided that, if a saloon license could not be procured, the lease should be null and void on 90 days' notice, speaks to the same intent. There is no ambiguity concerning this point, and, in determining whether the lessee had a right to terminate the tenancy whenever a saloon license could not be procured, whatever help may be drawn from the clear purpose to let the premises for use as a saloon is available to the court on the face of the lease without reference to extrinsic evidence. The intention of both parties regarding the purpose of the demise must wield potent influence in interpreting any clause of it; for the duty of the court is to give an effect to each clause which will promote the general purpose, if it is possible, in view of the language, to do this. *Union Depot Co. v. Railroad*, 113 Mo. 213, 20 S. W. 792; *Bent v. Alexander*, 15 Mo. App. 181. The clause in question runs in these words: "Should said saloon license be not secured on said premises in said block, then this lease is null and void on ninety days' notice from said lessee." Plaintiff's counsel contend this stipulation means that only in the event a single license, to wit, the one for the first six months, could not be procured, defendant might end the term by giving 90 days' notice; whereas, defendant contends the meaning of the clause and the intention of the parties was that if, at any time during the term of 5 years, a license could not be procured, the lessee might surrender the term. In aid of this interpretation, they point to the statutory law of the state which limits saloon licenses to a term of six months, and to the obvious purpose of the demise, arguing that it would be unreasonable to hold defendant was willing to commit itself for the entire five years

on the strength of a license for the first six months. If the language was clear, its meaning would be obligatory on the parties, although the consequences might be harsh and the stipulation contrary to the mode in which men ordinarily bind themselves by contracts. *Sachleben v. Wolfe*, 61 Mo. App. 28. But the clause to be construed is ambiguous in this: The language is "should said saloon license be not secured on said premises," etc. Those words convey the impression that some license had been mentioned in the previous part of the lease to which the phrase "said saloon license" referred. But no particular license had been mentioned, nor had the word "license" been used before in the instrument. Hence there is no more reason to hold the words "said saloon license" referred to a license for the first six months than to hold they referred to one for any other six months. There is some weight in the argument of defendant's counsel that they referred to one license, and not the numerous licenses which would need to be procured for a dramshop during the five years' term, since the word "license" is in the singular number. According to old law, the patent ambiguity of the clause might make the stipulation void; but this doctrine is no longer enforced as strictly as formerly, and, whether an ambiguity is patent or latent, a court will endeavor to glean the intention of the parties from the whole instrument and the circumstances attendant on its execution. 2 *Parsons, Contracts* (9th Ed.) *561 et seq. Taking into account the law regarding saloon licenses, and the purpose for which the premises were taken by defendant, we have no doubt the intention of the parties was to make the existence of the lease contingent on the ability of defendant to procure from time to time a license; that is to say, defendant was accorded the privilege of ending the term on 90 days' notice whenever it became impossible to obtain a license. It is highly improbable the brewing association would have entered into the lease to have a saloon kept on the premises unless it knew beforehand a license for the first six months could be procured. Indeed, testimony was admitted without objection to prove the officers of defendant had investigated this matter before the lease was executed, and were assured a license would be granted. Therefore it was useless to put the stipulation in the lease, if it related, as plaintiff's counsel say, only to the first license. To adopt such a view we must conclude the parties stipulated for a cessation of the term in case it turned out to be impossible to get a license for the first six months, when, in fact, defendant made sure of this contingency before it took up with plaintiff the proposition to rent the property.

Plaintiff's counsel insist that, inasmuch as a corporation cannot be licensed to keep a dramshop, the clause providing for the surrender of the term in the event a license for a dramshop could not be procured is against

public policy, and void. It is argued that, if defendant was permitted to put an individual in possession of the premises to conduct a saloon for its benefit, this would be doing indirectly what it was forbidden to do directly. It does not appear the defendant was going to put a man in there to conduct a saloon as its agent; but merely that the property was rented for saloon purposes, and probably to increase the sale of defendant's beer. The lease does not reveal what arrangement defendant contemplated making with the person who would keep a dramshop on the property, nor are we informed by the evidence what terms it actually made with Wuertenbacher who kept one there. The record will support the conclusion that the arrangement was not one by which defendant was the real owner of the saloon and the keeper its custodian. Hence, if an arrangement of the latter sort would be unlawful, and we do not decide the point, it was not established. The argument for defendant in this connection, if sound, would avoid the entire lease on which it sues as against public policy, rather than a particular clause, because the lease shows McClure demised the property for dramshop purposes. However, it is not unlawful for a brewing corporation to lease premises for the purpose of having its beer sold in them. Such contracts have been upheld. *Holm v. Brewing Co.*, 21 App. Div. 204, 47 N. Y. Supp. 518; *Koehler v. Reinheimer*, 26 App. Div. 1, 49 N. Y. Supp. 755.

We are clear the judgment is for the right party, and will be affirmed. All concur.

STATE v. JAMES.

(St. Louis Court of Appeals. Missouri. Oct. 20, 1908.)

1. LARCENY (§ 1*)—ELEMENTS—DEFINITION—“LARCENY.”

Larceny is the wrongful or fraudulent taking and carrying away by any person of the personal goods of another without the owner's consent, with a felonious intent to convert them to the taker's use.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 3991-4003.]

2. LARCENY (§ 1*)—ELEMENTS—OWNERSHIP AND CONSENT.

In larceny for taking a pocketbook from another's possession, the state must prove that the person from whom it was taken was the owner, and that it was taken without her consent.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. LARCENY (§ 62*)—EVIDENCE—SUFFICIENCY—TAKING OF PROPERTY—CONSENT.

In larceny, proof that a pocketbook was snatched from another's pocket while she was looking at goods in a store was sufficient to show that she did not consent to the taking.

[Ed. Note.—For other cases, see *Larceny*, Dec. Dig. § 62.*]

4. LARCENY (§ 60*)—EVIDENCE—SUFFICIENCY—OWNERSHIP OF PROPERTY.

In larceny for taking a pocketbook from one's pocket, while her possession was prima facie evidence of her ownership, it was not sufficient evidence of ownership to overcome the presumption of innocence, and warrant a conviction.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 156; Dec. Dig. § 60.*]

5. CRIMINAL LAW (§ 559*)—EVIDENCE—SUFFICIENCY—REASONABLE DOUBT—INFERENCE.

One should not be convicted of a crime upon proof of an essential element thereof by mere inference.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1265; Dec. Dig. § 559.*]

Appeal from St. Louis Court of Criminal Correction; Wilson A. Taylor, Judge.

Walter F. James was convicted of petit larceny, and he appeals. Reversed and remanded.

Richard A. Jones, for appellant. Phillips W. Moss, for the State.

BLAND, P. J. On an information filed in the St. Louis court of criminal correction, defendant was found guilty of petit larceny, and his punishment assessed at a fine of \$10. His contention in the court below and on his appeal here is that the evidence was insufficient to support a verdict of guilty. Nettie Nolan, a witness for the state, testified as follows: "I reside at 6416 Wade avenue, in the city of St. Louis. About 9 a. m. Wednesday, on the 14th of August of this year, myself and mother, Mrs. Annie Nolan, and Mrs. Amanda Rose, the complaining witness, went downtown in the city of St. Louis, Mo., to do some shopping. We shopped all day until about 3 o'clock in the afternoon, and then while in the Knox Ten-Cent Store on Washington avenue, near Broadway, where Mrs. Amanda Rose stood, looking at some things on the counter, while she was so engaged, I noticed the defendant put his hand in her pocket and take therefrom something, which I afterwards found to be a pocketbook. I told her she had better look and see if the pocketbook was gone. She found it was, and the defendant was just then going out on the street, and my mother ran after him, but they were unable to catch him. I identify the defendant as the man whom I saw put his hand in Mrs. Rose's pocket and take therefrom the pocketbook." Mrs. Annie Nolan testified as follows: "I reside at 6416 Wade avenue, in the city of St. Louis. Wednesday morning, August 14th of this year, my daughter, who has just testified, and myself, went downtown in the city of St. Louis, Mo., with Mrs. Amanda Rose, who was visiting us from Illinois, for the purpose of making some purchases. In the afternoon, while in the Knox Ten-Cent Store, on Washington avenue near Broadway, my daughter called my attention to the defendant, who was just

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

going out of the door of this store, and said he had taken a pocketbook from Mrs. Rose's pocket. I ran after him, but was unable to overtake him, and did not again see him until on Saturday, August 17th, thereafter, when I was called down to the Four courts, and there identified, and now identify, the defendant as the man who ran out of the Knox Store with the pocketbook which he had taken from Mrs. Rose. Mrs. Rose had this pocketbook taken by the defendant in her possession when she went downtown with us in the morning, and she placed therein a \$10 bill, of which at the time the pocketbook was taken she had not spent over \$3 or \$4, and there was at least \$6 in the pocketbook when it was taken from her possession. Mrs. Rose is an elderly lady, and lives at Pana, Ill. She is not in the city of St. Louis at this time." Officer O'Brien testified he arrested defendant August 18, 1907. This was all the evidence offered by the state. Defendant and his mother testified that defendant was at his home, No. 5211 Kensington avenue, all the afternoon of August 14th, and are strongly corroborated by the evidence of Dr. J. B. Rule. Defendant proved by several creditable witnesses, including Dr. Rule, that he is a young man of good character. Wilbur C. Allen testified for defendant as follows: "I reside in the city of St. Louis, and am a floor walker in Knox Ten-Cent Store on Washington avenue near Broadway, where the occurrence detailed, in which a pocketbook was said to have been taken from the pocket of Mrs. Amanda Rose, occurred. I saw Mrs. Nolan run to the street after a man, but did not try to stop him. He disappeared in the crowd on Washington avenue. The man she ran after was not the defendant. It was a fellow who had been hanging around a poolroom in the next block from the Knox store. I once played pool with him. I did not try to stop him, because I did not think it was my business to. Saw him putting something in his pocket as he went out the door." Witness also stated, that although he saw the person pick Mrs. Rose's pocket and was close to the door he ran out of, and could have stopped him if he had tried, yet he made no attempt to do so.

1. The cause was tried to the court without a jury. No declarations of law were asked or given. It seems to me that the learned trial judge failed to give defendant the benefit of a reasonable doubt of his guilt, and found him guilty on a doubtful preponderance of the evidence in respect to the identity of the person who picked Mrs. Rose's pocket. Neither of the Nolans were acquainted with defendant. Nettie Nolan testified she saw him put his hand into Mrs. Rose's pocket, and go out on the street. Mrs. Annie Nolan testified she saw him from the inside of the store as he was going through the door. She only saw his back, and could not, with any

degree of certainty, identify him. The other state witness' view of him was but for a moment and under circumstances calculated to excite her, and she might very well have been mistaken as to his identity. Allen testified the man Mrs. Nolan ran after on the street (whom she identified was defendant) was not defendant, but a fellow who had been hanging around a poolroom in the adjoining block. This evidence, in connection with the evidence of defendant's good character, was ample to raise a reasonable doubt as to whether or no defendant was the person who picked Mrs. Rose's pocket.

2. East defines larceny to be "the wrongful or fraudulent taking or carrying away by any person of the personal goods of another, from any place, with a felonious intent to convert them to his [the other's] own use, and make them his property, without the consent of the owner." 2 Bishop's New Criminal Law, § 811. To prove the offense charged, it was incumbent on the state to prove that Mrs. Rose was the owner of the pocketbook and its contents, and that they were taken without her consent. Proof that they were taken from her pocket, under the circumstances narrated by the state's witnesses, was sufficient to show that she did not give her consent to have her pocket picked. But there is no direct or positive evidence that she was the owner of the pocketbook and its contents, though her possession of them was prima facie evidence of her ownership. But this mere prima facie evidence of ownership, proof of which is indispensable to warrant a conviction, is not sufficient to overthrow the presumption of innocence which attended defendant throughout the trial. One presumption cannot overthrow another, nor should a man be convicted of a degrading crime upon a mere inference of an essential fact. State v. Shelley, 166 Mo., loc. cit. 618, 619, 66 S. W. 430; Klein v. Laudman, 29 Mo. 259.

The judgment is reversed, and the cause remanded.

GOODE, J., and NORTON, J., concur in second paragraph.

CONNELLY v. ILLINOIS CENT. RY. CO.
et al.

(St. Louis Court of Appeals. Missouri. Oct. 20, 1908.)

1. CARRIERS (§ 177*)—CARRIAGE OF GOODS—CONNECTING CARRIERS—INJURIES TO GOODS—STATUTES—APPLICATION.

Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718), providing that, when shipments begin in Missouri, the initial carrier shall be liable for damages accruing anywhere on the route, does not apply to transportation of goods wholly without the state.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 177.*]

2. CARRIERS (§ 185*)—CARRIAGE OF GOODS—CONNECTING CARRIERS—INJURIES TO GOODS.

When property is delivered to a carrier in good order to be transported over its line and that of one or more connecting carriers, and the property is damaged en route, proof that the goods were delivered to the owner at destination by the final carrier in bad order establishes a prima facie case against it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 848; Dec. Dig. § 185.*]

3. CARRIERS (§ 177*)—CARRIAGE OF GOODS—CONNECTING CARRIERS—LIABILITY OF INITIAL OR INTERMEDIATE CARRIER.

To make a case against an initial or intermediate carrier on its common-law liability, the owner must prove that the damage happened while the property was in such carrier's custody.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 779, 780; Dec. Dig. § 177.*]

4. CARRIERS (§ 187*)—CONNECTING CARRIERS—INITIAL CARRIER—INJURY TO GOODS—PRESUMPTIONS—INSTRUCTION.

Where, in an action against an initial carrier for injuries to goods, there was evidence justifying the submission of the question whether the injury occurred on such carrier's line to the jury, it was error to charge that, in the absence of evidence to the contrary, it would be presumed that any damage to the goods occurred while they were in the hands of the last carrier before the damage was discovered was erroneous, as conceding the possibility that there was no evidence that the loss occurred on the initial carrier's line.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 187.*]

5. EVIDENCE (§ 588*)—WEIGHT AND SUFFICIENCY—CONCLUSIVENESS ON PARTY.

Plaintiff was not bound by the testimony of witnesses introduced by defendant, nor was the jury bound to believe them if their manner discredited them, or if the evidence as a whole supported a different inference.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.*]

6. CARRIERS (§ 136*)—CARRIAGE OF GOODS—INJURIES TO GOODS—IMPROPER LOADING AND PACKING—QUESTION FOR JURY.

In an action against a carrier for injuries to goods, whether they were improperly loaded and packed held for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 596; Dec. Dig. § 136.*]

7. APPEAL AND ERROR (§ 1066*)—REVIEW—REVERSIble ERROR—INSTRUCTIONS.

In an action for injuries to goods in transit, an instruction, not within the issues, that defendant would not be liable for any damages which occurred while the goods were stored in its warehouse prior to shipment, while erroneous, would not constitute reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action by Thomas L. Connelly against the Illinois Central Railway Company and others. From a judgment in favor of defendant Illinois Central Railway Company, plaintiff appeals. Reversed and remanded.

H. A. Leary, for appellant. Samuel McPheters, for respondents.

GOODE, J. This cause was reviewed by us before on questions different from those

now presented. A report of the former decision will be found in 120 Mo. App. 852, 97 S. W. 616, but it will help the reader to restate the principal facts. The action counts on the common-law liability of a carrier, and was brought to recover for damage done to appellant's household furniture while in transit from Jackson, Miss., to East St. Louis, Ill., over three railroad companies; the respondent the Illinois Central Company, the Southern Railroad Company, and the Mobile & Ohio Railroad Company. The goods were received by respondent company at Jackson, and loaded in one end of a freight car which contained in the other end 20 barrels of flour. The car doors were sealed, and the car carried by respondent to Winona, Miss., where it was turned over to the Southern Company, which carried it to West Point, Miss., and there, after considerable delay, turned it over to the Mobile & Ohio Company. The delay at West Point was due to the refusal of the agent of the Mobile & Ohio Company to receive the car, on account of the damaged condition of the goods, until an arrangement was made by which the Southern Company delivered the property to the Mobile & Ohio as in bad order. Because the goods were damaged before delivery to the Mobile & Ohio Company, the action, which was originally against the three railway companies, was dismissed as to it. On the second trial a verdict was returned in favor of respondent, and appellant brought the case here, complaining of instructions given by the court.

It will be observed the carriage of the goods was entirely outside this state, and hence was not affected by our statutes, providing that, when shipments begin in this state, the initial carrier shall be liable for damage occurring anywhere on the route. Rev. St. 1899, § 5222 (Ann. St. 1906, p. 2718); Crouch v. Railroad, 42 Mo. App. 248. The case was tried by both parties on the assumption that either defendant was liable only for whatever damage occurred while the goods were in its charge and on its own line. The instructions given at the request of appellant allowed a verdict against the Illinois Central Company in the event the jury found the furniture was in good order when loaded on said company's car, and, while it was in transit and before delivery to the Southern Company at Winona, it was broken or otherwise damaged. A counterpart of said instruction was granted at respondent's request, advising the jury it was not liable if the goods were delivered by it to the Southern Company at Winona in the same condition they were in when received for shipment at Jackson. But, at the request of respondent, the court also instructed that if the car was opened on June 26th between Winona, where the Southern Company received it, and West Point, to which said company carried it, and the goods were then in a damaged

*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

condition, and the goods on said date had been in the possession of the Southern Company since June 24th, the law, in the absence of evidence to the contrary, would presume any damage done after the goods were loaded at Jackson occurred while they were in the possession of the Southern Company, and under the terms of the bill of lading offered in evidence the Illinois Central Company was not liable for this damage. Appellant assigns the giving of this instruction for error. It advised the jury as to what the law would presume in a given instance; i. e., the absence of evidence to prove the damage to the goods occurred prior to June 24th, when the car passed into the care of the Southern Company, and that in said contingency the presumption was the damage occurred while the goods were in the custody of the Southern Company, and respondent was not liable. The argument of counsel for respondent in favor of the instruction is that the law presumes damage done to property in the course of its transit over the lines of two or more public carriers occurred while it was in charge of the final carrier, unless there is evidence to the contrary; and in support of this proposition they cite *Crouch v. Railroad*, 42 Mo. App. 248; *Flynn v. Railroad*, 43 Mo. App. 424; *Hurst v. Railroad*, 117 Mo. App. 25, 94 S. W. 794.

When property is delivered to a carrier in good condition to be transported over its own line and the line or lines of one or more other carriers, and the property is damaged en route, for the purpose of giving an effective remedy to the owner, who can rarely prove what carrier was to blame for the damage, it is held proof the goods were delivered to the owner at destination by the final carrier in bad order establishes a *prima facie* case against said carrier. This is because it could have protected itself from responsibility for losses occurring prior to its reception of the property by an inspection of its condition at the transfer point. And, moreover, sources of evidence regarding where the blame rests are more accessible to the last carrier than they are to the shipper. *Flynn v. Railroad*, 43 Mo. App. 424, 438. In order to make a case against an initial or intermediate carrier on its common-law liability, the owner must do more than show the property was found to be damaged when it reached destination—must introduce evidence to prove the damage happened while the property was in the custody of the company he sues. We are speaking now of shipments not affected by our statutes. But this presumption in favor of initial and intermediate carriers, like other legal presumptions, is not one which properly can be declared to the jury if there is evidence touching the issue of where the property was when it was injured. The reason of this rule is that submitting the question to the jury as one of fact implies there is evidence regarding it, and to tell them what the law

will presume in the absence of evidence may lead them to think there is no evidence one way or the other—a conclusion contrary to the hypothesis on which the issue is submitted. *Moberly v. Railroad*, 98 Mo. 183, 11 S. W. 569; *Rapp v. Railroad*, 106 Mo. 424, 428, 17 S. W. 487; *Myers v. Kansas City*, 108 Mo. 480, 487, 18 S. W. 914. The appropriate use of presumptions of law is to indicate to the court where the burden of proof rests. If the law presumes so-and-so in the absence of evidence, then, unless the party who relies on the fact introduces evidence to prove it, it will be presumed the fact did not exist, and the court will as a matter of law hold against said party. If appellant put in no evidence which conduced to prove the damage to his goods occurred on respondent's line, a verdict in favor of the company should have been ordered. Instead of doing this, the court left it to the jury to determine whether or not the loss occurred on said company's line, thereby taking for granted there was evidence to prove it did. Therefore the instruction in hand under the authorities, *supra*, was erroneous and harmful, because it conceded the possibility of there being no evidence the loss occurred on respondent's line—a theory opposed to the instructions given for appellant.

This error must be held material, unless we can say there was no evidence tending to prove the goods were damaged while in respondent's custody, and therefore the demurrer offered by respondent to appellant's evidence should have been sustained. To our minds the weight of evidence shows the damage was done after the furniture was received by the Southern Company and while in its custody, as the jury found. Said company's agent at Winona said he examined the car at that transfer point, and its contents were in good order. The car was opened between Winona and West Point, where it was to be delivered to the Mobile & Ohio Company, and then the property was found to be damaged. But the witnesses who testified to those facts were introduced by respondent and appellant was not bound by their testimony. Neither was the jury bound to believe them if their manner on the stand discredited them, or if the evidence as a whole would support another inference. *Gannon v. Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Mowry v. Norman*, 204 Mo. 191, 103 S. W. 15; *Hunter v. Wethington*, 205 Mo. 292, 293, 103 S. W. 543. Testimony was given that the furniture, which consisted of chairs, rocking chairs, sewing machines, and other household property, was packed at one end of the car with a space of over six feet between it and the barrels of flour which were in the other end. Many of the articles were neither boxed, crated, nor burlapped, but some of them were tied together to hold them in place. One witness swore the goods were improperly loaded and packed. It is plain the furniture was so arranged that it was apt to be shaken about and broken while

in transit over appellant's line to the transfer point, and whether it was or not was for the jury to say.

The instruction that respondent was not liable for any damage to the furniture which occurred while it was stored in respondent's warehouse prior to shipment was outside the issues made by the pleadings, but would not constitute reversible error.

The judgment is reversed and the cause remanded. All concur.

GREENVILLE LUMBER CO. v. NATIONAL PRESSED BRICK CO.

(St. Louis Court of Appeals. Missouri. Oct. 20, 1908. Rehearing Denied Nov. 17, 1908.)

1. PRINCIPAL AND AGENT (§ 14*)—AGENCY—EXISTENCE OF RELATION.

About the time of a negotiation for the purchase of brick from plaintiff by defendant, resulting in a disagreement as to whether there was a positive agreement of sale, S. took an option on plaintiff's factory, the sales made thereafter to be credited against the purchase price, but the option was never closed. Pending the option, S. contracted to sell defendant a quantity of brick, which was shipped by plaintiff under an arrangement with S., the bills of lading for the first two orders being issued in S.'s name, the others showing plaintiff as consignor, but they were turned over to S., who collected from defendant the price. Defendant had no knowledge of the option, or of plaintiff's agreement with S. for the delivery of the brick. *Held*, that S. did not act as agent for defendant, but the sale was made by him as principal, and plaintiff hence could not recover from defendant for the brick.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 29; Dec. Dig. § 14.*]

2. SALES (§ 363*)—ACTION FOR PRICE—DEMURRER TO THE EVIDENCE.

In an action for goods sold and delivered, where the evidence failed to show that the goods were purchased from plaintiff, or that defendant promised to pay plaintiff for them, a demurrer to the evidence was properly sustained.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 363.*]

3. SALES (§ 17*)—REQUISITES OF CONTRACT—PARTIES.

If defendant and another colluded to induce plaintiff to ship brick to defendant, plaintiff could recover their value from defendant, though the latter's contract was with such other, and the purchase price had already been paid to him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 26-30; Dec. Dig. § 17.*]

4. CARRIERS (§ 58*)—CARRIAGE OF GOODS—BILLS OF LADING—PURCHASE OF BILL OF LADING.

Where plaintiff transferred to another the bills of lading for goods shipped defendant, defendant having ordered the goods from such other, and having no knowledge of plaintiff's understanding with him by which the bills were turned over to him, he could pay such other for the goods.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.*]

Appeal from St. Louis Circuit Court; Robt. M. Foster, Judge.

Action by the Greenville Lumber Company

against the National Pressed Brick Company. From a judgment for defendant, plaintiff appeals. Affirmed.

John B. Denvir, Jr., for appellant. E. N. Robinson, for respondent.

GOODE, J. Plaintiff, a corporation, engaged in business in Greenville, Ill., began this action to recover \$696.53, the purchase price of eight car loads of brick alleged to have been sold and delivered to defendant at different dates from January 12, to January 24, 1907. The petition is in the form of assumpsit for goods sold and delivered, and avers plaintiff, at the special instance and request of defendant, sold and delivered to defendant certain goods and merchandise of the value aforesaid, the items of which and the dates when they were sold, would appear from a bill of items annexed to the petition. It is also averred the prices charged were reasonable, and defendant promised and agreed to pay the total amount, but afterwards refused to pay. Defendant does business in St. Louis. Charles W. Irwin, secretary of the defendant company, had negotiated with C. E. Davidson, manager of the Greenville Lumber Company, in December, 1906, for the purchase of some brick, and a dispute arose between the two companies out of the negotiation. Irwin claimed plaintiff sold brick to the National Pressed Brick Company at that time, but Davidson denied there was a positive agreement to sell, and said the bricks were not to be shipped unless a reduction in freight rates could be procured. This affair between the parties has only an incidental bearing on the case at bar. Davidson swore the bill for the purchase of the bricks in controversy was not mailed to defendant until February 15, 1907, although the car loads of brick were delivered at different times in January, and it was the custom of plaintiff to mail bills with the cars, because, in the December talk with Irwin, the latter had said defendant paid for all brick it bought about the middle of the month after delivery. About the time of said negotiation between Irwin and Davidson, Henry Scherf, of St. Louis, who is designated as a "brick broker," took an option to expire February 15, 1907, to purchase the entire factory or plant of the Greenville Company, but never closed the deal. Davidson testified it was part of the arrangement with Scherf that the price of whatever brick plaintiff sold during the life of the option should be credited on the contract price Scherf was to pay for the whole property. After Scherf had acquired the option, he made a contract with defendant to sell it 500,000 brick at \$6.25 per 1,000. The written order for these bricks was given by defendant under date of January 14, 1907, in this letter addressed to Scherf: "January

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

14, 1907. Mr. Henry Scherf, 602 Roe Building, City—Dear Sir: You may enter our order for 500,000 Strictly Hard and Red Brick, to be $\frac{1}{2}$ Face and $\frac{1}{2}$ Backing up, price to be \$6.25 per M. less 25 c. o. b. cars, East St. Louis, with freight prepaid to East St. Louis. It is understood that 200,000 will be shipped immediately as we direct, and the additional 300,000 to be shipped on our order in three (3) or four (4) weeks. It is agreed and understood that any shipping instructions that we may give you on this business will not be interfered with in any way by you or your company. Payment is to be made upon receipt of bill of lading and your count to be verified by us. Yours very truly, National Pressed Brick Co. by C. W. Irwin, Secy. Accepted by Henry Scherf." Irwin swore the arrangement for the purchase of the brick from Scherf was made verbally a few days before the letter was written; thus explaining how it happened the first car load of brick was delivered January 12th, or two days before the date of the letter. Scherf arranged with plaintiff to furnish the brick, as stated, and they were shipped in eight car loads. Plaintiff contends it sold them to defendant; whereas, defendant contends it bought them from Scherf, paid him in full, and had nothing to do with plaintiff in the transaction. The bills of lading for two of the cars were issued in the name of H. Scherf—that is to say, the railroad company receipted him for the cars—but the other six bills of lading named plaintiff as the consignor. All the cars were consigned to the National Pressed Brick Company at East St. Louis. The eight bills of lading were turned over to Scherf as issued, and were in his possession when the brick reached destination. He collected the price of every car from defendant, as the evidence conclusively shows. In explanation of Scherf's possession of the bills of lading, Davidson swore he (Scherf) induced plaintiff to turn them over to him by representing that the movements of cars at East St. Louis often were delayed by the railroad companies, and he needed the bills of lading in order to expedite the carriage of the cars in question from there across the river. The court refused to direct a verdict in favor of defendant on the testimony of plaintiff; but gave the direction when all the evidence was in. Whereupon plaintiff took a nonsuit with leave to move to have it set aside; and, this having been done and the motion overruled, an appeal was allowed.

We can think of no theory on which defendant would be liable for the price of the bricks, unless Scherf was its agent in the purchase and plaintiff sold to him as agent, or he and defendant colluded to defraud plaintiff. The testimony of Davidson goes to show he dealt with Scherf as agent for defendant; but no proof of such an agency

was introduced, and all the evidence disproves it. The only trace of testimony of any kind to show the transaction was a sale by plaintiff to defendant was Davidson's statement that it was agreed between plaintiff and Scherf that, while Scherf's option was in force, all sales were to be made to customers by plaintiff, and Scherf given credit for the amount of them on what he was to pay. There is no proof defendant knew of this understanding, and Davidson admitted on the stand Scherf might have deceived defendant regarding the arrangement between him and plaintiff. Of course, if there was collusion between Scherf and defendant, the latter would be liable; but collusion and fraud were neither pleaded nor proved. The action is in assumpsit, and the gravamen of the petition is the averment that plaintiff sold the brick to defendant at the latter's special instance and request—an averment wholly unsupported by testimony or circumstance. Plaintiff points to the receipt of one car load of brick by defendant prior to the date of its written order to Scherf. It is argued this fact shows defendant's contract with Scherf was subsequent to the sale by plaintiff to Scherf, and tends to prove Scherf acted for defendant. Such reasoning is forced. It would not be fair to conclude Scherf and defendant were in collusion, and the letter was written as part of a fraudulent scheme, even if the circumstance had not been explained, and it was. There was a total failure to prove the promise laid in the petition, and the court did right to sustain the demurrer to the evidence. *Huston v. Tyler*, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795; *Carson v. Cummings*, 69 Mo. 325. Scherf probably committed a fraud in not paying plaintiff for the bricks he bought and may have intended to defraud all the time. Be that as it may, defendant had the right to pay him for the bricks it had ordered from him, especially as he had obtained possession of the bills of lading by the act of plaintiff company. *Scharff v. Meyer*, 133 Mo. 429, 34 S. W. 858, 54 Am. St. Rep. 672.

The judgment is affirmed. All concur.

STINEBAKER et al. v. NATIONAL RESTAURANT CO. et al.

(St. Louis Court of Appeals. Missouri. Oct. 20, 1908.)

1. CORPORATIONS (§ 249*)—STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS—UNPAID STOCK—RIGHT TO SET OFF DEBT OF CORPORATION.

The holder of unpaid stock in a corporation against whom a judgment creditor of the corporation proceeds by motion for execution under the statute may set off against his debt a debt of the corporation to him which had accrued prior to the return nulla bona of an execution against the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1002-1012; Dec. Dig. § 249.*]

2. CORPORATIONS (§ 269*)—STOCKHOLDER—LIABILITY FOR CORPORATE DEBTS—UNPAID STOCK—SETTING OFF DEBT OF CORPORATION—EVIDENCE.

Evidence held to sustain a finding that cash furnished a corporation by the holder of partly unpaid stock, above what was credited on his stock, was advanced with the knowledge and consent of the managing officers of the corporation, and was treated by them as creating a debt of the corporation to the stockholder.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 269.*]

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by George W. Stinebaker and others against the National Restaurant Company and another. From an order overruling a motion for an execution against one of the defendants as a shareholder in defendant company, plaintiffs appeal. Affirmed.

This appeal was taken from an order overruling a motion for an execution against respondent Reinhardt as a shareholder in the National Restaurant Company. The motion was filed after judgment had been given in favor of appellants for \$4,250 in an action by them against the company and after return nulla bona of an execution on the judgment. Reinhardt held shares in the company of the par value of \$100 each, and it is contended he was liable on these shares because he had not paid their face value to the company. The entire capital stock was \$30,000 par value, divided into 300 shares, of which J. C. Hopkins, president of the company, held 165 shares, Reinhardt, the secretary and treasurer, 100, and Charles Blanchard, 10. It thus appears that 275 shares of the stock were held by these three men; but it was not shown who held the remaining 25 shares. The company was organized to take over a leasehold on certain premises near the site of the Louisiana Purchase Exposition or World's Fair in 1904, and conduct a restaurant on them. The lease was made by appellants Stinebaker and Early to J. C. Hopkins for a term running from April 15, 1904, to December 31, 1904, and for a rental of \$20,000, of which Reinhardt guaranteed the payment of \$15,000. Hopkins took possession of the premises and retained it until August, 1904, when, with the consent of the lessors, he transferred possession to the National Restaurant Company, assigned to it all his interest in the leasehold, and said company the evidence shows, assumed Hopkins' liability for the whole rent and also Reinhardt's liability on his guaranty for a portion of it. It is not definitely shown when the company was organized, or that its incorporation and occupation of the leasehold were contemplated at the time the lease was given to Hopkins; but there are circumstances going to show the company conducted business on the leased premises from the first. A resolution of the board of directors was adopted which treated the capital stock

as fully paid by the leasehold; that is to say, the lease on the premises was treated as of the value of \$30,000 and the stock issued as fully paid. What the actual value of the lease was, and whether it was greater or less than this sum, there is no evidence to prove; an important circumstance we think. Notwithstanding said resolution of the directors, Blanchard paid in cash \$1,200 on accounts owed by the company for goods furnished to it in payment for his 10 shares of stock, and there was from the first an understanding among the principal shareholders named, supra, that Reinhardt should advance \$5,000 in cash to pay for supplies to the company and its running expenses in part payment for his 100 shares. He advanced money from time to time as the exigencies of business required, and to keep the company from being sued, until he had paid liabilities and bills of the company to the amount not of \$5,000, but of \$10,430.39. For some \$4,000 or \$5,000 of these payments notes were given him in the name of the company, but he never realized anything on those obligations. Besides the above amount, Reinhardt paid the lessors on account of his guaranty for rent \$12,093; and, as the company had assumed his guaranty, it follows his payments on account of the company's obligations amounted to \$22,523.39. At the instance of the plaintiff, the court declared the law to be that, though Reinhardt guaranteed the payment of \$15,000 on the rent and paid on said guaranty the sum of \$12,093, he could not set off said sum against any indebtedness he owed as the holder of unpaid stock, unless it appeared the restaurant company had recognized or assented to his payment as stockholder of said rental, or the payment was made in such circumstances as to constitute him a creditor of the company for the amount, and that, though Reinhardt may have paid debts of the company to the amount of \$5,000 or more, unless it was shown the company recognized and assented to such payments, Reinhardt could not set off the amount of them against any balance he owed for his stock. At the request of defendant, the court declared that, if Reinhardt paid \$5,000 or more on account of the company under an understanding and arrangement with its president and general manager, these payments were to constitute payment on account of defendant's shares of stock, and, if the court found the money was used as aforesaid (i. e., to settle the debts of the company), though no formal action was taken by the board of directors authorizing this arrangement, such payment or payments were made on his stock; that, if Reinhardt became the guarantor of Hopkins, the original lessor, for \$15,000 of the rent, and the restaurant company afterwards accepted an assignment of the rights and assumed the liabilities of Hopkins under said lease, and en-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tered into possession and control of the premises, and thereafter Reinhardt paid any sum on account of his guaranty before execution had issued in favor of plaintiffs in this case and been returned nulla bona, and Reinhardt was not reimbursed for such payments, the same constituted a valid claim against the company which Reinhardt was entitled to offset against the judgment of plaintiffs against the company.

W. H. Ludwig and R. F. Walker, for appellants. Lee A. Hall, for respondents.

GOODE, J. (after stating the facts as above). We might dispose of this appeal by affirming the judgment for lack of evidence to prove the leasehold was worth less than the value placed on it by the company. We cannot take judicial notice on this question one way or the other. But, as the record is meager and the court below did not proceed on the theory the stock was unpaid, there may have been some testimony of the fact, or it may have been conceded. Therefore it will be more satisfactory if we consider the appeal on the merits.

We can see nothing favorable to the plaintiffs in any aspect of the case. Although the board of directors passed a resolution which treated the leasehold as payment in full of the capital stock, it appears to have been understood from the first respondent should advance \$5,000 as a payment on his stock. There is an inconsistency between what the board resolved and this arrangement, but business men frequently act irregularly in these matters. It is certain respondent agreed to pay and paid \$5,000 in cash on his stock, thereby leaving only \$5,000 unpaid. But to pay rent and other expenses and buy supplies, he advanced for the company \$17,000 in addition to the \$5,000. These payments were made to keep the company alive and prevent suits against it, and while the company was still a going concern; and it is not disputed respondent may use them as a bar to plaintiffs' recovery in this proceeding if they occurred under circumstances which made him a creditor of the company. The question of the right of a holder of unpaid shares against whom a judgment creditor of the company proceeds by motion under the statute to avail himself by way of offset of a debt the company owes him which had accrued prior to the return nulla bona of an execution against the company has been determined in favor of the shareholder in several cases in this state. *Webber v. Leighton*, 8 Mo. App. 502; *Manville v. Roever*, 11 Mo. App. 317; *Merchants' Ins. Co. v. Hill*, 12 Mo. App. 148; *Jerman's Adm'r v. Benton*, 79 Mo. 148. The reasoning on which the offset is allowed is expounded in the opinion in *Jerman's Adm'r v. Benton*, which may be read with benefit, as also may the opinions in *Briggs v. Penni-*

man, 8 Cow. (N. Y.) 397, 18 Am. Dec. 454, and *Garrison v. Howe*, 17 N. Y. 458. In the present case appellants insist the money paid by respondent for the benefit of the company was advanced voluntarily; wherefore he did not become a creditor of the company, and hence had no demand to set off against plaintiffs' judgment. It is true the board of directors did not, by motion or resolution, formally request respondent to make the payments, but the testimony shows they were essential to the continuance of the company's business, and, indeed, the capital on which it subsisted, and that they were made with the knowledge and approval of the president, were in each instance entered as a credit in favor of respondent on the books of the company, and the company so far assented to them and recognized them as creating obligations against it in his favor that it executed notes to him on account of them for more than \$4,000; that is to say, for about all the money he advanced except the \$5,000 paid on his shares and the \$12,000 paid on his guaranty for rent. We consider the evidence was ample to justify the court below in finding the cash furnished by respondent above what was to be credited on his stock was advanced with the knowledge and consent of the managing officers of the company, and was treated by them as creating an indebtedness of the company to respondent.

The judgment is affirmed. All concur.

WILLIAMSON v. ST. LOUIS & M. R. R. CO.
(St. Louis Court of Appeals. Missouri. Nov. 5, 1908.)

1. CARRIERS (§ 316*)—INJURY TO PASSENGERS—STREET RAILROADS—RES IPSA LOQUITUR.

A street car on which plaintiff was a passenger was stopped in the middle of a street crossing, and plaintiff was injured by the pole of a city fire department hose wagon, which crashed through the side of the car as the hose wagon was proceeding to a fire at high speed. *Held* sufficient to establish a prima facie case of negligence of the railway company under the doctrine of *res ipsa loquitur*.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1287; Dec. Dig. § 316.*]

2. CARRIERS (§ 320*)—INJURY TO PASSENGER—STREET RAILROADS—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a street car passenger in a collision between the car and a city hose cart, evidence *held* to require submission of the railway company's negligence to the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1323; Dec. Dig. § 320.*]

3. DAMAGES (§ 208*)—PERSONAL INJURIES—PERMANENT INJURY—EVIDENCE—QUESTION FOR JURY.

Evidence *held* to justify a submission of the issue of the permanency of plaintiff's injury to the jury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 533; Dec. Dig. § 208.*]

4. APPEAL AND ERROR (§ 1068*)—INSTRUCTIONS—DAMAGES—PREJUDICE.

Failure of the instructions to limit plaintiff's recovery to the amount sued for was without prejudice, where the verdict was less than the petition demanded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

5. CARRIERS (§ 300*)—STREET RAILROADS—DUTY OF OPERATIVES.

It is the duty of the conductor of a street car, as well as the motorman, to use all means at hand to prevent collision with a fire department hose wagon at a street crossing, if he could have discovered the approach of the wagon by the exercise of ordinary care in time to have averted a collision; the railroad company being responsible alike under such circumstances for the negligence of either conductor or motorman.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1211; Dec. Dig. § 300.*]

6. TRIAL (§ 252*)—INSTRUCTIONS—REQUEST TO CHANGE.

A request to charge, while correct as an abstract proposition of law, was properly refused where the standard of care applicable to the facts proved was not mentioned, and it was also devoid of the essential elements of liability or nonliability arising on the facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by Martha Louise Williamson against the St. Louis & Meramec River Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jefferson Chandler, T. M. Pierce, and S. P. McChesney, for appellant. Taylor R. Young and Frank H. Haskins, for respondent.

NORTONI, J. This is an action for damages resulting from personal injuries alleged to have been received by the plaintiff while she was a passenger on one of defendant's street cars. The occasion of the injury was a collision with a hose wagon connected with the fire department of the city of St. Louis. Plaintiff recovered, and the defendant appeals.

The testimony on the part of the plaintiff tended to prove that the plaintiff was a passenger on defendant's west-bound car on Franklin avenue. A hose wagon of the city fire department, traveling south at a high rate of speed on Compton avenue, ran against the side of the car on which plaintiff was a passenger. The tongue or pole of the wagon crushed its way through the side of the car, striking plaintiff between the knee and the hip, causing her painful and serious injury. The defendant insists the court should have peremptorily directed a verdict for it in accordance with a request to that effect, for the reason the evidence was insufficient to establish a reasonable inference of negligence against its servants in operating the car. The case is properly one in which the doctrine of *res ipsa loquitur* inheres. It ap-

pears the plaintiff was entirely free from negligence, and that the injury was received while she was a passenger on a street car, the management of which was exclusively in the control of defendant's servants. Under such circumstances, the fact that street cars, when managed with prudence, do not ordinarily collide with other vehicles, without more, introduces into the case a presumption of negligence on the part of defendant's servants sufficient at least to remove the question within the province of the jury, and devolves upon the defendant the duty to overcome the presumption of negligence with evidence of due care on its part. *Olsen v. Railway*, 152 Mo. 428, 432, 54 S. W. 470; *Mitchell v. C. & A. Ry. Co.* (Mo. App.) 112 S. W. 291; *St. Clair v. St. L. & S. F. Ry. Co.*, 122 Mo. App. 519, 99 S. W. 775. However, the plaintiff did not invoke the doctrine of *res ipsa loquitur*, but assumed to prove negligent conduct on the part of defendant's servants, and we will, therefore, notice the facts tending to this end.

It appears Franklin avenue runs east and west. The street car on which plaintiff was a passenger was proceeding westward at a rate of speed between four and six miles an hour. At the point in question the west-bound car track runs on a downgrade. Compton avenue runs northward from Franklin avenue obliquely, tending to the northwest. The hose wagon, en route to a fire, was traveling under high pressure southward or toward Franklin, on Compton avenue. The driver of the hose wagon gave testimony to the effect that the gong attached thereto was constantly being sounded from the fire department's headquarters until the collision occurred. Other witnesses testified the sounding of the gong could be heard two or three blocks. When the defendant's car was about 125 or 150 feet east of the east line of Compton avenue, a bystander, being attracted by the noise of the approach of the hose wagon and realizing the impending danger of a collision, ran into the middle of the street, stood in the center of the west-bound car track, and waved numerous signals with his hand for the motorman to stop. The car continued to approach, however, finally stopping about the center of the crossing of Compton avenue, at which point the hose wagon simultaneously collided therewith, and inflicted the injury complained of. There was evidence that the track rails were wet, and the car slipped after the brake was set. There was evidence, too, by an expert motorman to the effect that a car running at the rate of speed mentioned could have been stopped on a wet rail at that point in about 90 feet, or three car lengths, if sand was applied to prevent slipping. An ordinance of the city of St. Louis providing that all fire apparatus shall have right of way on all streets and avenues of the city when attending a fire alarm was also

introduced. The facts above detailed were amply sufficient to raise an inference of negligent conduct against defendant's motorman in charge of the car, for, had he been giving slight attention, he might have heard the gong attached to the hose wagon at least two blocks away, and, by the exercise of ordinary diligence, averted the collision. The fact that a bystander stood in the center of the track and waved signals when the car was 125 or 150 feet east of the east line of Compton avenue would contribute to invite the attention of one exercising due care for the safety of passengers to an impending danger. An ordinarily alert motorman should thereupon have discovered the approaching hose wagon by the sound of the gong, if his attention had not been attracted before. Aside from the signals waved by the man on the track, it appears a man exercising ordinary care for the safety of others should have heard the sounding gong on the hose wagon for two or three blocks. It is entirely clear the case was one for the jury, as appears by reference to *Olsen v. Citizens' Railway Co.*, 152 Mo. 426, 54 S. W. 470, which is almost identical in material facts.

On behalf of plaintiff, the court instructed as follows: "The court instructs the jury that, if they find a verdict in favor of the plaintiff, they will assess her damages in such sum as will be a just and fair compensation for the injuries received by her, as shown by the evidence, and, in fixing the amount of such damages, you will take into consideration, first, all expenses, if any, incurred by her for medical and surgical attendance directly caused by said injuries; secondly, bodily pain and mental anguish, permanent injuries, if any, suffered by plaintiff, directly caused by said injuries." This instruction is complained of, first, for the reason it permits a recovery for permanent injuries. It is said there is no evidence in the record tending to prove that the plaintiff had received permanent injuries. An examination of the record with the slightest care overthrows the objection mentioned. Besides the testimony of the plaintiff herself tending to prove permanent injuries, her physician testified: That shortly before the trial, upon his last examination of the injured parts, he found there was "a thickening of the bone at that point, and an atrophy or shrinking of the muscles. The bone appears to be thickened and inflamed, and the soft tissues are somewhat adhered at the point of injury." That this condition resulted from the injury mentioned, and that the injury was in his opinion permanent. A second objection to this instruction is to the effect that the instruction does not limit the amount of plaintiff's recovery to the amount specified in her petition. The amount specified and sued for in the petition is \$4,500. The jury gave her a verdict for \$3,000. Although, where instructions have failed to limit the amount of recovery and the jury returned a verdict in excess of the amount

claimed in the petition, error has been affirmed on the ground of failure to limit the recovery by instruction (*Wright v. Jacobs*, 61 Mo. 19), the rule is certainly without force in a case where the recovery is for a less amount than that against which the defendant is called upon in the petition to defend. By command of our statute judgments should not be reversed except for error materially affecting the merits of the action. Aside from this statute, it would, indeed, be highly technical to predicate reversible error on a matter of such slight consequence in a case where the recovery is within the amount claimed in the petition. *Crews v. Lackland*, 67 Mo. 619, 622. The instruction was not improper, and the assignment of error is overruled.

Another one of plaintiff's instructions permitted the jury to affirm negligence on the part of defendant if the jury believed from the evidence that after they knew, or by the exercise of ordinary care might have known, of the impending danger of collision, the defendant's servants in charge of said car could, by the exercise of care, with the appliances at hand for that purpose and with safety to the passengers in the car, have avoided the collision, but negligently failed to do so by reason of which negligence the collision occurred. The instruction is complained of because it authorizes a verdict against the defendant company for the negligence of its servants, and thereby included the negligence of the conductor, as well as that of the motorman, as one in charge of the management of the car. The case of *Gebhardt v. St. Louis Transit Company*, 97 Mo. App. 373, 71 S. W. 448, is relied upon. The ruling in that case was given upon the vigilant watch ordinance to the effect that it was the duty of the motorman, and not of the conductor, to keep a vigilant watch for dangers. It is said no such duty is required of the conductor. The case cited is not an authority for the proposition advanced on the record now before us; for here it was certainly the duty of the conductor, as well as the motorman, if he either heard the sound of the gong on the hose wagon, or, by the exercise of ordinary care, might have discovered the danger in time to have averted it, to use all means at hand to that end, and the defendant company is responsible alike for the negligence of either the conductor or the motorman in such circumstances. The Supreme Court has expressly determined the identical question in a case almost on all fours with the one in judgment. *Olsen v. Citizens' Railway Company*, 152 Mo. 426-431, 54 S. W. 470. The instruction was proper, and the assignment of error is overruled.

The defendant requested and the court refused the following instruction: "The court instructs the jury that the mere possibility that the servants of the defendant in charge of its car could have stopped it in time after the danger to plaintiff, if any, was discov-

ered, to have avoided a collision with said hose cart, is not sufficient to entitle the plaintiff to a recovery." This action by the court is complained of as error. As an abstract proposition of law, the instruction may be well enough. However that may be, the court properly refused it, for the reason it wholly failed to incorporate the proper principles applicable to the facts in proof. It is conceded the plaintiff was in the exercise of due care on her part at the time of the injury. Before the defendant could be acquitted of her hurt, it was incumbent upon the jury to find that its servants had exercised due care to avert the injury. The standard of care applicable to the facts in proof is not even mentioned or referred to in the instruction mentioned. It is devoid of the essential elements of liability or nonliability arising on the facts, and was properly refused. See the following authorities in point: *Cytron v. St. Louis Transit Company*, 205 Mo. 692, 104 S. W. 109; *Zeis v. St. Louis Brewing Ass'n*, 205 Mo. 638, 104 S. W. 99. The verdict was not excessive.

The remaining assignments of error are without merit, and are therefore overruled.

The judgment should be affirmed. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

TUCKER et al. v. DEERING SOUTHWESTERN RY. CO.

(St. Louis Court of Appeals. Missouri. Nov. 5, 1908.)

1. CONTRACTS (§ 353*)—ACTIONS FOR BREACH—INSTRUCTIONS.

In an action for the breach of an oral contract for construction of a railroad, where defendant contended that there was no contract, but merely conversations with respect to the work, which were to be followed by a written agreement, which was afterwards drawn up subject to the approval of defendant's superintendent, but was not consummated because of his disapproval, and plaintiffs contended that the conversations constituted a valid oral contract which was neither merged in nor superseded by the writing, it was error to refuse to charge that if plaintiffs commenced work under the written memorandum, and not under an oral agreement, and continued to work thereunder until notified to quit on account of the disapproval of the memorandum, defendant should recover, since it submitted the issue whether plaintiffs relied upon an oral contract or on the writing which was subject to the superintendent's approval.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 353.*]

2. DAMAGES (§ 18*)—PROXIMATE OR REMOTE—BREACH OF CONTRACT.

In an action by professional railroad contractors for breach of contract to construct a railroad embankment, the cost of supplies, tools, and camp outfit is not a proper element of damage, since plaintiffs were not deprived of their value because of the breach.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 37; Dec. Dig. § 18.*]

Appeal from Circuit Court, Pemiscot County; H. C. Riley, Judge.

Action by William Tucker and another against the Deering Southwestern Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed, and cause remanded.

Faris & Oliver, Oliver & Oliver, and J. M. Blazer, for appellant. Gossom & McKay, for respondents.

NORTONI, J. This is an action for damages alleged to have accrued to the plaintiffs because of the defendant's breach of an oral contract providing for the construction of an embankment for a railroad. The plaintiffs recovered, and the defendant appeals. The defendant is a railroad corporation existing under the laws of this state, and owns and operates a short line of railroad in Pemiscot county in connection with its sawmills for the purpose of conveying timber thereto. Henry Pingle was one of the directors of defendant railroad and its general superintendent. The defendant desired to extend its road a short distance, and Mr. Pingle was clothed with authority to negotiate a contract therefor in its behalf. There are two plaintiffs to the action, Tucker and King. The original contract declared upon in the petition, however, is alleged to have been entered into by the plaintiff Tucker and the defendant's superintendent, Mr. Pingle. King subsequently came into the case as a partner of Tucker by the consent of the defendant's civil engineer, Mr. Randolph. As stated, the petition declares upon an oral contract and its breach. It is alleged in the petition substantially that the plaintiffs and defendant entered into an oral contract on December 27, 1903, wherein the plaintiffs agreed to clear the right of way and construct a roadbed for the defendant's railroad from the town of Deering, in Pemiscot county, to a point of intersection with the Paragould Southeastern Railroad, in Dunklin county, Mo., according to the specifications and plans furnished by the engineer of the defendant railroad company, in consideration whereof the plaintiffs were to receive the sum and price of 25 cents per cubic yard for construction, subject to 10 per cent. shrinkage for all team work and 20 per cent. shrinkage for wheelbarrow and shovel work. All stations on said road were to be completed consecutively, and paid for as completed. It is further alleged that all merchantable timber standing on the right of way was to be cut into saw stock by the plaintiffs, for which they were to receive a compensation of 50 cents per 1,000; that the plaintiffs entered upon the work and performed every condition of the contract on their part until about January 21, 1904, when they were notified by defendant railroad company to desist from further prosecution thereof; that the defendant refused to permit

them to further comply with the contract and earn large profits which would otherwise have accrued to them, etc.; and that they were damaged by reason of the defendant's breach of the contract mentioned in the sum of \$9,774, for which they ask judgment.

The testimony on the part of the plaintiffs tended to prove that the plaintiff Tucker, a railroad contractor, had a conversation with defendant's superintendent, Pingle, on December 27, 1903, at the depot at Pascola while Mr. Pingle was awaiting a train. The entire conversation consumed about 20 minutes' time. Tucker insists that he proposed to Pingle to clear the right of way, construct a roadbed, etc., at the price of 25 cents per cubic yard, subject to 10 per cent. shrinkage for team work and 20 per cent. shrinkage for wheelbarrow and shovel work, and otherwise as declared in the petition; and, further, that he would cut all merchantable timber on the right of way into saw stock at 50 cents per 1,000. He testified that Mr. Pingle accepted his proposition in every respect other than the price to be paid for cutting the merchantable timber into saw stock. This matter was left open temporarily, with the understanding that Mr. Randolph, the defendant's civil engineer, would make some agreement on the part of the railroad with respect to the matter; that he should see Mr. Randolph, and Randolph could reduce the contract to writing provided Tucker so desired. Tucker says he met Mr. Pingle a second time three or four days thereafter, upon which occasion Pingle accepted his proposition of 50 cents per 1,000 for cutting the merchantable timber into saw stock, thus completing the contract, and instructed him to move upon and commence the work. About this time Tucker moved his teams and equipment to the work, and Superintendent Pingle introduced Tucker to those in charge of the company's store and commissary, giving instructions to the effect that Tucker was going to build the railroad, and that they should let him have goods, supplies, etc. Thereupon Mr. Pingle departed for Chicago, where he was detained by business for a number of days. In the interim, plaintiff Tucker, with the consent of the defendant's civil engineer, Randolph, took the plaintiff King into the contract with him as partner. Tucker insists the oral contract as heretofore detailed was entirely completed between himself and Mr. Pingle prior to his associating King therewith, which was consented to by the defendant's civil engineer, and not objected to thereafter by Pingle. About January 4, 1904, when King became associated with plaintiff Tucker as partner, he insisted upon having a written memorandum, at least, with respect to the matter, and declined to proceed until such was had. Thereupon the two plaintiffs met the defendant's civil engineer, Mr. Randolph, during the period while Superintendent Pingle was detained in Chicago, and entered into the following

written memorandum, subject to the approval of Superintendent Pingle. "Deering, Mo., Jan. 7, 1904. Agreement between the Deering Southwestern Railway and Wm. Tucker and D. King, to be known as Tucker & King. Whereas, it is agreed that in consideration of the sum of twenty-five (25) cents per cubic yard, to be paid by the said Deering Southwestern Ry., the said Tucker & King shall clear the right-of-way and build the roadbed for said road, according to grade and specifications furnished by the engineer. All stations to be completed consecutively, also shall receive the sum of fifty (50) cents per M. for all timber cut as saw stock and shall be merchantable timber, according to the orders of the timber foreman. This work shall be subject to a shrinkage discount of 10 per cent. for team work and 20 per cent. for barrow or shovel work, and shall be inspected and paid for as each station is completed as near as practicable. This agreement subject to the approval of the superintendent. Deering Southwestern Ry., by E. C. Randolph, Eng. It is further understood and agreed that the men now engaged in station work shall continue at same as they may desire at the price of twenty (20) cents per cubic yard, and shall work under the supervision and contract of said Tucker & King, who shall furnish their station work on reasonable grounds. [Signed] E. C. Randolph. Wm. Tucker. D. King." Immediately thereafter plaintiffs commenced operations on the roadbed. They continued to prosecute the work for some days. Mr. Pingle returned from Chicago January 18th, declined to approve the memorandum of the contract as drafted, and had one or two conversations with the plaintiffs concerning certain details about the distance they were to build the embankment, insisting that he had not agreed that it should be constructed by them to the Paragould Southeastern Railroad, and, further, that certain stipulations should be contained therein concerning the payment of labor, etc., looking to the protection of the defendant against labor liens. Plaintiffs declined to accede to Mr. Pingle's wishes in this behalf, and thereupon, on January 21st, he notified them to desist from further operations on the road.

The theory of the case, as presented by the defendant, is that no contract whatever was made with the plaintiff Tucker nor with Tucker & King. Mr. Pingle, the superintendent, insists that the two conversations between him and Tucker had prior to his going to Chicago were preliminary only, and did not amount to a contract between them. Mr. Pingle says there was no contract to build the road to connect with the Paragould Southeastern Railroad, which is a distance of about 9½ miles, that they contemplated a much shorter extension; and that the conversations were general only, with respect to how the work was to be done and the price to be paid. On the defendant's theory of the case it appears the contract was to be after-

wards reduced to writing by the civil engineer, Randolph, and the plaintiffs, subject to the approval of Superintendent Pingle. And therefore the contract was never consummated for the reason Pingle declined to approve it because the plaintiffs would not stipulate as to the distance the road should be constructed and concerning the time and manner of payment, labor liens, etc. It therefore appears that defendant insists no contract whatever, either oral or written, was entered into between it and the plaintiffs touching the matters mentioned. The plaintiffs insist that, while no written contract was entered into for the reason Pingle declined to approve it, there was a valid oral contract between the parties in the first instance, which was neither merged in nor superseded by the writing. There is no instruction contained in the record which pointedly refers this issue to the jury. It is true in some of the instructions for plaintiffs the contract "mentioned in the petition" is referred to the jury. In none of them, however, is the issue referred in pointed terms for the jury to find whether the contract declared upon was or was not entered into between the parties, and in none of the instructions are the jury required to find its breach. We may regard the matter concerning the breach as immaterial, however, inasmuch as the entire case shows the contract to have been breached, if it was, in fact, entered into. Upon another trial the issues should be defined with more particularity.

The defendant sought to have referred to the jury its theory of the case, to the effect that the two conversations had with Superintendent Pingle by Tucker amounted to no more than preliminary negotiations, to be subsequently incorporated in writing by Randolph and the plaintiffs, subject to Pingle's approval. To that end, it requested, and the court refused, to instruct in effect that if plaintiffs commenced the work for defendant under a written memorandum dated January 7, 1904, and not under an oral agreement, and continued to work under the written memorandum until notified to quit on account of the disapproval of its terms by defendant's superintendent, then plaintiffs have failed to make out a case, and the verdict should be for the defendant. This instruction should have been given, for, indeed, if plaintiffs refused to enter upon the work at all, as testified by plaintiff King, until they had a writing, then it is obvious that whatever oral agreement the parties may have had was abandoned by the plaintiffs, and at their instance merged in the writing which, by its terms, could only become a completed contract upon the approval of the superintendent, Pingle. Of course, we do not mean to say that the rule operating a merger of all prior negotiations in the written contract applies in its full force here for the reason no writ-

ten contract was finally consummated because Pingle, who retained a veto power, refused to approve it; but what we do say is that the defendant was entitled to have its instruction for the reason it placed before the jury the question as to whether the plaintiffs relied upon an oral contract, as they claim, or whether what had been said between Pingle and Tucker were merely negotiations looking to a contract, to be thereafter reduced to writing by Randolph, subject to Pingle's approval.

In proving damages plaintiffs' counsel asked plaintiff King the following question: "State whether or not you went to great expense in preparing and getting down and beginning this work." Over competent objection and exception, plaintiff answered: "I think the books will show between \$600 and \$700 expenses getting in there and beginning; supplies, tools, stuff, camp outfit, taken in there." The plaintiffs were professional railroad contractors. Their "tools, stuff, camp outfit," etc., were, of course, valuable to them in the prosecution of the work for the defendant or any other railroad on which they might be employed and remained of value to them, notwithstanding the breach of the contract declared upon. Any element of damage predicated upon these items, "tools, stuff, camp outfit," etc., was certainly remote, and not allowable as a natural and necessary result of the breach of the contract complained of. *Applegate v. Franklin*, 109 Mo. App. 293-304, 84 S. W. 347. The damages accruing to the plaintiffs on this score, if any, are the result of an unusual combination of circumstances which could not be reasonably anticipated, and over which the defendant railroad company had no control. Such damages are remote. 8 Amer. & Eng. Ency. Law (2d Ed.) 542.

The verdict was for \$2,000, in which nine of the jurors only concurred. The admission of the evidence complained of no doubt materially contributed to the result. The judgment should be reversed and the cause remanded. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

STATE v. JACOBS.

(St. Louis Court of Appeals. Missouri. Nov. 5, 1908.)

1. CRIMINAL LAW (§ 364*)—EVIDENCE—RES GESTÆ—ACCUSED'S DECLARATIONS.

What accused may have said to a policeman in explaining his possession of stolen property immediately upon being arrested, and understanding that he was accused of the theft, was admissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 808, 809, 810; Dec. Dig. § 364.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. CRIMINAL LAW (§ 364*)—EVIDENCE—RES GESTÆ—ACCUSED'S DECLARATIONS.

The theory on which *res gestæ* declarations of accused made contemporaneously with the fact about which they are spoken or upon being first charged with the offense is that, because of their spontaneity, they are at least likely to be true, and, if they are reasonable and consistent with his innocence, they are entitled to considerable weight; but, if considerable time has elapsed after he is informed of the suspicion against him, the declarations are excluded as self-serving.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 808, 809, 810; Dec. Dig. § 364.*]

3. CRIMINAL LAW (§ 306*)—EVIDENCE—PRESUMPTIONS.

One inference or presumption cannot be based upon another.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 306.*]

Goode, J., dissenting in part.

Appeal from St. Louis Court of Criminal Correction; Hiram N. Moore, Judge.

Henry Jacobs was convicted of petit larceny, and he appeals. Reversed and remanded.

Thomas B. Harvey, for appellant. J. D. Dalton, for the State.

NORTONI, J. The defendant, a keeper of a secondhand store and junkshop, was convicted on a charge of petit larceny, and prosecutes this appeal. The subject of the alleged larceny was a small quantity of molten lead, the property of the Laclede Gaslight Company. The material fact relied upon for conviction was an unexplained possession of the recently stolen property. The defense interposed is to the effect that defendant purchased the lead from a negro; that he took the name and address of the negro, and entered the same in a book kept for the purpose, in accordance with an ordinance of the city of St. Louis requiring as much from keepers of secondhand stores and junkshops. The error complained of on appeal is that the court excluded declarations of defendant as of the *res gestæ* made in his interest to the police officer at the time of his arrest. The defendant himself sought to testify, and his counsel also sought to elicit from the police officer who made the arrest, that the defendant then stated to the officer the fact with respect to his coming into possession of the lead by purchase from the negro, whose name and address he had entered in a book. The court excluded this evidence both upon cross-examination of the police officer and upon direct examination of the defendant as being self-serving declarations of the accused, and therefore inadmissible. There is certainly no doubt of the rule of evidence to the effect that what the defendant may have said to the police officer in explanation of his possession of the alleged stolen property immediately upon his being arrested, or given

to understand that he was accused of the theft on the discovery of the property in his possession, would be admissible as part of the *res gestæ*. 18 Amer. & Eng. Ency. Law (2d Ed.) 492, 493; State v. Castor, 93 Mo. 242-251, 5 S. W. 906; State v. Ware, 62 Mo. 597-601; 2 Bishop, New Crim. Proceed. (4th Ed.) § 746. It is always important, however, in the admission of such evidence, to prevent the defendant's self-serving declarations from coming before the jury. 2 Bishop, New Crim. Proceed. (4th Ed.) § 746; Foster v. State, 4 Tex. App. 246.

The theory of the law in receiving in evidence as of the *res gestæ* declarations of the accused made contemporaneously with and illustrative of the fact about which they are spoken, or upon being first charged with the offense, and before he has had an opportunity to contrive or concoct a story, is that because of their spontaneity they are at least likely to be true. If such declarations are reasonable and consistent with his innocence, they are entitled to very considerable weight in the scale or balance along with the presumption of innocence attending the defendant in a criminal cause. On the other hand, if some considerable time has elapsed after the property is discovered in possession of the accused, and he is informed of the suspicion attached to his possession, such declarations in his own interest are excluded as self-serving, and not of the *res gestæ*, on the theory that he has had ample time to concoct or contrive a story in his own interest tending to mislead or conceal the true fact. 2 Bishop, New Crim. Proceed. (4th Ed.) § 746; 18 Amer. & Eng. Ency. Law (2d Ed.) 492, 493; State v. Castor, 93 Mo. 242-252, 5 S. W. 906. It therefore appears that the defendant was entitled to the benefit of whatever statements he may have made in his own interest touching the possession of the property when first arrested or informed that he was under suspicion. It appears from the bill of exceptions that Hollis, the agent of the gas company, was absent from the place on its premises from whence the lead was stolen only about 15 minutes. Upon returning, the molten lead had disappeared. After searching a short time only therefor, he discovered it in defendant's place of business, wrapped in an old sack, lying near some scales. It does not appear that he said anything to the defendant about the matter one way or another. It seems Hollis sent out for a police officer, who answered his call a few moments thereafter, and made the arrest. From all that appears in the bill of exceptions the defendant was not taxed with the theft, nor for that matter in any manner given to understand that he was under suspicion until the police officer appeared and arrested him. There is indeed no word in the record to the effect that the defendant was even present in his store when Hollis entered, and discovered the lead there-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in. A majority of the court are therefore persuaded that to allow an inference from what appears in the record to the effect that defendant was present when Hollis entered, and, on this inference, base another inference that Hollis accused him, or otherwise intimated that he was under suspicion of the theft, would be unreasonable indeed. To base inference upon inference or presumption upon presumption is not permissible. To predicate on mere inference the ruling insisted upon here certainly does not comport with the ends of justice sought to be attained by the principles of the common law in those proceedings wherein the liberty of a citizen is involved. Every word which appears in the bill of exceptions touching this matter is contained in the following excerpt therefrom: "John Hollis, being duly sworn, upon his oath stated that he resided at 1411 Spruce street, in the city of St. Louis, and is now, and for quite a while has been, employed as a private watchman for the Laclede Gaslight Company, which is a corporation doing business in the city of St. Louis, and state of Missouri; that on March 17, 1906, a lot of scrap lead was melted on the premises of said company for the purpose of cooling out, and that during the very short absence of the said Hollis from the yard where said lead was placed it was stolen and taken away by some person unknown to witness, and in 10 or 15 minutes after having seen the lead in the said yard aforesaid the witness missed it and undertook to find it; that 10 or 15 minutes thereafter the witness went to the premises of the defendant, Harry Jacobs, where the said Jacobs keeps a secondhand store and junkshop, and found the lead back of some scales still hot and wrapped, or partially wrapped in a piece of cloth or sack; that witness examined the lead, and recognized and identified it as the same lead which had been taken, stolen, and carried away as aforesaid from the premises of the Laclede Gaslight Company, of which said company it was then and there the property, by certain indentations he made therein as the lead was cooling, and that it weighed about seventy-five (75) pounds and was of the value of three (\$3.00) dollars or four (\$4.00) dollars; and thereupon the witness sent for a policeman and within a few minutes Officer Kinsey came into the junkshop and arrested Jacobs, and the lead aforesaid was taken by the witness." From a careful perusal of this excerpt it is obvious that nothing appears therein to the effect that the defendant was informed in any manner by Hollis that he was under suspicion of having stolen the lead. It does appear affirmatively therefrom, however, that upon his arrival the police officer arrested Jacobs and the declarations of Jacobs sought to be introduced in evidence were the declarations made then and there upon the occasion of his arrest, and, so far as the

record shows, immediately upon his being first taxed with the theft.

Entertaining this view, the judgment should be reversed and the cause remanded. It is so ordered.

BLAND, P. J., concurs.

GOODE, J., concurs in remanding the case, but thinks it is a question for the jury whether defendant knew he was suspected of the crime when he made the declaration explanatory of his possession of the stolen property.

CURRY v. LA FON.

(St. Louis Court of Appeals. Missouri. Oct. 20, 1908.)

1. JOINT ADVENTURES (§ 4*)—MUTUAL DUTIES OF PARTIES—TAKING OF SECRET PROFIT BY ONE PARTY.

Where co-adventurers bargain for the purchase of land, to part of which the vendor's title is found to be faulty, the consummation of a deal by one of them with the vendor, without the knowledge of the other, whereby such one receives a profit in consideration of carrying out the purchase of the portion to which a good title was furnished, is contrary to the policy of the law.

[Ed. Note.—For other cases, see Joint Adventures, Dec. Dig. § 4.*]

2. MORTGAGES (§ 282*)—TRANSFER OF PROPERTY—ASSUMPTION OF MORTGAGE DEBT BY GRANTEE.

A covenant in a deed, by which the grantee assumes the payment of a mortgage on the land, creates an obligation, on which the mortgagee may sue the grantee covenantor for the indebtedness assumed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 751; Dec. Dig. § 282.*]

3. MORTGAGES (§ 275*)—TRANSFER OF PROPERTY—ASSUMPTION OF MORTGAGE DEBT BY GRANTEE—ESTOPPEL.

Where a grantee for a valuable consideration assumes a mortgage indebtedness on the land, he is estopped from disputing the validity of the indebtedness.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 780; Dec. Dig. § 275.*]

4. ESTATES (§ 10*)—MERGER.

A merger, which takes place when a greater and lesser estate coincide in the same person, in the same right, without the intervention of any other right or title, by the lesser estate merging in the greater can be effected only when the same person possesses both the equitable and legal title; and hence, where one is a tenant in common in an equity of redemption, and the legal title to the property is in a trustee under a trust deed, the mere fact that the tenant of the equity reacquires the notes and mortgage given by him and his co-tenant does not effect a merger in him of the equitable and legal estates so as to extinguish the indebtedness under the notes.

[Ed. Note.—For other cases, see Estates, Cent. Dig. §§ 9, 10; Dec. Dig. § 10.*]

5. BILLS AND NOTES (§ 440*)—PAYMENT—REISSUE BY MAKER.

The maker of a note may reissue it before maturity, for a valid consideration, so as to bind himself as effectually as in the first instance; and hence, though mortgage notes are paid by a joint maker, so as to extinguish their

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

original obligation against the other maker, the latter can reissue them before maturity for a new consideration, as by assuming their payment by covenant in a deed as part consideration for his co-maker's interest in the equity of redemption in the mortgaged land.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1223; Dec. Dig. § 440.*]

6. CONTRACTS (§ 140*)—VALIDITY—SUBSEQUENT CONTRACT BASED ON ORIGINAL CONSIDERATION.

The rule that, if the original consideration for a note is illegal or immoral, subsequent contracts based on that consideration are unenforceable does not apply where the original consideration for notes was land purchased by two joint adventurers, and free from immorality or illegality, though the notes might be void as against the policy of the law because of a connivance between the vendor and one of the adventurers whereby such adventurer received a secret profit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 713; Dec. Dig. § 140.*]

Appeal from Circuit Court, Audrain County; J. D. Barnett, Judge.

Action by W. B. Curry against A. M. La Fon. Judgment for plaintiff, and defendant appeals. Affirmed.

P. H. Cullen and S. D. Stocks, for appellant. A. E. Rieger and Geo. Robertson, for respondent.

NORTON, J. This is a suit by the holder of a note against the grantee in a deed, on a stipulation in the deed by which the defendant covenanted to assume and pay the note mentioned, which was secured by a mortgage on the land conveyed by the deed. The plaintiff recovered, and defendant appeals.

The facts out of which the controversy arose are somewhat complicated, and will be stated in extenso. The plaintiff, Curry, and the defendant, La Fon, had formerly been partners in the real estate business. This partnership was dissolved, however, recently before their association in the present instance. Having decided to purchase some lands jointly in the state of Arkansas, they visited one Louis Sachs, who was engaged in the real estate business, and together examined and agreed to purchase 2,080 acres of land in Arkansas owned by Sachs. This was in July. They entered into a written contract with Sachs, whereby they agreed to purchase the 2,080 acres of Arkansas land at the stipulated price of \$17,000, to be paid as follows: Curry and La Fon were to assume the payment of a \$2,500 mortgage on the land. They were to pay Sachs \$3,000 in cash, deed him certain property in Missouri owned by them jointly, at the agreed price of \$4,000, and to execute their joint promissory notes, payable to Sachs, for the sum of \$7,500, which notes were to be secured by a second mortgage on the lands acquired from Sachs. Sachs agreed to furnish good and sufficient title to the Arkansas lands, and execute a warranty

deed therefor, subject only to the \$2,500 mortgage thereon, heretofore mentioned. The deal was to be finally consummated on the 1st of the following January. During the interim between the time this contract was entered into and the date at which it was finally consummated, it was discovered that Mr. Sachs was unable to furnish satisfactory title to 240 acres of the land mentioned. It seems the present plaintiff, Curry, took advantage of this fact, and, without the knowledge of his associate, the present defendant, La Fon, interviewed Mr. Sachs, and informed him that, inasmuch as their contract for the purchase of the Arkansas land was an entire obligation, he considered himself no longer obligated to complete the deal, as Sachs would be unable to furnish sufficient title to all the lands mentioned. He suggested, however, that if, upon a final consummation of the deal, Sachs would agree to take from him an equity which he owned in several brick buildings in Green City, Mo., at an agreed price of \$3,500, and exchange therefor notes to that amount, which were to be executed by the defendant, La Fon, and himself to Sachs, he might waive his objection and consummate the trade, provided Sachs agreed to drop out of the deal the 240 acres of land to which the title had proved insufficient, at an agreed valuation of \$2,000. Mr. Sachs investigated the Green City equity owned by Curry, and entered into a collateral agreement with him to the effect suggested. The purport of this agreement was that, upon Curry and La Fon consummating the deal for the Arkansas lands, Sachs would assign to Curry certain of the notes, to be jointly executed by Curry and La Fon, and purchase the Green City equity at \$3,500. This collateral agreement, however, was not revealed to the defendant La Fon, and in fact it was the purpose of both Curry and Sachs to keep La Fon in ignorance thereof. For some reason the deal for the Arkansas property was not finally consummated until the 14th of the following February, on which date the several parties met at Kirksville, Mo., and exchanged deeds. The 240 acres of Arkansas land, to which Sachs had found himself unable to perfect title, was dropped from consideration at an agreed valuation of \$2,000. As thus modified Curry and La Fon purchased from Sachs 1,840 acres of land at a valuation of \$15,000, to be paid for as above indicated except, instead of giving to Sachs a second mortgage for \$7,500, they were to execute notes and a mortgage to him for \$5,500. On that date, February 14, 1904, Sachs executed and delivered to Curry and La Fon a warranty deed conveying the 1,840 acres of Arkansas land, subject to the \$2,500 mortgage, then outstanding against the same, which mortgage Curry and La Fon assumed. Curry and La Fon at the same time each paid to Sachs \$1,500 in cash,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a total of \$3,000, and conveyed to him equities in certain real properties, at an agreed valuation of \$4,000, and executed to him their two series of joint and several promissory notes, aggregating \$5,500. These notes were all antedated, in accordance with the original agreement as of January 1, 1904. As stated, instead of this \$5,500 indebtedness being included in one note, it was divided into six notes, all of which were dated January 1, 1904, signed by both Curry and La Fon, and payable to Louis Sachs or order, in the following manner: Two notes for \$1,000 each, due January 1, 1906; two notes for \$1,000 each, due January 1, 1907; two notes for \$750 each, due January 1, 1908—all of the notes to bear interest at the rate of 6 per cent. etc. While Curry and La Fon both signed each of the notes mentioned, it appears they were divided in the manner indicated, and ran concurrently in two series, in order to enable Sachs and Curry to carry out and consummate their collateral bargain concerning the Green City equity. Although this is true, La Fon insists that, at and before the execution of the notes, he was not informed as to this purpose, nor as to the details of the collateral trade between Sachs and Curry respecting the Green City property. Immediately upon the execution and delivery of the several notes to Sachs, or during the same day at least, Sachs indorsed in blank and delivered to Curry one-half of the notes mentioned, amounting to \$2,750—that is, one of the entire series of notes—and returned to Curry \$750 in money, making a total of \$3,500 notes and cash, and in consideration thereof accepted from Curry a deed to his equity in the Green City property at an agreed valuation of \$3,500. Mr. La Fon admits in his testimony that he learned these facts during that day, and immediately upon the execution and delivery of the notes.

Although Curry and his wife, before the delivery of the notes to Sachs, executed a mortgage deed of trust to Sachs securing the same, Mr. La Fon failed to sign the same at that time, for the reason his wife was not in Kirksville. But with full knowledge of the fact that Curry had received an assignment of the notes for the Green City property, La Fon conveyed the mortgage to his home at Mexico, Mo., where he and his wife executed the same before a proper officer two days thereafter, and delivered it to Mr. Sachs. In April thereafter Sachs informed Mr. La Fon fully as to the details of his collateral bargain with Curry, whereby he had acquired the Green City property, and Curry had become possessed of \$2,500 of the joint notes of Curry and La Fon; or, in other words, that he had assigned to Curry, for the consideration mentioned, one-half of the joint indebtedness of Curry and La Fon to him, and that Curry then held the notes. In the month of June thereafter the defendant, La Fon submitted a proposition to Curry to

purchase from him Curry's one-half interest in the equity of redemption in the Arkansas lands on which the mortgage securing the notes lay. Curry agreed to accept, and La Fon agreed to pay to him \$1,500 for his equity therein. La Fon caused to be drafted a warranty deed from Curry and wife, purporting to convey Curry's one-half interest in the lands mentioned to La Fon. This deed recited a consideration of \$9,000, subject, however, to the \$2,500 mortgage, which was outstanding against the land at the time Curry and La Fon bought it, and subject also to the following mortgages: Two for \$1,000, each given January 1, 1904, due January 1, 1906; two for \$1,000 each, given January 1, 1904, due January 1, 1907; two for \$750 each, given January 1, 1904, and due January 1, 1908—all of which mortgages it is stipulated therein "the said A. M. La Fon assumes." All of the evidence in the case tends to establish that the indebtedness assumed in this deed is the identical indebtedness existing against the lands by virtue of the joint notes of Curry and La Fon, of which notes Curry, at the time, as La Fon well knew, was possessed of three, representing a principal of \$2,750 under assignment from Sachs, the payee. A few days after having received this deed from La Fon, as prepared by him, Curry and his wife executed and delivered the same to La Fon. La Fon accepted the deed containing the covenant of assumption inserted therein by himself, or the scrivener at his instance, and paid Curry \$1,500 in addition to the covenant of assumption, as a consideration for his equity of redemption in the Arkansas land. At this time, June 25, 1904, none of the notes mentioned had fallen due. Upon maturity of the first note Curry asserted his claim against La Fon on the covenant of assumption in the deed, and La Fon refused to pay, declaring that he was not indebted to Curry for several reasons, to be hereinafter noticed. Thereupon Curry instituted the present action on the covenant in the deed to recover the amount of the first installment of indebtedness, originally evidenced by one of the joint notes of Curry and La Fon to Sachs, dated January 1, 1904, for the sum of \$1,000, and due January 1, 1906, with interest thereon, which note had been assigned to Curry by Sachs, as above stated, and was secured by a mortgage assumed by La Fon. The circuit court peremptorily directed a verdict for the plaintiff, and defendant appeals.

As stated above, the evidence tended to prove that Curry made a collateral deal with Sachs, whereby he exchanged the Green City equity for the note in suit and others, that this collateral arrangement was carefully concealed from La Fon until the purchase of the Arkansas land was actually consummated and the notes executed, and, further, that Curry made a secret profit by the exchange. That is to say, Curry seized upon the opportunity to be relieved from the en-

ture contract for the purchase of the Arkansas lands because of the failure of title to a portion thereof, and thereby procured an agreement from Sachs to accept his Green City equity at an inflated value for the notes mentioned, and thus realize a secret profit to himself of probably \$2,000. An argument is predicated on this evidence, to the effect that, Curry and La Fon having associated themselves together in a joint undertaking for the purchase of the Arkansas land, the highest degree of good faith was due from each to the other, and that therefore the contract which Curry made with Sachs violative of this confidence, and whereby a secret profit accrued to Curry, even though indirectly, as by the exchange of the equity for the notes, rendered the notes absolutely void as against public policy, and therefore acquits La Fon of the duty to respond to Curry in this action. The peremptory direction of a verdict for the plaintiff by the trial court of course eliminated this element of the defense. The defendant complains of this action and insists the matter should have been referred to the jury for an ascertainment of fact as to whether or not Curry and Sachs had, in fact, conspired to conceal this collateral arrangement from him, and that it resulted in a secret profit to Curry. It is no doubt true that the taking of a secret profit by one of two co-adventurers, in the manner and under the circumstances suggested, is contrary to the policy of the law. *Seehorn v. Hall*, 130 Mo. 257, 32 S. W. 643, 51 Am. St. Rep. 562. And were this suit on the notes alone for contribution, possibly an accounting of the profits mentioned could be had. However this may be, the present action predicates, not on the note mentioned and its original consideration, but rather upon the covenant of assumption of payment contained in the deed resting upon an entirely new consideration; that is, the conveyance of Curry's equity of redemption in the Arkansas land to La Fon. We are of the opinion that the entire matter is precluded by this covenant; that is to say, that the defendant is estopped from asserting the invalidity of the obligation of the note which he has assumed by the covenant contained in the deed.

As stated before, the suit proceeds upon the covenant in the deed by which the defendant assumed the payment of the note to Curry. It is well settled that a covenant contained in a deed of the nature mentioned creates an obligation on which a mortgagee may sue the grantee covenantor for the indebtedness assumed. *Fitzgerald v. Barker*, 4 Mo. App. 105; *Id.*, 70 Mo. 685; *Id.*, 85 Mo. 13; *Id.*, 13 Mo. App. 192; *Keifer v. Shacklett*, 85 Mo. App. 449; *Jones on Mortgages* (6th Ed.) § 740 et seq. And it is the universal rule that the purchaser in such circumstances is not allowed to defend against a mortgage debt he has assumed to pay on the ground that it is without consideration. *Terry v. Durand Land Co.*, 112 Mich. 665, 71 N.

W. 625; *Crawford v. Edwards*, 33 Mich. 354. Nor will he be heard to set up the invalidity of the mortgage. *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268. The purchaser is not permitted to show the mortgage deed was invalid as against the mortgagor. *Crawford v. Edwards*, 33 Mich. 354; *Comstock v. Smith*, 26 Mich. 306; *Gowans v. Pierce*, 57 Kan. 180, 45 Pac. 586; *Alt v. Banholzer*, 36 Minn. 57, 29 N. W. 674. Nor will he be permitted to say the mortgage debt assumed was void under the pre-emption laws (*Green v. Houston*, 22 Kan. 35), for the grantee is liable on his covenant of assumption, even though his grantor were not (*Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467). And this doctrine is equally true where the mortgage and deed were originally void on account of usury. *Jones on Mortgages* (6th Ed.) § 736. The acceptance of the deed containing such a covenant is sufficient to and does operate an estoppel against, and concludes the grantee from subsequently denying the validity of that to which he has theretofore, for a valuable consideration, admitted to be a valid obligation. It is certain that he cannot hold under the deed and dispute the validity of his covenant therein, which enters into and forms the very consideration which moved the grantor to vest title in him. *Fitzgerald v. Barker*, 85 Mo. 13, 21; *Jones on Mortgages* (6th Ed.) 744; 13 Amer. & Eng. Ency. Law (2d Ed.) 813, 820. Defendant insists, however, that if the note was void as against public policy, then there was no debt to be assumed by the grantee. It is unnecessary to consider this proposition further than to say that, under all of the authorities, he is estopped from disputing the covenant in his deed recognizing the debt as valid and assuming its payment. Although the notes in the first instance were invalid on the grounds of public policy referred to—and this question it is unnecessary to decide—the defense is precluded by estoppel. There was certainly a valid consideration for the covenant contained in the deed, by which the defendant received title to Curry's interest in the equity of redemption; and, although the note was void in the first instance, it would operate as a sufficient memorandum to show the amount and character of indebtedness which was assumed by a valid obligation contained in the deed. Be this as it may, the defendant is estopped, at all hazards, from asserting that the note was originally invalid.

The parties were joint owners of the equity of redemption, and likewise joint and several makers of the notes assumed in the deed. It is therefore insisted that, as Curry received an assignment and became possessed of the three several notes mentioned while he yet retained his title to the equity as tenant in common with the defendant, the doctrine of merger then intervened, and entirely extinguished the indebtedness mentioned in the notes, and in this view there was no indebt-

edness upon which the covenant of assumption in the deed could attach. The rule is absolute at law that a merger takes place when a greater estate and a lesser coincide and meet in one and the same person, in one and the same right, without the intervention of any other or outstanding right or title. Under such circumstances the lesser estate is annihilated or merged into the greater. It is said: "The doctrine of merger springs from the fact that, when the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it would be of no use to the owner to keep up a charge upon the estate of which he was seised in fee simple; but, if there is an outstanding, intervening title, the foundation for the merger does not exist, and, as a matter of law, it is so declared." *Stantons v. Thompson*, 49 N. H. 272; *Jones on Mortgages* (6th Ed.) § 848; 20 Amer. & Eng. Ency. Law (2d Ed.) 1064. It therefore appears that, in order to effect a merger so as to extinguish the lesser estate, there must be a union, in the same person, of both the equitable and legal titles, without an intervening right operating to prevent a merger. Therefore, when one holds an equity of redemption, and the legal title to the property is outstanding in a trustee, the mere fact that he acquires and holds the notes and mortgage is insufficient to operate a merger of the equitable and legal estates in him, and this, for the reason that the legal estate is still outstanding in the trustee, and thus intervenes to prevent the merger. This doctrine is sound in the principle underlying the rule of merger, as we understand it. It has been so declared by the courts, and asserted by the standard text-writers. *Hospes v. Almstedt*, 13 Mo. App. 270; *State ex rel. Peters v. Koch*, 47 Mo. 582; *Jones on Mortgages* (6th Ed.) § 488. Now in the case at bar, while Curry and La Fon held the equity of redemption, the lands were incumbered by what is commonly known as a "mortgage deed of trust." By the provisions of this instrument the legal title was vested in Louis Sachs, with power of sale upon default in the payment of the notes mentioned. Sachs, therefore, occupied the position of trustee in whom the legal title to the lands at all times resided, and thus intervened to prevent a merger of estates in Curry by virtue of his holding the notes while he was co-tenant in the equity of redemption. Aside from all of this La Fon's acceptance of the covenant, assuming to pay the indebtedness mentioned as parcel of the consideration for the lands, operates to estop him from making the defense of merger. *Fitzgerald v. Barker*, 85 Mo. 13, and cases *supra*.

It is argued that, as Curry and La Fon were joint and several makers of the notes, the fact that Curry purchased the same from Sachs and received an assignment thereof operates at law as payment, and entirely extinguishes the indebtedness therein evidenc-

ed, and that therefore there is no indebtedness evidenced by the note upon which the covenant in the deed could attach and operate. Although the purchase of the note by Curry, one of the original makers, operated the extinguishment of its original obligation, so as to prevent him from maintaining an action thereon against La Fon other than for contribution or for money paid to the use of his co-obligor (*Williams v. Gerber*, 75 Mo. App. 18; *Dillenbeck v. Dygert*, 97 N. Y. 308, 49 Am. Rep. 525; *Stevens v. Hannan*, 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125; *Reynolds v. Schade* [Mo. App.] 109 S. W. 629-632) and although such a purchase by and assignment to Curry operated to prevent his reissuing the note, if a valid one as an obligation on its original promise against his co-maker, La Fon, at least for an amount greater than his right of contribution against his co-maker (*Stevens v. Hannan*, 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125), there is certainly no reason why La Fon could not, for a new and valid consideration, reissue the note against himself. Upon this theory of the case it is to be remembered La Fon knew the notes were held by Curry, and that they were paid. If they were not yet due, and he saw fit to reissue the identical notes to Curry, or to any other person for a new and valuable consideration, we are familiar with no principle to forbid it in so far as he was concerned; that is, to forbid him reissuing them as obligations against himself only. The general rule that the maker of a note who is *sui juris* may reissue the paper before maturity for a valid consideration, so as to bind him as effectually as in the first instance, is firmly imbedded in the law, and is beyond question. *Sater v. Hunt*, 66 Mo. App. 528; 2 *Edwards, Bills and Notes* (3d Ed.) § 723; 4 *Amer. & Eng. Ency. Law* (2d Ed.) 500. And so it is we conclude that, even though the notes were void in the first instance as against public policy, because of the misconduct of Curry and Sachs, and for that reason unenforceable against La Fon, or even though they were extinguished or paid by the act of Curry, the joint maker, purchasing the same, it was competent for La Fon to revive, rehabilitate, and reissue the same for a new, distinct, and valid consideration, as he did by assuming their payment by the covenant in the deed as part of the consideration for the lands.

As to the proposition that, even though the note was void in the first instance, it was competent for La Fon to reissue the same as a valid obligation against himself for a new consideration, it may be said that, if it was infected with illegality at all, the taint was not in the original consideration for which the note was given, but resulted rather from the misconduct of Curry and Sachs when considered from the standpoint of La Fon and his rights. The consideration for the note in the first instance was the Arkansas lands which were purchased by

Curry and La Fon, and this consideration was a valuable one, and entirely free from immorality or illegality. The original consideration was neither immoral nor illegal in itself, however much the promise of the note, when considered from the standpoint of La Fon, may have become tainted by the misconduct of Curry and Sachs. It is very true if the original consideration were illegal or immoral, then no subsequent contract bearing an obligation to execute the original, and into which the original immoral or illegal consideration mingled, could be enforced. *The policy of the law forbids the enforcement of a subsequent contract based upon such illegal or immoral consideration. *Bick v. Seal*, 45 Mo. App. 475. This proposition is not true, however, when the consideration of the original contract was neither immoral nor illegal, and the subsequent contract based thereon is founded upon a new and valid consideration, as in this case, as will fully appear by reference to *Gwinn v. Simes*, 61 Mo. 335, *Hutchinson v. Dornin*, 23 Mo. App. 575, and 15 Amer. & Eng. Ency. Law (2d Ed.) 992. In *Gwinn v. Simes*, supra, the original contract involved was a note executed on Sunday, and therefore void because of the Sunday statute. The suit was to enforce a mortgage executed on a secular day thereafter, securing the note which contained the original invalid promise. It was adjudged that, even though the original promise was void as against the policy of the law, the consideration itself for which the note was given (the loan of money) was neither illegal nor immoral, and that therefore the subsequent contract contained in the mortgage executed on a secular day was valid and enforceable. The case in principle is precisely in point here, and conclusive on the question under consideration. However this may be, La Fon is estopped from making this defense by accepting the covenant in the deed assuming to pay the debt. *Fitzgerald v. Barker*, 85 Mo. 13, and authorities cited.

The judgment will be affirmed.

BLAND, P. J., and GOODE, J., concur.

GERMAN-AMERICAN BANK v. MANNING et al.

(St. Louis Court of Appeals. Missouri. Nov. 5, 1908.)

1. TRIAL (§ 51*)—RECEPTION OF EVIDENCE.

Where a tax bill was received in evidence subject to objection and not afterwards excluded, it must be treated as properly before the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 125; Dec. Dig. § 51.*]

2. TRIAL (§ 386*)—TRIAL BY COURT—DECLARATIONS OF LAW—MATERIALITY OF ALTERATION.

Where a tax bill was altered in one of the calls of the description and its materiality de-

pended on extrinsic facts, a requested declaration of law that the alteration was not material, and did not affect the validity of the bill, called for a declaration on an issue of fact.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

3. ALTERATION OF INSTRUMENTS (§ 16*)—TAX BILLS—TIME—EFFECT.

An alteration of the description in a tax bill made after delivery would prima facie nullify the bill, though it may have described the same lot described by the original words.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 114-121; Dec. Dig. § 16.*]

4. ALTERATION OF INSTRUMENTS (§ 27*)—TIME—PRESUMPTION.

Unless the alteration of an instrument is suspicious, it will be presumed to have been made before the instrument was issued or delivered.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. § 234; Dec. Dig. § 27.*]

5. ALTERATION OF INSTRUMENTS (§ 24*)—TIME—SUSPICION—EVIDENCE.

Where an interlineation in a description in a tax bill was in different writing from words erased, such fact was sufficient to excite suspicion and justify the court in requiring evidence that the alteration was bona fide before admitting the tax bill in evidence, and, the bill having been admitted, it was still a question for the court as to whether the erasure and interlineation were made before the issuance and delivery of the bill, and whether, in the absence of evidence of the consent of all parties to the change, it invalidated the bill.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. § 208; Dec. Dig. § 24.*]

6. MUNICIPAL CORPORATIONS (§ 567*)—IMPROVEMENTS—TAX BILLS—ACTION—DESCRIPTION—VARIANCE.

A tax bill against defendant M. originally described the land as "lot No. Pt. 28 in City Block No. 5149, said ground having an aggregate front of 30.00 feet by a depth of 137.50 bounded north by Page Bl. east by Birkbeck R. E. & I. Co., south by alley and west by Aetna Loan Company." The bill as introduced in evidence showed the words, "Birkbeck, R. E. & I. Co.," crossed out, and after them the words, "now Dennis," interlined in different handwriting. The petition to foreclose the bill alleged that defendant M., against whom it was issued, owned the west 29 feet and 2 inches of lot 28 and the east 10 inches of lot 28 of Raymond Place on the date of the bill. *Held*, that there was a fatal variance between the description in the tax bill, both as originally drawn and as altered, and the description in the petition.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 567.*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

Action by the German-American Bank against Ella E. Manning and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Kehr & Tittman, for appellant. Abbott & Edwards, for respondents.

GOODE, J. This is an action on a special tax bill for street improvements against a lot in the city of St. Louis. The petition alleges defendant Ella E. Manning was the owner of the lot at the date of the bill, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

describes the property as the west 29 feet 2 inches of lot 28, and the east 10 inches of lot 27 of Raymond Place, in the city of St. Louis, fronting 30 feet on the south line of Page boulevard by a depth southwardly of 137 feet 6 inches, bounded north by Page boulevard, east by Dennis, south by an alley, and west by the Aetna Loan Company. It is alleged the property was subject to a deed of trust to defendant Abbott to secure a debt to defendant Buerman. The other essential allegations of a petition on a special tax bill are made, but need not be recited. When the tax bill was offered in evidence, defendant objected because the lot described in it and the one described in the petition were not the same; and because the tax bill bore on its face an unexplained alteration in the handwriting of another person than the one who made it out. The court admitted the bill, subject to the objection, and it was read in evidence. In its material parts it is as follows:

"No. 1456. Special Tax Bill.

"Office of the President of the Board of Public Improvements.

"St. Louis, June 22, 1903.

"Ella E. Manning, Owner, to Gilsonite Construction Company, Contractor, Dr.

"For work done on Page Blvd. from Kingshighway Blvd. to Union Blvd. Chargeable against lot No. Pt. 28 in City Block No. 5149, said ground having an aggregate front of 30.00 feet by a depth of 137.50 feet, bounded north by Page Bl., east by ~~Birkbeck R. E. & I. Co.~~ now Dennis, south by alley, and west by Aetna Loan Co.

"Under authority of the charter and of Ordinance No. 20,722 and of Contract No. 6249.

Frontage tax against the lot.....	\$ 53.16
Area tax against the lot.....	150.69
	<hr/> \$203.85

"With coupons from 2 to 7, inclusive, of \$29.12 each, attached.

"I hereby certify that the above-mentioned work, as shown by the certificate of the street commissioner on file in this office, was done by the above-mentioned contractor according to contract prices, and that I have caused the computation herein set forth to be made, and that I have assessed against the above-mentioned lot the amount, viz.: Two hundred three and 85.100 dollars, as being the special tax levied against said lot and to be paid by the person herein named as the owner of the land.

"Registered and countersigned by

"Hiram Philips,

"President of the Board of Public Improvements.

"James Y. Player,

"Comptroller."

The assignment of the bill was proved and other formal matters and the plaintiff rest-

ed, whereupon certain declarations of law were asked by plaintiff and refused, the court, sitting as a jury, declaring that it could not give judgment for plaintiff under the evidence. Judgment having been entered for defendant, the plaintiff appealed.

It will be perceived the description of the property in the tax bill is "Lot No. Pt. 28 in City Block No. 5149, said ground having an aggregate front of 30.00 feet by a depth of 137.50 feet, bounded north by Page Bl., east by ~~Birkbeck R. E. & I. Co.~~ now Dennis, south by alley and west by Aetna Loan Company." Instead of the property "against which the bill was issued being described as part of lot 28 and part of lot 27, the description in the petition, it is described as part of lot 28 only. It seems to be agreed Raymond Place named in the petition and city block 5149 called for in the tax bill are consistent, and we suppose block 5149 is in Raymond Place. A line had been drawn through the words and letters "Birkbeck R. E. & I. Co." in the tax bill, and to the left and immediately above them had been written in a different writing the words "now Dennis." Counsel for defendant say this alteration, which plaintiff left unexplained by testimony, justified the court to deny plaintiff redress, as did also the discrepancy in the descriptions of the property in the bill and in the petition.

The tax bill was received in evidence subject to objection, was not afterwards excluded, and hence must be treated as before the court. Plaintiff asked the court to declare the alteration shown in the tax bill was not an alteration in the meaning of the law or material, and that it had no effect on the validity of the bill. This declaration, which was refused, called in one part for a declaration on an issue of fact; for whether or not the alteration was material depended on extraneous facts. The altered part was one of the calls descriptive of the lot chargeable with the assessment. The call for the east boundary of the lot to be charged was changed from the "Birkbeck R. E. & I. Co." to Dennis by drawing a line through the first description and writing above it the words "now Dennis." It is true the lot is also described as having a frontage of thirty feet on the north side of Page boulevard; but a call for a boundary or monument usually takes precedence over one for distance, if there is a discrepancy between the two. If the Birkbeck R. E. & I. Co. at one time owned the lot immediately east of the lot to be charged and some one by the name of Dennis owned it when the tax bill was issued, the alteration in question did not change the description of the property, and in that sense was immaterial. But suppose no one by the name of Dennis owned it then, but the Birkbeck R. E. & I. Co. was still the owner, and it is apparent the change in the call completely altered the description of the property.

The alteration might be immaterial as regards a change of description, and yet highly material in respect of whether it was made prior to or at the time the tax bill was issued and delivered or subsequently. If it was made after delivery of the tax bill, then, though it may have described the same lot described by the original words, it would prima facie have a nullifying effect on the tax bill. *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Powell v. Banks*, 146 Mo. 620, 48 S. W. 664. Unless the alteration was of a suspicious character, presumably it was made before the issuance of the tax bill. *Matthews v. Coalter*, 9 Mo. 705; *Grimes v. Whitesides*, 65 Mo. App. 1. But the interlined words "now Dennis" are in a different writing from the erased words, and this fact was sufficient to excite suspicion and justify the court in requiring evidence that the alteration was bona fide before admitting the tax bill itself in evidence. *Paramore v. Lindsey*, 63 Mo. 63; *Stillwell v. Patton*, 108 Mo. 352, 360, 18 S. W. 1075. As said, the court did not exclude the tax bill because of the unexplained alteration, but admitted it. This put it before the court sitting as a jury for what it was worth, but without the presumption that it had been altered prior to delivery; and the question of when it was altered became a question of fact for the court. *Paramore v. Lindsey*, supra; *Sweltzer v. Banking Co.*, 76 Mo. App. 1, 6. Hence the court as a jury might find the erasure and interlineation were made after the issuance and delivery of the tax bill, and, in the absence of proof of consent by all parties in interest to the change, that it invalidated the bill. This point, as presented on the appeal, is unlike the one determined in *Heman v. Gilliam*, 171 Mo. 262, 71 S. W. 163, in this: In the case just cited the trial court found the alteration was immaterial and a presumption in favor of the ruling was proper; whereas, here the court appears to have ruled the alteration was material, and the like presumption must be indulged.

There was a variance between the description of the property in the tax bill, both as originally drawn and as altered, and the description in the petition. The petition expressly alleges Ella E. Manning owned the western 29 feet and 2 inches of lot 28 and the eastern 10 inches of lot 27 of Raymond Place on the date of the bill. But said instrument purports to create a charge against 30 feet of lot 28 fronting north on Page boulevard and bounded on the west by the Aetna Loan Company. According to the petition, the 30 feet of lot 28 to be charged must be the west part and bounded by Ella E. Manning's 10 inches of lot 27, which is immediately west of lot 28; that is to say, according to the petition, the lot described in the tax bill would be bounded by Ella Manning's property on the west instead of the Aetna Loan Compa-

ny's. On this petition the tax bill in suit was nonenforceable, though we do not say plaintiff would not be entitled to recover on an amended petition against so much of the frontage (29 feet, 2 inches) as is in lot 28. Relief of this kind was not asked.

The judgment is affirmed. All concur.

E. H. POWERS SHOE CO. et al. v. ODD FELLOWS HALL CO.

(St. Louis Court of Appeals. Missouri. Nov. 5, 1908. Rehearing Denied Nov. 17, 1908.)

1. LANDLORD AND TENANT (§ 76*)—LEASE—ASSIGNMENT—PROHIBITION.

The assignment of a lease may be absolutely prohibited, the owner being entitled to select his tenant and stipulate against a transfer of the term without his approval.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 225; Dec. Dig. § 76.*]

2. LANDLORD AND TENANT (§ 111*)—FORFEITURE OF LEASE—FRAUD, ACCIDENT, OR MISTAKE.

While equity would not relieve against a forfeiture of a lease because of a prohibited assignment of the term under equity jurisdiction to set aside forfeitures, yet, if the forfeiture resulted from the fraud, mistake, or accident of the party seeking to avail himself of it, it would be set aside under the jurisdiction of equity to relieve against fraud, accident, or mistake.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 342; Dec. Dig. § 111.*]

3. LANDLORD AND TENANT (§ 111*)—LEASE—CHANGE OF LESSEE—FORFEITURE—FRAUD—INJUNCTION.

The K. Company held a favorable lease on a store building which did not expire until December 31, 1910. There was a change of stockholders on July 14, 1906, after which a new corporation was organized to take over the assets and business of the K. Company. Before any application for defendant's consent to the assignment of the lease, defendant had resolved to declare a forfeiture in order to obtain a new lease at a higher rent, but permitted the new corporation to make valuable improvements on the premises, and incur expense in changing the names on signs, labels, and cartons, continuously declining to decide whether the consent would be granted, but endeavoring to obtain a new lease, until finally, being unable to do so, the lease was formally forfeited and suit brought to recover possession. The signs and labels in the name of the new company were thereupon removed, and those of the K. Company substituted, and it claimed the right to hold the property. *Held*, that the forfeiture was fraudulent, and that the K. Company was entitled to an injunction restraining the prosecution of the suit to recover possession and to a judgment reinstating the term.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 342; Dec. Dig. § 111.*]

4. LANDLORD AND TENANT (§ 112*)—LEASE—FORFEITURE—PROMPT ACTION.

A lessor must act with promptness after discovering breaches of the lease by the tenant, if he desires to forfeit the lease therefor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 343; Dec. Dig. § 112.*]

5. LANDLORD AND TENANT (§ 111*)—FORFEITURE—RELIEF—COMPLAINT.

Where, in a suit to restrain a lessor from enforcing a forfeiture of the lease, the complain-

ing lessee stated acts committed by him which, without more, would justify a forfeiture, but assailed the validity of a declaration of forfeiture based on such acts, on the theory that he was led into doing them by the lessor's fraud, the complaint was not defective for failure to allege, not only that a forfeiture was declared, but that the term was forfeited in fact.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 111.*]

6. LANDLORD AND TENANT (§ 111*)—FORFEITURE OF LEASE.

Where a lessee was not only entitled to restrain a forfeiture of the lease by the lessor because the lessor was estopped to rely on the lessee's breach of covenant as a ground for forfeiture, but was also entitled to have its term under the lease reinstated, the lessee's remedy at law, by pleading the defense of estoppel to the lessor's suit to recover possession, was inadequate.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 342; Dec. Dig. § 111.*]

Appeal from St. Louis Circuit Court; Chas. Claffin Allen, Judge.

Action by the E. H. Powers Shoe Company and others against the Odd Fellows Hall Company to restrain defendant's prosecution of an action of forcible entry and detainer against complainants. Judgment for complainants, and defendant appeals. Affirmed.

H. A. & C. B. Hamilton, for appellant. C. T. Case and J. E. King, for respondents.

GOODE, J. The E. H. Powers Shoe Company is successor to the D. P. Kinsella Shoe Company by change of name. The Front Shoes Company is a corporation which was organized about September 9, 1906, for the purpose of acquiring the assets and business of the D. P. Kinsella Shoe Company and assuming its obligations. It did not do those things because of the refusal of the appellant, the Odd Fellows Hall Company, to consent to the transfer of a lease to be mentioned presently, and, in consequence of this refusal, the name of the Kinsella Company was changed to the E. H. Powers Shoe Company. Kinsella, who owned 48 of the 50 shares of the stock of the company which bore his name, found himself without adequate capital, and wished to sell his interest. He drew the attention of George W. Brown of the Brown Shoe Company to the business, and, after a negotiation, sold his shares of stock on July 14, 1906, to said Brown and others for a price which it was agreed should be fixed by taking an inventory of the stock and adding the estimated value of the good will of the business, furniture, and fixtures, and the leasehold of the storeroom. The total price thus ascertained was above \$23,000, of which sum Brown contributed the larger portion, and had most of the shares transferred to Harris H. Johnston for him. The other parties to the purchase were E. H. Powers and M. L. Powers, his wife, and W. F. Armstrong. Johnston and Powers took the management of the business, the former

as secretary of the company and the latter as vice president. As Mr. Kinsella had no further interest in the concern, the new owners of the stock wished to conduct the business under a new corporate name, either by transferring it from the Kinsella Company to a distinct corporation, or by changing the name of the Kinsella Company in the statutory mode. The place of business was a storeroom No. 822 Olive street, owned by appellant, Odd Fellows Hall Company. It was part of a building known as the Odd Fellows Hall Building, in which there were other storerooms. The Kinsella Shoe Company held a lease on said storeroom from appellant, dated November 1, 1904, for a term to commence January 1, 1905, and ending December 31, 1910, at a rental of \$500 a month. It was stipulated in this lease the premises should not be "assigned, let, or underlet, or permitted to be used for any purpose other than a retail store for the handling, keeping, and sale of shoes," without the written consent of the lessor, and that no consent would be given for tailoring or merchant tailors, furnishing goods, hats, caps, books, news, stationery, cigars, tobacco, beers, or liquors; further, that if the premises should be assigned, let, or underlet, or permitted to be used as above mentioned without the consent of the lessor, the latter might enter and relet the same, and for such unauthorized act the lease would become void if the lessor should so elect. There was also a stipulation that in case of a violation of the covenants and conditions of the lease, or the rules and regulations established for the control of the building, the lease should thenceforth, at the option of the lessor, become null and void, and the lessor might enter without notice or demand. In the same clause of the lease the lessee (Kinsella Shoe Company) waived all right to notice to quit possession, or of the intention of the lessor, Odd Fellows Hall Company, to re-enter. Appended to the lease were various rules regulating the use by tenants of the Odd Fellows Hall Building. One of those rules said no sign, advertisement, etc., should be inscribed, painted, or fixed on any part of the outside or inside of the building by a tenant, unless the color, size, style, and material of the sign or advertisement was specified by the lessor in writing. After the purchase of Kinsella's stock in the Kinsella Shoe Company, the new management desired to advertise a cut sale of shoes, but not to publish the advertisement in the name of the Kinsella Shoe Company. In view of the rule prohibiting tenants from putting out signs or advertisements until the Odd Fellows Hall Company had approved of them, the officers of said company were asked by the officers of the Kinsella Company for permission to advertise by signs in other names than the Kinsella Company. The request was granted, and the business

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

advertised for several weeks under the names of Armstrong & Powers Shoe Company, White House Shoe Company, Front Shoes Company, and Front Shoe Store. This was done through July and August, and afterward, on September 9th, when the Front Shoes Company had been incorporated to take over the business, Johnston and Powers asked the Odd Fellows Company, through its president, Edward Wilkerson, to consent to an assignment of the lease of the store-room by the Kinsella Company to the new corporation, Front Shoes Company.

According to the testimony for respondents, Wilkerson said some of appellant's directors thought the lease had been already forfeited but he was not in favor of a forfeiture, and thought there would be no trouble about the Odd Fellows Company consenting to an assignment; but the question would have to come before the board of directors. What he meant by saying some of the members thought the lease had been already forfeited was that on account of the purchase by Johnston, Powers, and Armstrong of the Kinsella stock, and the installation of a new management in charge of the company's business, some of the directors of the Odd Fellows Company deemed the lease had been de facto assigned by the Kinsella Company without the consent of the Odd Fellows Company, and therefore had been forfeited. The testimony of Johnston and E. H. Powers tends to prove they held two or three conversations with Wilkerson and one or more with Hiram Lloyd, a director of the Odd Fellows Company, in which conversations Johnston and Powers were led to believe the directors of the Odd Fellows Company would consent to the assignment whenever the matter was brought before the board; but were told the matter would be acted on formally when the board met. Meanwhile the Kinsella Company, with the knowledge of appellant's officers, made or continued to make improvements on the leasehold in the way of electric wiring, resurfacing the floor, building a balcony in the rear of the store, and putting new mirrors around the walls. These improvements cost about \$1,700, and would become the property of appellant under a clause of the lease at the end of the term. Meanwhile, too, the business was advertised in the name of the Front Shoes Company, checks were drawn, contracts entered into with various persons, and license and insurance policies taken out in that name. Packages and cartons in the store were so labeled, and other things were done which indicated the Front Shoes Company was in possession of the stock and premises, and had taken over and was conducting the business. These incidents began about September 9th, when the Kinsella Company requested the Odd Fellows Company's consent to an assignment of the lease to the Front Shoes Company, and continued for several weeks pending an an-

swer by the board of directors to the request. On October 18, 1906, the Kinsella Company was notified in writing the Odd Fellows Company had declared a forfeiture of the lease because of its assignment to the Front Shoes Company. As soon as this notice was received, the signs and labels of the Front Shoes Company were removed, those of the lessee, the Kinsella Company, substituted in their places, and, as far as could be done, indications of occupancy of the premises and management of the business by the Front Shoes Company were effaced and the Kinsella Company reinstalled. It acknowledged in writing receipt of the notice of forfeiture by appellant, declared the lease had not been assigned, or the premises let or underlet; that the Kinsella Company was in possession of the store, basement, and all parts of the building included in its lease and intended to protect its rights. On November 2, 1906, the Odd Fellows Hall Company instituted an action of unlawful detainer before a justice of the peace against both the Kinsella and the Front Shoes Company to recover possession of the storeroom. In the complaint filed in said cause the Odd Fellows Company recited the lease to the Kinsella Company for six years from January 1, 1905, and the covenant against an assignment or underletting, without its written consent, and the proviso that, if said covenant was violated, it might enter and relet the premises if it should so determine, and alleged the Kinsella Company prior to October 18, 1906, had assigned, let, and underlet the premises to the Front Shoes Company without the consent of the Odd Fellows Company, and by the determination and election of the latter company the lease had become forfeited and void, and the Odd Fellows Company had claimed the forfeiture, given notice of the same to the Kinsella Company on October 18, 1906, and demanded possession of the premises.

This suit is a bill in equity to enjoin the prosecution of the said unlawful detainer case, to have set aside as a nullity the declaration of forfeiture of the lease, to have E. H. Powers Shoe Company, respondent, as successor to the rights of the Kinsella Company, reinstated in its rights under said lease, and for other proper relief. Other facts need to be stated, particularly the doings of appellant with reference to a forfeiture of the lease. When Mr. and Mrs. Powers, Johnston, and Armstrong purchased the Kinsella stock in July, 1906, the board of directors of the Odd Fellows Company took into consideration the question of forfeiture of the lease in consequence of the change of management, and referred to their attorney the question of whether they could forfeit it. This was about July 21st. The resolution adopted reads as follows: "After a discussion as to the assignment of existing store leases and consent thereto by this company, it was the sense of the members present that

our consent be refused, and, on motion of Mr. Hequenbourg, the lease of the D. P. Kinsella Shoe Company was referred to Mr. Henry A. Hamilton, attorney, for his legal opinion upon our right to withhold consent and declare lease forfeited." Mr. Taylor, secretary and agent of the Odd Fellows Company, testified the occasion of this resolution was that some of the members of the board deemed there had been a change of the tenancy of the store. This was because, he said, alterations in the interior of the room, in the fixtures, and the management had been made, but appellant had not inquired about the facts of the managers of the store; the impression being the Kinsella Company had sold out to the Brown Shoe Company. It will be observed from the quoted resolution it was the sense of the members of the board present that consent should not be given to an assignment of leases. On July 31st the board again met, and the minutes of the meeting show the attorney "had submitted an opinion upholding the terms of the lease to the D. P. Kinsella Shoe Company." No further action was taken then. The next minute in the records of the Odd Fellows Company regarding the subject is under date of September 11, 1906, and is as follows: "The matter of lease to D. P. Kinsella Shoe Company was left to the president; it being the sense of the board that no assignment or transfer of the lease be allowed or permitted." Taylor swore that, when the last resolution was passed, there had been as yet no request by the Kinsella Company for permission to assign the lease, but a request to assign to the Front Shoes Company must have been preferred in a few days. The minutes under date of September 21, 1906, read as follows: "Mr. Lloyd moved that the action of the board at its last meeting that no assignment or transfer of the lease of the D. P. Kinsella Shoe Company would be allowed or permitted, be reconsidered. The motion carried. The members present thereupon indulged in an informal discussion of the subject of the lease of the D. P. Kinsella Shoe Company. The president having announced that the lease had been recently presented to him by the Front Shoes Company's officers with the request that our consent be given to its assignment to them. On motion of Mr. McCargo the matter concerning the lease of the D. P. Kinsella Shoe Company was postponed until Tuesday, September 25th, at 4 o'clock p. m. Motion carried." The first of those resolutions shows permission to assign the lease had been requested, and that, in view of the request, appellant's directors resolved to refuse permission. At the meeting on Tuesday, September 25th, the following resolution was adopted: "An informal discussion was held concerning the lease of the D. P. Kinsella Shoe Company. On motion of Mr. McCargo the question of our differences with the D. P. Kinsella Shoe Company and the Front Shoes Company was referred to Mr.

Taylor with instructions to try to effect a compromise. The motion was carried. The matter of compromise was the subject of informal discussion and on motion of Mr. Hequenbourg the matter was postponed until Thursday, September 27, at 4 p. m. The motion carried." That resolution contained an instruction to the secretary, Mr. Taylor, to compromise the matter. Taylor swore the purpose appellant company had in view was to get a new lease, and get a higher rental on account of the change of tenants. On September 27th this resolution was adopted by appellant's board: "On motion of Mr. McCargo, Mr. Taylor was instructed to carry out the wishes of the board as to a compromise of the lease of the D. P. Kinsella Shoe Company relative to its assignment to the Front Shoes Company, but not to declare to the parties any forfeiture of the lease. The motion carried." It will be seen that though the signs and cartons had been changed from the Kinsella Company to the Front Shoes Company, and the business was apparently in charge of the latter, Taylor was instructed by appellant's directors not to declare the companies in interest (the Kinsella and Front Shoes Companies) had forfeited the lease. Taylor explained that he personally was in favor of a forfeiture, and this clause was inserted to instruct him not to declare a forfeiture as the board knew he was in favor of doing and might do if not restrained. Taylor said he entered the storeroom in question on September 28th, and told Powers the directors were considering the expediency of offering the room for rent, and, as the Front Shoes Company seemed to be in possession, deemed it right to make the offer to said company first. Powers declined to discuss the proposition then, but on the next day requested permission to appear before appellant's board of directors, and was refused. Meanwhile Taylor was pressing the proposition for a new lease to the Front Shoes Company, and he swore appellant's directors designed to compromise the matter in that way, as the board thought a strange tenant was in possession in violation of the lease. On October 1st Taylor told Johnston, as previously he had told Powers, appellant was thinking about offering the premises for rent and deemed it but just, as they (meaning Johnston and his associates) were in possession, to make a new lease to them, and let the tenancy continue under new terms if they were found, after investigation, to be satisfactory tenants. Johnston replied they were in possession, had the lease and meant to keep it, but hoped there would be no trouble and appellant would consent to an assignment. Taylor proposed to give a lease for the balance of the term and seven months longer at \$7,800 a year; that is, an advance of \$1,800 a year or \$150 a month. At the same time Johnston tendered the rent in behalf of the Kinsella Company for October; it being payable that day. Taylor refused to accept it,

saying he did not think appellant was entitled to any rent from that concern, evidently meaning, not the Kinsella Shoe Company, in whose name the rent was tendered, but the Front Shoes Company, whom he considered in occupancy, in proof of which he called attention to the name of the Front Shoes Company on the boxes. He swore the proposition for a new lease was declined on October 2d, Johnston again saying they had a lease and were going to hold it, but hoped the parties would continue to be friends. Appellant's board had met again on September 29th, and Taylor had reported no progress in the Kinsella matter. The board met again on October 5th, and Taylor reported he had not been able to effect a compromise with the Front Shoes Company, though he had submitted two propositions, which Johnston had declined, with the request that no further propositions be submitted to the Front Shoes Company. Appellant's board laid the matter over until October 16th. On the 16th the board met and requested its attorney to appear before it the next day, the 17th. On that day the board resolved the lease of the store to the Kinsella Company was void because the lessee had assigned, let, or underlet the premises or a portion thereof without the written consent of the lessor; and the attorney was instructed to draw up papers to get early possession. At the final hearing the court made the temporary injunction against the prosecution of the unlawful detainer suit permanent.

Both parties have treated the case as though transfer of the lease to the new corporation organized to take over the assets of the Kinsella Company and carry on a shoe business in the storeroom would be an assignment of the term within the sense of the clause against an assignment without appellant's consent. Hence we will assume, without deciding, that this proposition is sound.

1. Equity does not relieve against the forfeiture of a term because of an assignment without the lessor's consent, unless there are special grounds like mistake or fraud in connection with the assignment. 18 Am. & Eng. Ency. Law (2d Ed.) 374; 1 Pomeroy, Eq. Jur. 454; 2 Taylor, L. & T. § 496; 1 McAdam, L. & T. 797, and citations; Wolfer v. Macato, 9 Mod. 112; Barrows v. Isaacs, 1 Q. B. (1891) 471; Eastern Tea Co. v. Dent, 1 Q. B. (1891) 835; Grigg v. Landis, 19 N. J. Eq. 350; 68 Am. Dec. 73, note, p. 86; Baxter v. Lansing, 7 Paige (N. Y.) 350. An assignment may be absolutely prohibited, because an owner of premises has the right to select his tenant and stipulate against the transfer of a term he grants except with his approval. A breach of this stipulation cannot be compensated in damages, as a failure to pay rent when due, or perform various other covenants, may be; nor does it fall within any of the rules according to which equity will relieve, as, of course, against a forfeiture. Northcote v. Dyke, Amb. 513; Davis

v. West, 12 Ves. Jr. 475; Sanders v. Pope, 12 Ves. Jr. 282; Hill v. Barclay, 18 Ves. Jr. 56; Griggs v. Landis, supra, note, p. 86; Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933. It follows respondents do not present a case for relief on the ground that equity courts have jurisdiction to set aside forfeitures—a jurisdiction ranged under the head of Accident, on the ancient theory that defaults in the payment of money, or performance of other conditions, were due to accidental hindrances, which is, of course, commonly a fiction, yet nevertheless the classification is maintained. But a forfeiture of a leasehold term or other property brought about by fraud of the party seeking to avail himself of it or by mistake, or even accident in the genuine sense, will be set aside, though the forfeiture may be of a kind which, in general, courts of equity do not relieve against; that is, when there is no special fact to make the case one of fraud, accident, or mistake, which are in themselves sources of equity jurisdiction as well in cases of forfeiture as in other instances. South Penn Oil Co. v. Edgell, 48 W. Va. 348, 37 S. E. 596, 86 Am. St. Rep. 43; Baxter v. Lansing, 7 Paige (N. Y.) 350; Sheets v. Selden, 7 Wall. 416, 19 L. Ed. 166; Hill v. Barclay, supra; Bracebridge v. Buckley, 2 Pierce, R. 200. In New York Life Ins. Co. v. Rector, etc., St. George's Parish, 12 Abb. N. C. (N. Y.) 50, it was said all the authorities agree an honest mistake or ignorance of the facts is good ground for equitable interference against a forfeiture; and, of course, the case for relief must be stronger if fraud appears. Henry v. Tupper, 29 Vt. 358, and Ransome v. Bentley, 4 Brown, Ch. 415. The facts before us reveal disingenuous conduct on the part of appellant, which, if not inspired by a fraudulent motive, will work a fraud on the Kinsella Company if its consequences are not obviated. Appellant was watching for an opportunity to forfeit the Kinsella Company's term in order to get a larger rental; a fact that, if not admitted point blank, is hardly denied, and of which the testimony leaves no doubt. In July, when a change in the stockholders of the Kinsella Company took place, but its occupancy continued, appellant's directors took under advisement the expediency of declaring a forfeiture and referred the question to their attorney. At the same time they declared it was the sense of those members present at the meeting that consent would be refused to an assignment of the term. This is an important circumstance; for it proves the policy to be pursued in regard to permitting a transfer of the lease if it should be requested was settled. But, when a request was made in the early part of September, instead of notifying the officers of the Kinsella Company, who were likewise the officers of the Front Shoes Company, that consent would not be given, appellant's officers deferred an answer from time to time on the

plea that the matter would have to be decided by the board of directors, though the board had decided it two months before. Meanwhile its president and one of its directors led the officers of the two shoe companies to believe consent would be granted, and stood by while the shoe companies continued to make valuable improvements and incur expense in changing the names on the signs, labels, and cartons. While these changes were going on, appellant's board of directors told its secretary to try to effect a compromise, but not to declare a forfeiture; that is, to give no notice to the Kinsella Company the lease would be forfeited because of a change of occupancy. The so-called compromise to be attempted was no compromise with the Kinsella Company as lessee at all, but an effort to induce the Front Shoes Company to pay \$1,800 a year more rent. It thus appears that during the time appellant was postponing an answer to the shoe companies regarding permission to assign the lease it was negotiating for more rent, and, without protest or disapproval, was allowing said companies to do the very acts for which it asserted the lease had been forfeited. A forfeiture was not afterward formally declared until appellant realized it could get no higher rent from the Front Shoes Company; but Taylor's testimony shows appellant intended all along to do this as a last resort, and, according to the purpose resolved on in July, to refuse consent to an assignment. This being true, its officers who had in charge the duty of arranging with the Kinsella Company were guilty of double dealing in giving vague assurances that an assignment would be permitted and doing nothing while the tenant acted on the faith of these assurances. We attach little weight to appellant's consent in July to a display of signs bearing the names of various corporations, though this consent tended to encourage the belief that it cared nothing about the name in which the business was conducted. Without said circumstance, there is ample evidence to prove appellant's behavior would damage the Kinsella Company if the lease should be terminated because of what the latter company did toward putting another company in possession, though perhaps this amounted to an assignment of the lease. *Dickinson Co. v. Fitterling*, 69 Minn. 162, 71 N. W. 1030; *Jones, L. & T.* § 442, p. 503. If a lessor would forfeit the term for breaches of contract by the lessee, he must be prompt in his declaration of forfeiture after he learns of the breaches, and cannot hold his decision in reserve to speculate for some advantage to himself, while he suffers the tenant to incur expense in the belief that he will not be disturbed. 18 Am. & Eng. Ency. Law (2d Ed.) pp. 382, 383, and citations in notes; *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303; *Hawes v. Favor*, 161 Ill. 440, 43 N. E. 1076.

2. One of the propositions mainly relied

on by appellant is lack of equity in the petition. The point of this contention is that it omits to allege a forfeiture occurred under the law in consequence of the acts of respondents which caused the forfeiture to be declared. It is said the petition ought to allege sufficient breaches, and also that the term was not only declared forfeited because of them, but actually was forfeited. In this connection we are cited to cases supposed to sustain appellant's proposition. *Warne v. Wagenor* (N. J.) 15 Atl. 307; *Graham v. Carondelet*, 33 Mo. 262. Appellant, of course, insists a valid forfeiture occurred and therefore relief should be denied, but insists, too, it should be denied because the petition does not say in so many words it occurred. The petition states the facts leading to the attempted forfeiture as we have recited them, and avers appellant's board of directors declared the lease forfeited by a unanimous vote on October 17, 1903, on the 18th served respondents with notice of the declaration, and later took steps to oust them from the premises. Where relief is sought from a court of equity against a forfeiture of the kind equity relieves against merely on proof that it has happened, such as one for failing to pay money when due, it may well be that a complainant should state in his petition for relief a forfeiture had occurred. And, if the petition shows the tenant had done nothing on his own motion, or by inducement of the lessor, in breach of a condition as in *Warne v. Wagenor*, supra, the complainant would present a case wherein the legal remedy is entirely adequate; or if an attempt to declare a forfeiture was abortive because of the omission of prescribed steps, and the whole matter is shown of record and is plainly void and casts no cloud on the complainant's title, there is no occasion for recourse to chancery. But these rules cannot be applied where the complaining lessee states acts committed by him which, without more, would justify a forfeiture; but assails the validity of a declaration of forfeiture based on said acts, on the ground that he was led into doing them by the artifice of the lessor. Fraud defeats what would otherwise be valid, and, though there may have been a de facto transfer of the lease which would have justified appellant in ending the term if it had done right itself, the attempt to end it was invalid if appellant's behavior induced the Kinsella Company to let another tenant into possession. In this event said company, in seeking relief against a possible loss of its term and ouster, and at least a cloud on its leasehold, as consequences of appellant's declaration, was not bound to aver a forfeiture had happened; in other words, that the declaration was warranted. This was the essential issue in dispute, and it was enough to confess the acts on which appellant proceeded, and, in avoidance of their effect, allege behavior of appellant which in-

duced them and sufficed to deprive its declaration of validity.

3. It is further insisted respondents have a complete remedy at law by setting up appellant's conduct as an estoppel in the unlawful detainer action before the justice of the peace. It always has been parcel of the jurisdiction of equity to relieve against forfeitures and also against fraud, and likely this jurisdiction is not lost in such a case as we have before us because the defense of estoppel is available at law. But we prefer to put the decision of this point on the ground that the relief obtainable by respondents in the unlawful detainer case would be inadequate. The Kinsella Company is not only entitled to defeat said action, but to have its term reinstated. The evidence shows the leasehold is a valuable part of its assets. The declaration of forfeiture casts a cloud on its title which cannot be dispelled except by proof of facts in pais and thereby the value of its assets is reduced, and this is good ground of equity cognizance. *Biddle v. Ramsey*, 52 Mo. 153; *Tscheider v. Biddle*, 4 Dill. 55, Fed. Cas. No. 14,210. The decree might have done more than continue the injunction against the prosecution of the unlawful detainer case, might have set aside the declaration of forfeiture, and have restored to the Kinsella Company its full rights under the lease for the remainder of the term, subject, of course, to payment of the accrued rents, which were tendered in the petition. The Kinsella Company was entitled to that measure of relief which none but a court of equity can grant.

The judgment is affirmed. All concur.

PARKER et al. v. BRITTON.

(St. Louis Court of Appeals. Missouri. Nov. 5, 1908.)

1. NEW TRIAL (§ 110*)—GROUNDS—JUDICIAL POWER.

A new trial may be allowed on a ground not assigned therefor.

[Ed. Note.—For other cases, see *New Trial*, Dec. Dig. § 110.*]

2. NEW TRIAL (§ 91*)—GROUNDS—SCOPE—MISTAKE OF COUNSEL.

In passing on a motion for new trial, a court is not restricted to the statutory causes; but, if a new trial be allowed for one of them—e. g., a mistake of counsel—it should be such a mistake as the statute intends, and not forgetfulness or neglect.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 184; Dec. Dig. § 91.*]

3. APPEAL AND ERROR (§ 977*)—DISCRETION OF LOWER COURT—NEW TRIAL.

Trial judges have a very wide discretion to grant new trials to accomplish justice, and their orders will not be reversed, unless abuse of discretion plainly appears.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876; Dec. Dig. § 977.*]

4. APPEAL AND ERROR (§ 977*)—REVIEW—ORDERS RESPECTING NEW TRIAL.

Appellate courts are less disposed to reverse orders granting new trials than orders refusing them.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876; Dec. Dig. § 977.*]

5. ATTORNEY AND CLIENT (§ 88*)—ATTORNEY'S NEGLIGENCE—CLIENT'S RESPONSIBILITY.

An attorney's neglect is in law the client's.

[Ed. Note.—For other cases, see *Attorney and Client*, Dec. Dig. § 88.*]

6. NEW TRIAL (§ 91*)—RIGHT TO—OVERSIGHT.

It was an abuse of discretion to allow plaintiffs a new trial on a nominal verdict in their favor, to enable them to offer evidence, forming a basis for material recovery, which was omitted through their counsel's mistake or oversight, where defendant was not responsible for the oversight, and would be put to expense and inconvenience by a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 186; Dec. Dig. § 91.*]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by D. H. Parker and others against D. H. Britton. From an order granting plaintiffs a new trial on a nominal verdict, defendant appeals. Reversed and remanded, with directions.

Henry B. Davis, for appellant. W. H. Douglas, for respondents.

GOODE, J. This appeal was taken from an order of the circuit court granting a new trial to respondents. The action was instituted by attachment, and the attachment was sustained on the ground of appellant's non-residence in this state, he being a citizen of the state of Louisiana. On August 10, 1906, he and respondents, who are also citizens of Louisiana, and real estate agents, entered into a contract, by which he intrusted to them the sale of the merchantable timber, cypress, cottonwood, and ash on about 5,000 acres of land in that state for the price of \$40,000 net to appellant, respondents to have for their commission whatever excess of that price was obtained. It was further stipulated appellant himself might deal with any party to whom respondents had not previously submitted a proposition, and in case he sold to a party whom they had introduced, their commission should be as above stated, unless the price fell below \$42,500, in which contingency the commission should be 5 per cent. of the price. The petition alleges respondents began a negotiation for the sale of the timber with C. F. Liebke, informed appellant of the fact, introduced him to the purchasing agents of Liebke, when appellant took up the negotiation in person, and sold to Liebke for \$31,500, whereby respondents became entitled to a commission of \$1,575. In his answer appellant admitted the execution of the contract, but denied the other averments of the petition. Respondents gave proof that they, through their agent in St.

Louis, drew the attention of Liebke, or rather the Liebke Hardwood Lumber Company, to the timber, and introduced Kirk, purchasing agent of said company in Louisiana, to appellant; and a letter written by appellant to respondents' attorney, under date of October 30, 1906, was put in evidence, from which it may be inferred appellant sold the land to the Liebke Company. At the conclusion of the testimony verdict and judgment for one cent damages were rendered in favor of respondents, who filed a motion for new trial on certain grounds we will not recite, because no point is made about them on the appeal. The motion passed over to the next term of court, and was then sustained, for the reason "that the cause should be more thoroughly presented to the court and a judgment rendered for plaintiffs in a substantial sum, or for defendant."

Both sides concede respondents omitted to prove the quantity of timber sold and the price received, thereby failing to afford any way to ascertain what amount of commission they were entitled to, that for said omission, and in order to permit proof of the amount of the price received by appellant, the court sustained the motion, and that the only question for decision is whether or not this order was an abuse of the trial court's judicial discretion. The ground on which the new trial was granted was not one of those assigned in the motion; but a court may, if it sees proper, go outside the reasons for new trial assigned by a defeated party and allow it on some other ground. *Stannard Mill. Co. v. Transit Co.*, 122 Mo. 258, 26 S. W. 704; *Lovell v. Davis*, 52 Mo. App. 342. Our statutes provide several causes for which a court may allow a new trial: Mistake or surprise of a party or his attorney, misdirection or mistake of a jury, a finding contrary to the court's direction, fraud or deceit practised by one party on the other, and perjury of a witness. Rev. St. 1899, § 800 (Ann. St. 1906, p. 761). And in this state the court is not restricted to the causes enumerated in the statute. *Leahy v. Dougdale*, 41 Mo. 517. But if a new trial is allowed for one of those causes, say a mistake of counsel, as in the present case, it ought to be such a mistake as the statute intends, and not forgetfulness or neglect. *Fretwell v. Laffoon*, 77 Mo. 28, 30. In *Bright v. Eynon*, 1 Burr. 395, Lord Mansfield said the best general rule on the subject is the one laid down by Lord Parker in *Regina v. Helston*; i. e., that a new trial should be granted for attaining the justice of the case. See, too, *U. S. v. Merchandise*, 2 Spr. (U. S.) 85, Fed. Cas. No. 15,964; 14 Ency. Pl. & Pr. 718. Trial judges have a very wide discretion to grant new trials in order to accomplish justice, and their orders will not be reversed, unless an abuse of discretion plainly appears. *Longdon v. Kelly*, 51 Mo. App. 572; *Ensor v. Smith*, 57 Mo. App. 588; *Whitsett v. Ransom*, 79 Mo. 258. In view of the strong colors in which this dis-

cretion has been depicted by courts of review, our first thought was that the ruling of the court below in the present case must be approved, especially as it allowed a new trial; for appellate tribunals are less disposed to reverse orders granting new trials, and thereby leaving the controversy to be examined again judicially, than orders of refusal which foreclose redress if wrong has been done. The defect of proof in this cause must be charged against respondents themselves or their attorneys, and in either event the result is the same, because the neglect of their attorneys is, in law, their own. *Blebinger v. Taylor*, 64 Mo. 63, 66. Yet our impression was that a trial court's discretion included the right to allow another trial if justice had miscarried on account of the oversight of counsel, as indeed, has been decided in some states. *Greene v. Farlow*, 138 Mass. 146; *Brock v. Railroad*, 65 Ala. 79; and see on this point, also, 14 Ency. Pl. & Pr. p. 732 et seq. But an examination of the decisions of the appellate courts of this state has yielded the conclusion that the opposite rule prevails here, at least on facts like those before us.

The Missouri cases cited *supra* declare as strongly as those of other jurisdictions in favor of large power in the trial court to grant new trials, yet the opinions consistently condemn such an exercise of discretion on the exact facts presented by this appeal; that is, condemn the allowance of another trial because of a mistake or oversight of counsel for the defeated party. In most of the cases the relief asked had been refused by the lower court, and the question on appeal was whether the ruling should be upheld; but the tone of the opinions would deny power to a trial court to grant a new trial for the negligent mistake or inadvertence of a party or his counsel though the party thereby had been cast in heavy damages. *Field v. Matson*, 8 Mo. 686; *Kerby v. Chadwell*, 10 Mo. 392; *Austin v. Nelson*, 11 Mo. 192; *Webster v. McMahan*, 13 Mo. 582; *Jacob v. McLean*, 24 Mo. 40; *Ridgley v. Steamboat*, 27 Mo. 442; *Gehrke v. Jod*, 59 Mo. 522; *Blebinger v. Taylor*, 64 Mo. 63; *Fretwell v. Laffoon*, 77 Mo. 26; *State v. Dreher*, 137 Mo. 11, 38 S. W. 567; *Tittman v. Thornton*, 107 Mo. 500, 510, 17 S. W. 979, 16 L. R. A. 410; *Meyer v. Construction Co.*, 2 Mo. App. 599; *Bowman v. Field*, 9 Mo. App. 578; *Miller v. Miller*, 13 Mo. App. 591; *State v. Jones*, 12 Mo. App. 93; *Smith v. Wheeler*, 27 Mo. App. 16; and see *Hayne, New Trials*, §§ 92, 351. In most of those opinions the broad denials of discretionary power to set aside a verdict for mistake due to carelessness were dicta, because uttered in cases where the question was whether discretion had been abused in refusing the relief; but, that being conceded, it remains that no support for a discretion in the trial court which would justify the ruling in the case at bar can be found in any decision of

this jurisdiction. To show the spirit of our adjudications dealing with the subject, we will quote a few excerpts. In *State v. Jones*, it was said: "It would be difficult to state with too much emphasis how the stern severity of the courts has generally compelled parties to stand by the consequence of negligent omission, blundering or improper management, by their attorneys in legal proceedings. This severity is generally justified by the most important considerations of public policy, as well as by the plain demands of justice, as between the parties to the cause. In civil cases the rule is broadly laid down that 'neither the ignorance, blunders, nor misapprehension of counsel, not occasioned by the adverse party, is a ground for vacating a judgment or decree.'" 12 Mo. App., loc. cit. 94. In *Gerhke v. Jod* the Supreme Court thus stated the law: "It has been frequently decided in this court that the omission of the attorney, spoken to in the cause to plead, or make the proper defense, cannot place the application to set aside the judgment by default upon more favorable grounds than if the omission had been on the part of the defendant himself. The attorney is the agent of the party employing him, and in the court stands in his stead, and any act of the attorney must necessarily be considered as the act of the client. A different principle would lead to endless confusion and difficulty in the administration of justice." 59 Mo., loc. cit. 522. In a case of extreme hardship wherein a man's life was at stake, this court ventured to reverse the trial court for refusing a new trial, when from gross incompetence defendant's counsel had failed to present his defense to the jury. The point was raised in the Supreme Court in a similar case, and the ruling of this court was criticised as unwarranted by any precedent and as bad law, and, besides, the court said: "We are not to be understood as consenting that, even if there had been negligence or want of skill, it would have afforded any ground for reversal. The neglect of any attorney is the neglect of his client in respect to the court and his adversary. The decisions are too numerous to cite; but their uniform tenor is to the effect that neither ignorance, blunders nor misapprehension of counsel, not occasioned by his adversary, is ground for setting aside a judgment or awarding a new trial. The rule is founded upon the wisest public policy. To permit clients to seek relief against their adversaries upon the alleged negligence or blunders of their own attorneys would open the door to collusions, and would lead to endless confusion in the administration of justice. The business of the courts cannot be conducted on any other terms than that parties must be held by the acts of their attorneys in their behalf in causes in which they are authorized to appear, and in the absence of fraud, leaving the client to his remedy against the

attorney for his negligence." 137 Mo., loc. cit. 23, 38 S. W. 570.

The question in hand has been determined in two instances at least, where the lower courts had granted new trials, and the rulings were reversed. In *Fretwell v. Laffoon*, supra, this was done, though the hardship of the verdict appealed strongly for relief. Laffoon was garnished as debtor of Daniel Hibler, against whom judgment had been given. In answering the interrogatories propounded to him as garnishee he or his counsel negligently stated he had executed certain notes to Daniel Hibler, and on this answer judgment went against him. In truth the notes had been executed, not to Daniel Hibler, but to Samuel Hibler. Hence Laffoon owed Daniel Hibler nothing, and on this ground a new trial was granted by the lower court. The Supreme Court held erroneously. The opinion says, *inter alia*, in defining what is meant in the statutes by mistake as ground for a new trial: "A party who by mistake of his attorney pleads a plea which does not cover his defense or correctly present his case cannot, after judgment against him on his own admissions, set the verdict aside, and obtain leave to amend his plea. *McNeish v. Stewart*, 7 Cow. (N. Y.) 474. And there are no more favors to be shown in this regard to a garnishee than to any one else. He stands upon the same footing, and must pay the same penalty for his negligence, inadvertence, or forgetfulness as any other defendant whatsoever." 77 Mo., loc. cit. 32, 33. The Supreme Court considered the scope of a trial court's discretion to grant new trials, and the effect of the discretion, on the case under review. It approved and adopted the views expressed by the Supreme Court of New York in *People v. Superior Court*, 5 Wend. (N. Y.) 114, wherein the extent of the discretion of courts of first instance to grant new trials was considered at length, and the result declared that the discretion did not exist when settled and well-defined principles stood in the way of allowing a second trial, and that those principles were "that a party is bound and presumed to know the general leading points which will be litigated in his case; that if he omits to procure evidence, which with ordinary diligence he might have procured, in relation to those points, upon the first trial, his motion for a new trial for the purpose of introducing such testimony shall be denied. If the newly discovered evidence consists merely of additional facts and circumstances going to establish the same points which were principally controverted before, or of additional witnesses to the same facts and circumstances, such evidence is cumulative, and a new trial shall not be granted." 5 Wend., loc. cit. 127. The point determined was that negligent failure to procure and introduce important evidence was no ground for a new trial, and so the

courts of this state have always held. *Maynor v. Burns*, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728. If carelessly omitting to procure essential evidence in advance is no cause to set aside a judgment, omitting to introduce it when it is at hand is less cause. And *Fretwell v. Laffoon*, deciding a negligent oversight of a party or counsel at the trial, is no good ground to disturb the judgment. In *Smith, etc., Co. v. Wheeler*, a new trial had been allowed, the opinion says, because the plaintiff's attorney and agent was mistaken and surprised, and because one of the witnesses made a mistake in his testimony. The plaintiff's attorney in a replevin case had negligently relied on a statement of the opposing counsel, and had failed to procure essential testimony to prove the property replevied was the same as that described in the mortgage on which plaintiff relied for right of possession. It appeared no fraud had been practiced, and the order for a new trial was reversed. Those authorities are directly in point. In the present case respondents' commission depended on the price appellant received for the timber. This being true, proof of the price was obviously necessary to a substantial recovery, and must have been carelessly omitted. We wish to go no further than we must under controlling authorities toward circumscribing the right of trial courts to allow new trials, and therefore leave at large the question of whether instances of neglect or mistake of counsel might not occur to justify setting aside the verdict. Appellant lives in a distant state, and would be put to expense and trouble in attending another trial, and might be prejudiced in his rights if he did not attend. His defense goes to the merits, for he denies respondents induced the sale. He was in no wise to blame for respondents' failure to make out a case at the first trial, and we cannot say the hardship which will be visited on them is so onerous that the hardship of requiring appellant to come to court again or submit to a trial in his absence ought to be overlooked. In other words, the circumstances of the present case do not present an equity of peculiar strength in favor of respondents.

The judgment is reversed, and the cause remanded, with a direction to the court to set aside the order for a new trial and enter judgment for respondents in accordance with the verdict. All costs.

INTERNATIONAL BANK v. ENDERLE

121 Mo. 208, 19 S. W. 1107, 21 S. W. 728.

2. **BILLS AND NOTES (§ 242*)—INDORSEMENT BEFORE DELIVERY—NATURE OF OBLIGATION—ESTOPPEL.**

The defendant, who was induced to sign a note as a maker and not as an indorser,

he being neither payee nor indorsee, continues until overthrown by clear and convincing proof.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 542, 550; Dec. Dig. § 242.*]

2. **BILLS AND NOTES (§ 242*)—INDORSEMENT BEFORE DELIVERY—NATURE OF OBLIGATION—ESTOPPEL.**

That in extending interest on a demand note payable to a bank a clerk computed interest from the date thereof, and that defendant's name was entered on the ledger under the heading "Indorsers," does not estop the bank to show that the note did not become an obligation in its hands until after its date, and that defendant signed as a maker and not an indorser, where the clerk probably overlooked the date of discount and looked only to the date for data in computing interest, and where it appears that all names written on the back of a note discounted were entered under the heading "Indorsers," whether makers or indorsers.

[Ed. Note.—For other cases, see *Bills and Notes*, Dec. Dig. § 242.*]

3. **BILLS AND NOTES (§ 64*)—WHEN EFFECTIVE—DELIVERY.**

Ordinarily a note is presumed to take effect from its delivery to the payee, but delivery of a note, like other matters in pais, is explainable, and if it is understood that something else is to be done before the note becomes binding, as that the maker shall give certain security, procure another signer, etc., the delivery does not bind until performance of the conditions.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 104; Dec. Dig. § 64.*]

4. **BILLS AND NOTES (§ 242*)—ACCEPTANCE OF NOTE—EVIDENCE.**

That a note though dated January 25th was not discounted until February 1st, and after defendant had signed his name thereon, is evidence that it was not accepted by the payee until February 1st.

[Ed. Note.—For other cases, see *Bills and Notes*, Dec. Dig. § 242.*]

5. **TRIAL (§ 235*)—INSTRUCTIONS—COMMENT ON EVIDENCE.**

An instruction in an action on a note that, since plaintiff's cashier was dead, defendant could not testify to any agreements, etc., with him; that the fact that defendant's name appears on the back of the note created merely prima facie evidence that he signed as maker, which could be rebutted, etc.—was properly refused as commenting on the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 539-543; Dec. Dig. § 235.*]

6. **TRIAL (§ 252*)—INSTRUCTIONS—SUPPORT BY EVIDENCE.**

An instruction not supported by evidence is properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 536; Dec. Dig. § 252.*]

7. **TRIAL (§ 253*)—INSTRUCTIONS.**

An instruction that, if defendant did not write his name on the note used on until after it had been delivered by the maker to the payee, the payee could not recover, was properly refused as assuming that the bank's possession before defendant's signature conclusively showed that the note took effect before defendant signed it, where as there was evidence that the note was delivered with an understanding that it should not take effect until defendant signed it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 618-625; Dec. Dig. § 253.*]

8. **TRIAL (§ 256*)—ACTION ON NOTE—INSTRUCTIONS.**

It was not reversible error to refuse to instruct that if the payee of the note used on

treated a third person as the sole maker and defendant as an indorser, plaintiff could not recover, where the court instructed that, if defendant signed under an agreement that he should be liable only as an indorser, he was not liable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 705; Dec. Dig. § 296.*]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by the International Bank against George J. Enderle, Oscar Prybil, and others. From a judgment of the circuit court for plaintiff, on appeal from justice court, defendant Prybil appeals. Affirmed.

Frank E. Richey, for appellant. Carter, Collins & Jones, for respondent.

BLAND, P. J. The action originated in a justice's court. In due course an appeal was taken to the St. Louis circuit court, where, on a trial de novo to a jury, verdict and judgment were for respondent. The action is founded on the following promissory note:

"140.00. St. Louis, Mo., Jan. 25, 1898.

"On demand after date I promise to pay to the order of International Bank of St. Louis, one hundred and forty dollars, for value received, at the International Bank of St. Louis, with interest from date at the rate of eight per cent. per annum.

"Geo. J. Enderle,

"Eighteenth and Pine St."

The back of said note is in words and figures as follows:

"Oscar Prybil.

"Feb. 11, 1898, 95¢ Int. added extending note to Feb. 25/98.

"Feb. 28, 1898, Paid 5.95 on a/c of Prin. Int. 87¢ added extending note to Mch. 25/98.

"Mar. 29, 1898, Paid 5.87 on a/c Prin. Int. 88¢ added extending note to Apr. 25/98.

"May 3, 1898, Paid 10.88 on a/c Prin. Int. 80¢ added extending note to May 25/98.

"June 28, 1898, Paid 10.80 on a/c Prin.

"June 28, 1898, Int. 1.50 added to do extending note to July 25/98."

On the trial respondent elected to proceed against appellant as a maker of the note. Appellant testified that he was not in the city of St. Louis on the date of the note, but some days afterward he returned, was called into the bank by the cashier, who produced the note, and he then wrote his name across the back of it; that he received nothing from the proceeds of the note. The note ledger of respondent was produced, and the note was entered thereon as discounted on February 1, 1898. On this ledger, under appropriate headings, was entered the number, date, amount, date of discount, etc., of all notes discounted by respondent. There was also a column headed "Indorsers," in which was written all the names appearing upon

the backs of notes discounted. Appellant's name appeared in this column. The indorsement of February 11, 1898, "95¢ Int. added," shows that interest was calculated on the note from January 25th, the date of the note. On this evidence, and the evidence that the bank's ledger showed his name was entered in the column headed "Indorsers," appellant contends that his peremptory instruction (asked at the close of all the evidence) should have been given. For the reason the cashier who presented the note to appellant to be signed or indorsed by him was dead at the time of the trial, there was no direct evidence with respect to the capacity in which appellant wrote his name across the back of the note. He being neither a payee nor an indorsee of the note, it is conceded that presumptively, he indorsed the note as a maker. In these circumstances this presumption continued, unless overthrown by evidence that appellant signed as an indorser; therefore the peremptory instruction could not have been given, unless the evidence to overthrow the presumption was so clear and convincing that no reasonable mind could come to any other conclusion. The date of the note was entered on the ledger, and in extending the interest the clerk who made the calculation, perhaps, overlooked the date of its discount, and looked only to its date for data from which to calculate the interest on the note. It would therefore be unfair to hold the bank absolutely estopped to show, as a matter of fact, that the note did not become an obligation in its hands until a day subsequent to its date, to wit, on the day it was discounted, nor would the trial court have been justified in holding that, because appellant's name was entered on the discount ledger under the heading "Indorsers," the bank was thereby estopped to deny that appellant did not sign as an indorser, in the face of the evidence of the clerk who made the entries in the ledger that all names written on the back of a note discounted (whether makers or indorsers) were entered in this column and under this heading. It is further contended that, as the evidence conclusively shows the note was in the bank's possession for some days before appellant wrote his name on the back of it, the note took effect before he wrote his name on it, and for that reason he is not bound, as no new consideration passed for the purpose of obtaining his signature. Ordinarily, a note takes effect from the date of its delivery to the payee, and the presumption is that it takes effect the moment it is delivered. But delivery of a note, like other matters in pais, is subject to explanation, and if a note is delivered to the payee, with the understanding between the party making the delivery and the payee that something else is to be done before the note becomes a binding obligation, as that the maker shall give a certain security for

the payment of the note, or that another party shall sign it as a maker or an indorser, the delivery, so as to bind the parties, is not completed until the conditions are complied with. And the fact that the note in suit was not discounted until February 1st is some evidence tending to show that it was not accepted by the bank until the day it was discounted, and after appellant had written his name on the back of it, and we conclude that the trial court did not err in refusing appellant's peremptory instruction.

Appellant asked, and the court refused, the following instructions:

"(2) The court instructs the jury that it is admitted by the parties to this case that the cashier of the plaintiff bank with whom the negotiations between the defendant Prybil and the bank were had is now dead, and the court instructs the jury that by reason of the said death the law will not permit the defendant Prybil to testify in this trial to any conversations, contracts, or agreements had with him, the said cashier; and the court further instructs the jury that the fact that Prybil's name appears on the back of the note sued on creates what is known in law as merely prima facie evidence that he signed the note as a maker thereof, but that this may be rebutted by the facts, circumstances, and evidence in the case; and if, from all the evidence, the jury believe that the defendant Prybil put his name on the back of the note in evidence, under an agreement or understanding with the cashier of the International Bank that he, Prybil, should be liable only as indorser or guarantor or surety and not as a joint maker thereof, then you will find for the defendant Prybil.

"(3) The court instructs the jury that if they believe from the evidence that the plaintiff, the International Bank, in the matter of the note sued on in this case, treated and re-

garded George J. Enderle as the sole maker of said note, and treated and regarded the defendant Prybil merely and solely as an indorser on said note and not as a joint maker thereof, the jury should find in favor of the defendant Prybil.

"(4) The court instructs the jury that if, from the evidence, the jury believe that the defendant Prybil did not write his name on the back of the note sued on in this case until after the said note had been made and delivered by George Enderle to the International Bank, and that at the time the defendant Prybil wrote his name on the back of the said note the said note was in the actual possession of the said bank, then the jury should find in favor of the defendant Prybil."

The second instruction is a comment on the evidence, and is also predicated on facts not in evidence, and for these reasons was properly refused. No. 4 assumes that the mere possession of the note by the bank, before appellant wrote his name on it, was conclusive evidence that the note took effect and became a binding obligation before appellant signed it, whereas there is evidence tending to show that it was delivered to the bank by Enderle to be held by it for appellant's signature, and was not to take effect until so signed. No. 3 is substantially supplied by No. 5, given by the court, which reads as follows: "(5) The court instructs the jury that if they believe from the evidence that the defendant Prybil put his name on the back of the note sued on in this case, under an agreement or understanding with the International Bank that he, Prybil, should be liable thereon only as an indorser, then the defendant Prybil is not liable thereon in this action, and the jury should find for the defendant Prybil."

Discovering no reversible error in the record, the judgment is affirmed. All concur.

DUNN (TACKABERRY, Intervener) v. TAYLOR et al.

(Supreme Court of Texas. Nov. 11, 1908.)

1. ADVERSE POSSESSION (§ 114*) — EVIDENCE OF POSSESSION—SUFFICIENCY.

The fact of possession of real estate, relied on to establish adverse possession cannot be shown by the testimony of a witness that, during the intervals of the occupancy by tenants, there were care takers in possession of the premises, based wholly on the fact that persons had applied to him for permission to occupy the premises, and promised to do so.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 684, 687; Dec. Dig. § 114.*]

2. ADVERSE POSSESSION (§ 112*)—BURDEN OF PROOF.

A defendant, in trespass to try title, who relies on title by adverse possession, has the burden of proving every fact essential to his defense; and, where he relies on the occupancy of successive possessors, he must show that such occupancy was continuous.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 667; Dec. Dig. § 112.*]

3. ADVERSE POSSESSION (§ 112*)—CONTINUITY OF POSSESSION.

Where one, relying on title by adverse possession, admitted that breaks occurred in the occupancy of successive possessors, he must show facts from which the conclusion of continuity might be deduced affirmatively, and he could not ask the court to assume that the breaks were of so short duration as not to defeat the continuity of possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 655, 667; Dec. Dig. § 112.*]

4. ADVERSE POSSESSION (§ 46*)—CONTINUITY OF POSSESSION.

Where one relied on title by adverse possession, and showed that the land had been fenced and used for a pasture, and had been in possession of tenants, but it appeared that breaks in the occupancy of tenants were four, five, or six months, or a year in length, the breaks were too great to be disregarded, and they could not be regarded as the reasonable times allowed for changes of occupants so as to make the possession continuous.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 243; Dec. Dig. § 46.*]

5. TRIAL (§ 252*)—EVIDENCE—INSTRUCTIONS—APPLICABILITY.

Where, in trespass to try title, defendant relied on title by adverse possession, and showed that the land had been in possession of tenants, but did not show the length of the intervals between the occupancy of different tenants, the submission to the jury of the question as to the reasonableness of such intervals was not proper; an issue on which there is no evidence not being proper for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

6. ADVERSE POSSESSION (§ 19*)—ACTUAL POSSESSION.

Under the statute making cultivation, use, or enjoyment of land essential to actual and visible appropriation constituting adverse possession, the fact that land was inclosed was not sufficient.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 101; Dec. Dig. § 19.*]

7. ADVERSE POSSESSION (§ 46*)—CONTINUITY OF POSSESSION.

The necessity of the continuous use of land to create title by adverse possession is not

affected by difficulty in procuring tenants, but he who would acquire land by limitation must perform the conditions prescribed by law.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 243; Dec. Dig. § 46.*]

8. ADVERSE POSSESSION (§ 46*)—CONTINUITY OF POSSESSION.

The uses to which land was put may be considered, in determining whether the interval between the occupancy of different tenants was only such as might be considered as the time reasonably required for a change of tenants.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 243; Dec. Dig. § 46.*]

9. ADVERSE POSSESSION (§ 114*)—ACQUISITION OF TITLE—EVIDENCE.

Evidence held not to show continuous possession of land essential to create title by adverse possession, under the 10-year statute of limitation.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 682-690; Dec. Dig. § 114.*]

10. ADVERSE POSSESSION (§ 43*)—CONTINUOUS POSSESSION.

Where there was no possession under a recorded deed from the date of its execution until more than a year afterwards, when it was recorded, the possession after the recording of the deed could not be connected with prior possession so as to establish title under the five-year statute of limitation.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 213-218; Dec. Dig. § 43.*]

11. APPEAL AND ERROR (§ 1177*)—DISPOSITION OF CASE—REVERSAL—NECESSITY FOR NEW TRIAL.

Where the record indicates that additional evidence may be obtained, the Supreme Court will not render the judgment which should have been rendered in the court below, but will remand the cause for another trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1177.*]

12. ADVERSE POSSESSION (§ 19*)—INCLOSURES OF LAND—SUFFICIENCY.

Land inclosed on three sides by a fence and on the fourth side by a river, with the banks of which the fence connected, was sufficiently inclosed, when the land was in actual use, to show such an appropriation of it as would sustain the defense of limitation, where such use was continuous, subject to the operation of Rev. St. 1895, art. 3346, relating to the possession of land belonging to another.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 101; Dec. Dig. § 19.*]

13. LANDLORD AND TENANT (§ 18*) — EXISTENCE OF RELATION—EVIDENCE.

The relation of landlord and tenant may be shown by the tenant's acknowledgment of the tenancy.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 18.*]

14. EVIDENCE (§ 317*)—HEARSAY—DECLARATIONS OF TENANT—POSSESSION—ADMISSIBILITY.

The fact of actual possession by a tenant to establish adverse possession cannot be shown by the declaration of the tenant acknowledging the tenancy; the testimony being hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1178; Dec. Dig. § 317.*]

15. ADVERSE POSSESSION (§ 113*) — ACTUAL POSSESSION—EVIDENCE—ADMISSIBILITY.

Where one claiming land by adverse possession showed that the land used as a pasture was inclosed on three sides by a fence, and on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the fourth side by a river, evidence that the river was generally used above and below the land as a barrier for pastures was admissible to show to the owners of the land that it had been appropriated and used by others.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 113.*]

16. ADVERSE POSSESSION (§ 19*)—ACTUAL POSSESSION—EVIDENCE—ADMISSIBILITY.

The mere fact that a river, used as a barrier on one side of land fenced on the other sides, was not a perfect barrier against stock was not conclusive against the claim of possession of the land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 101; Dec. Dig. § 19.*]

17. TRESPASS TO TRY TITLE (§ 39*)—EVIDENCE—ADMISSIBILITY.

Where, in trespass to try title, defendant relied on adverse possession, and connected himself with conveyances in a chain of title, it was not error to permit defendant to show that a deed in the chain of title, dated January 1, 1901, was in fact not executed until about the date of its acknowledgment and record, June 9, 1903.

[Ed. Note.—For other cases, see Trespass to Try Title, Dec. Dig. § 39.*]

18. ADVERSE POSSESSION (§ 19*)—ACTUAL POSSESSION—STATUTES—CONSTRUCTION.

Rev. St. 1895, art. 3346, providing that possession of land belonging to another, by a person claiming 5,000 acres or more of lands inclosed by a fence, in connection therewith, shall not be peaceable and adverse possession contemplated by article 3343, unless the land so belonging to another shall be separated by a substantial fence from said lands connected therewith, etc., when considered in connection with Rev. St. 1895, arts. 3340, 3342-3345, 3348, 3349, prescribing different periods of limitation, article 3343 prescribing a 10-year limitation, and defining peaceable and adverse possession, does not apply where the 5-year statute is in question, but applies when the 10-year limitation is claimed by such an inclosure as is mentioned, and the legislation leaves unaffected the established rule as to the sufficiency of possession so far as it applies to claims under the 5-year statute, and abrogates the rule in its application to the 10-year statute, though the claim be asserted under recorded deeds.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 101; Dec. Dig. § 19.*]

Error from Court of Civil Appeals, Fourth Supreme Judicial District.

Trespass to try title by J. S. Taylor and another against Frank Dunn, in which J. V. Tackaberry intervened, and in which he and defendant Frank Dunn reconvened against plaintiffs, and brought in other parties. There was a judgment of the Court of Civil Appeals (107 S. W. 952) affirming a judgment for plaintiffs, and defendant Frank Dunn and intervener bring error. Reversed and remanded.

N. A. Rector, for plaintiffs in error. C. L. Bass and A. C. Bullitt, for defendants in error.

WILLIAMS, J. This is an action of trespass to try title, brought by J. S. Taylor and his wife, Ella G. Taylor, against Dunn, in which Tackaberry intervened, claiming to have purchased the title of Dunn, and in which he and Dunn, for the purpose of re-

covering the land, reconvened against the plaintiffs, and also brought in other parties asserting claims to portions of it. All of the other parties claimed under Mrs. Taylor; and the controversy resolved itself into one between Tackaberry, who had title to the land, unless it has been lost by limitation, and the other parties, except Dunn, claiming under the 5 and 10 year statutes of limitation. It will therefore be convenient to refer to Tackaberry as plaintiff, and to those asserting limitations as defendants. The pleas of limitation were sustained by verdict and judgment in the district court, and from an affirmance by the Court of Civil Appeals this writ of error is prosecuted by Tackaberry and Dunn.

It will be proper to take up first the assignments which assert that there is no evidence to sustain the verdict and judgment. The land in controversy is 640 acres patented to John Cummings, its western boundary being the Nueces river. It appears that many years ago it, with other lands, was inclosed by one Robert Hall in a pasture used for grazing horses, on three sides by a fence and on the fourth side by the river, with the banks of which the fence connected at both ends. This inclosure is called the Bob Hall pasture. Hall made no claim to the land, and finally sold out his improvements to G. W. Cavender. On the 12th day of July, 1882, one F. M. McCaleb executed to Cavender a deed for the Cummings tract, which was recorded July 18, 1882. The defendants connect themselves with this conveyance by deeds as follows: (1) F. M. McCaleb to G. W. Cavender, July 12, 1882, recorded July 18, 1882. (2) G. W. Cavender to W. J. Thornton, July 31, 1886, recorded February 24, 1887. (3) W. J. Thornton and wife to San Antonio National Bank, January 28, 1891, recorded January 31, 1891. (4) San Antonio National Bank to M. T. Taylor, February 9, 1898, recorded February 21, 1898. (5) M. T. Taylor to J. C. Taylor, September 19, 1899, recorded October 26, 1900. (6) J. C. Taylor to Ella G. Taylor, September 20, 1900, recorded October 26, 1900. (7) M. T. Taylor to Ella G. Taylor, January 1, 1901, recorded June 9, 1903. (8) Taylor and wife to Nueces Valley Irrigation Company, July 1, 1903, recorded July 13, 1903. (9) Taylor and wife to J. L. Carr and Emma Carr, March 9, 1902, recorded March 17, 1902. (10) Emma Carr, surviving wife of J. L. Carr, to H. W. Earnest, August 13, 1903, recorded same day. (11) Taylor and wife to M. A. Haas, August 16, 1904, recorded November 2, 1904. (12) Irrigation Company to C. L. Bass, July 15, 1904, recorded July 16, 1904.

The evidence of the different possessions, as well as it can be gathered from the very indefinite and confusing testimony of the witnesses, may be condensed as follows: In the fall of 1882 Cavender occupied a house in a pasture adjoining that in which the Cum-

dings tract was inclosed, as stated, and not long thereafter began the use of the latter as a pasture for his stock, which use he continued until he conveyed to Thornton at the date of the deed above given. Before that date Thornton lived in and had in use another pasture further up the river than the Bob Hall pasture, but adjoining it, and at some time not shown he thereafter used the latter, also, for grazing purposes, and had it so in use when he conveyed to the San Antonio National Bank. Whether or not he commenced so to use it so soon after Cavender's occupancy ceased as that the possession of the two may be regarded as continuous and unbroken the evidence fails to show, unless an inference may be indulged, from the situations of the different pastures and the character of Thornton's pursuits that he put the Bob Hall pasture in use within a reasonable time after acquiring it. When he executed the conveyance to the San Antonio National Bank, Thornton ceased to hold possession of any character. The evidence as to possession held between the dates of the conveyances from Thornton to the bank, and from the latter to M. T. Taylor, comes from the witness Vandervoort, who in 1893 was employed by the bank as its agent. Upon his testimony the defendants rely to show possession by the bank during the interval mentioned. Important parts of it are claimed by the plaintiffs to have been hearsay, but for the present purpose we shall assume that no proper objection was made upon that ground, and that the statement of Presnall to which he testified is to be considered as evidence upon the question as to the continuity of the possession. Vandervoort's testimony relates to the possession of the bank through tenants who occupied in the following order: Presnall & Blocker, Cavender, English, Howell, and Eardley. As to the occupancy of Presnall & Blocker, his earliest knowledge was acquired in 1892, when Presnall told him in Carrizo Springs that they had rented the land from the bank and were in possession. He does not account for the interval between that time and the date of the deed from Thornton to the bank. He says he thinks the bank bought Thornton's cattle with the pasture, and sold them to Presnall & Blocker, from which the inference might possibly arise that the bank in the meantime kept them in the pasture; but, when interrogated further, he states that he does not know these facts. The only conveyance from Thornton to the bank stated in the record says nothing about the pasture or the cattle, but is for the Cummings land only. His memory is uncertain as to the duration of Presnall & Blocker's occupancy. His best recollection is that it was for two years, lasting from 1892 to 1894, but he says it may have been for three years. After Presnall & Blocker left, the Cummings and another tract were rented by the witness to Cavender. This was in 1895, the time of the year not stated. Shortly after

this renting to Cavender he rented the remainder of the pasture to English. He says there were intervals between the going out of Thornton and the coming in of Presnall & Blocker and between the tenancy of the latter and those of Cavender and English, the length of which he cannot state, admitting that they may have been as great as four, five, or six months, or even a year. The witness, it is true, states that he had care takers in the pasture during some of the intervals, which ones he does not know; but further examination elicited the statement that his only knowledge was that persons applied to him for permission to occupy the premises, and promised to do so and to take care of them. Whether or not they were ever in possession he did not pretend to know. It is too plain that the fact of possession cannot be shown in this way. On account of the differences in the dates at which the defendants became parties to this litigation limitation is to be counted in favor of some until November 4, 1903, and of others until May 20, 1905.

It seems plain that no continuous and unbroken possession for 10 years was shown affirmatively. The possession of Cavender and Thornton, even if unbroken, did not last for 10 years before the latter conveyed to the bank, and thereafter no continuous possession of 10 years was shown. The burden was on the defendants to prove every fact essential to their defense. Relying on the occupancy of successive possessors, they were bound to show that such occupancy was continuous and unbroken. *Overand v. Menczer*, 83 Tex. 122, 18 S. W. 301; *Phillipson v. Flynn*, 83 Tex. 584, 19 S. W. 136. Admitting that breaks occurred, they are not in a position to ask the courts to assume that such breaks were of so short duration as not to defeat the continuity of the possession. It was incumbent on them to show the facts from which the conclusion of continuity may be deduced affirmatively. But we think the evidence affirmatively indicates, at least, that there were intervals between the possessions of Thornton and of Presnall & Blocker, and between those of the latter and of Cavender, which were too great to be disregarded as the reasonable times allowed by the law for changes of occupants. No decision of this court has ever held to be immaterial such lapses of possession as this evidence indicates. It was improper for the court to submit, as it did, to the jury the question as to reasonableness of the time. There was no evidence from which the jury could properly determine that only reasonable intervals occurred, when they could not possibly know how long those intervals were. Whether it is proper in any case, where the length of the intervals is shown, to submit such an inquiry to a jury is not the question. It certainly is improper to submit a question which cannot be decided upon evidence adduced. We cannot admit the right of the

courts to require only 9 or 9½ years of continuous possession when the law requires 10, and this would be the effect of overlooking gaps of 6 months or a year between tenancies. Of course, we are not speaking of cases in which, during such intervals, other acts of dominion over the land are done upon it by the claimant. Here there was nothing of the kind so far as the evidence shows. The land, it is true, was inclosed, but inclosure without use is not sufficient. The statute requires the cultivation, use, or enjoyment of the land, and this is essential to the "actual and visible appropriation" which constitutes adverse possession. The necessity for this continuous use of the land is not affected by difficulty in getting tenants. He who would acquire the land of another by limitation must perform the conditions under which the law permits him to do so. Excuses for nonoccupancy cannot be accepted as the equivalent of possession. It is doubtless true that the uses to which land is put may be considered, in determining whether or not intervals between the occupancy of tenants were only such as may be considered as the time reasonably required for the change. When yearly crops are raised, it may be that actual occupancy of a tenant for the time between the harvesting of one crop and the preparation for another should not be held to be essential. In such cases the appearances on the land itself would probably show the purposes for which it is being used. But the possession here in question, when held, was not itself of the clearest character. We think it would have been sufficient had it been shown to have been continuous, but it was nevertheless of a nature to be easily abandoned, and, at times when the land was not grazed, there were not, so far as the evidence shows, any indications of a continued dominion over it. We must therefore hold that 10-year limitation was not shown.

We think it equally clear that the facts do not sustain the claim under the five-year statute. No continuous payment of taxes was shown for a period of five years prior to 1893. There was no continuous possession of five years, as we have shown, from that time until Eardley took possession, which was in December, 1897. The five years must be counted from that time, for the reason already shown that Eardley's possession is not shown to have succeeded those which preceded it within proper time. The statement given of the deeds under which defendants claim shows that at no time after Cavender last entered did any one hold under a deed duly registered for as much as five years. The conveyance from M. T. Taylor to J. C. Taylor vested the title in the latter September 19, 1899, less than five years after Cavender's last entry, and thereafter the holding must have been under it. There was therefore no possession under a recorded deed from that date until October 26, 1900, when that

deed was recorded, more than a year after it was executed, so far as the record shows. Because of this interval in the registration of deeds the possession after October 26, 1900, cannot, for the purposes of five-year limitation, be connected with prior possessions, and five years did not elapse between that date and the interruption of limitation by suit.

It is urged by plaintiffs in error that we should render judgment in their favor, for the reason that the facts have been fully developed, but we cannot say that this is true. The record indicates that other evidence on the questions we have discussed may be obtained, and we think the cause should be remanded for another trial, which makes it proper that we determine some other questions. As we have already stated we agree with the Court of Civil Appeals that the inclosure by the fence and the river was sufficient, when the land was in actual use, to show such an appropriation of it as would sustain the defense of limitation if such use was continuous. This, however, is subject to the operation of article 3346, Rev. St., on the claim of 10-year limitation, which is discussed further on. The relation of landlord and tenant between the bank and Presnall & Blocker may be shown by an acknowledgment of tenancy, but the fact of actual possession by the tenants, for the purposes of limitation, cannot be thus established. Their declarations as to that fact would be hearsay. Evidence that the Nueces river was generally used above and below the Bob Hall pasture as a barrier for pastures was admissible, for the reason that such general use of it would indicate to the owners of land that it was thus appropriated and used by others. The mere fact that the river was not a perfect barrier against stock would not be conclusive against the claim of the possessor. *Gunter v. Meade*, 78 Tex. 638, 14 S. W. 562. The trial court did not err in permitting the defendants to show that the deed of M. T. Taylor to E. G. Taylor, dated January 1, 1901, was in fact not executed until about the date of its acknowledgment and record June 9, 1903. Had there been no previous conveyance by M. T. Taylor, this evidence would have shown that there had been continuous possession for her under her recorded deed from the bank until she executed the conveyance to Ella G. Taylor. As the case now appears from the record, the evidence is unimportant, but it may become important on another trial. The evidence upon another trial may differ materially from that in the record. From what we have said it follows that the court should direct a verdict for the plaintiffs for the land, unless there is fuller evidence on the question of limitation than that in the record. A discussion of the instructions given at the trial under review would serve no useful purpose, as we cannot know what other evidence may be adduced.

There is, however, a question raised upon the following instruction, which should be decided: "Prior to July 13, 1891, it was not important under the 10-year statute how many acres of land were contained in the inclosure embracing any land sought to be held by limitation, but on that date a law took effect restricting any inclosure sufficient to satisfy the 10-year statute to less than 5,000 acres. It was also provided by said law that possession of land belonging to another, by a person owning or claiming 5,000 acres of land or more inclosed by a fence, in connection therewith or adjoining thereto, shall not be the peaceable and adverse possession required by the 10-year statute of limitation, unless said land so belonging to another shall be segregated and separated by a substantial fence from said lands connected therewith or thereto adjoining, or unless there be actual possession thereof. However, where a party so in possession holds the land under a deed, or deeds, fixing the boundaries of the possessor's claim, and is duly recorded, such peaceable possession shall be construed to be coextensive with the boundaries specified in such instrument, and the restriction of the inclosure to less than 5,000 acres does not apply under said 10-year statute of limitation." The proposition in the instruction which is controverted is "that if the parties claiming such limitation had a deed on record, it was immaterial whether or not the inclosure in which the land in controversy was located exceeded 5,000 acres of land." The question arises upon the construction of the act of 1891 (Laws 1891, p. 76, now article 3346, Rev. St. 1895) in connection with articles 3340, 3342-3345, 3348, 3349. Article 3346 is as follows: "Possession of land belonging to another by a person owning or claiming five thousand acres or more of lands inclosed by a fence in connection therewith or adjoining thereto shall not be the peaceable and adverse possession contemplated by article 3343, unless said land so belonging to another shall be segregated and separated by a substantial fence from said lands connected therewith or thereto adjoining, or unless at least one-tenth thereof shall be cultivated and used for agricultural purposes, or used for manufacturing purposes, or unless there be actual possession thereof."

The phrase "peaceable and adverse possession" is common to articles 3340, 3342, 3343, which prescribe the different periods of limitation. None of these provisions prescribe what shall constitute the possession referred to. That is done by articles 3348 and 3349. The definitions there given of "peaceable" and of "adverse possession" originally applied to those terms as used in all the articles fixing the different periods of limitation, the same tests determining the sufficiency of the possession under all the provisions. This was true until the act of 1891 (article 3346)

was adopted. It is still largely true, but the act referred to prescribes a special rule to be observed in applying the 10-year period in the cases of which it treats. That rule is not made applicable to cases depending on the 3 and 5 year periods, as appears from the fact that it is expressly confined to possessions referred to in article 3343, which is the 10-year statute. Had it been intended to apply indiscriminately to possessions asserted under all three of the articles, the reference naturally would have been either to all of them or to articles 3348 and 3349, in which the possession contemplated in all had been defined. Hence it follows, as held by the Court of Civil Appeals in *Cunningham v. Matthews*, 57 S. W. 1115, in which a writ of error was refused by this court, that article 3346 by its terms does not apply where the 5-year statute is in question. But it is equally true that by its terms it does apply when 10-year limitation is claimed by such an inclosure as is mentioned. There is nothing in it which makes an exception of cases in which the land inclosed is held under deed or other muniment of title defining boundaries. It declares, in effect, that possession by inclosure of the specified size shall not be deemed the possession essential to 10-year limitation, unless the other prescribed things exist. The courts have not the right to make sufficient an inclosure without any of those other things, but with something else not mentioned in the statute. Article 3344, which prescribes rules for determining the extent of the required possession, when it exists, does not attempt to fix the essentials of the possession itself. It operates when the fact of possession required by other provisions is established, and enables the courts to ascertain the lawful extent of the possession, but it does not, as other provisions do, establish any rule by which to determine the sufficiency of the possession. Hence there is no conflict to be reconciled between it and article 3346. The effect of this legislation seems to be to leave unaffected the rule, established by the decisions in this state, as to the sufficiency of possessions held by means of such inclosures and use of land, so far as that rule applies to claims under the 5-year statute, and to abrogate the rule in its application to the 10-year statute, although the claim be asserted under recorded deeds. The same possession and claim, held sufficient for 5 years, is made ineffectual for 10 years. Speculation as to the reasons for this would be useless. We must take the statute as it is written, and hold that it does not admit such a construction as the instruction in question put upon it.

We discover nothing else needing further discussion than is found in the opinion of the Court of Civil Appeals. Reversed and remanded.

MEDDERS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 14, 1908. On Rehearing, Nov. 11, 1908.)

1. FALSE PRETENSES (§ 36*)—INDICTMENT—SUFFICIENCY.

An indictment for swindling, which alleges that defendants represented to a certain bank that they were solvent and the owners of certain property described, and procured said bank, in reliance on said representations, to discount their note for a certain amount, and that such statements were false, is not insufficient because not alleging that the note discounted by the bank was not paid.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 48; Dec. Dig. § 36.*]

2. FALSE PRETENSES (§ 38*) — OBTAINING MONEY—CREDITS.

Where an indictment for swindling charged that accused and B. received money from a bank by false representations, it was not material that the money was not actually paid over, but was placed to the credit of the codefendant and by accused checked out in his codefendant's name.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 50-53; Dec. Dig. § 38.*]

3. FALSE PRETENSES (§ 23*)—PARTIES LIABLE.

Where accused and B. went together to a bank and obtained credit by a loan to B. on their joint note by false representations as to their solvency and property, they were both guilty of swindling as principals, though the account was carried in B.'s name, and though defendant did not represent that he had any interest in the loan, and did not have in fact.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 28; Dec. Dig. § 23.*]

Appeal from District Court, Mason County; Clarence Martin, Judge.

L. Medders was convicted of swindling, and he appeals. Affirmed.

Walker, Adkins & Walker, for appellant.
F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a companion case to *Baxter v. State*, reported in 51 Tex. Cr. R. 576, 105 S. W. 195.

The indictment charges appellant with swindling, in that he made false representations to certain officers of the German-American National Bank at Mason; the officers' names being Lemburg, Durst, and White, White being vice president, and one of the other named parties being cashier and one assistant cashier. Appellant and Baxter were seeking a loan of \$1,000, and represented to the officers of the bank that he (appellant) was the owner of four sections of land located near the town of Voca in McCulloch county, that said land was unincumbered, that he had a contract with one Martin to "put up" for him a bunch of cattle, and that he desired to use the money for the purpose of filling his contract. He further represented that R. L. Baxter was jointly interested with him in said Martin contract, that Baxter was the owner of four sections of land located near the town of Voca, and that this land was also unincumbered. He further

represented that he desired to borrow the money for a period of 10 days, and that he and Baxter would execute a note due in 30 days, payable to the bank. On these representations, and the further representation as to the solvency of himself and Baxter above their homestead exemptions to satisfy the debt or refund the \$1,000, the bank let them have the money. Then followed the allegation of the falsity of the statements, etc. White testified in substance as charged in the indictment, and in addition that the parties stated they would secure the signature of one Stiles as surety, also a resident of McCulloch county. They took the note away with them. Stiles signed it, and it was returned to the bank, whereupon the bank placed to Baxter's credit \$1,000 less one month's interest, which was a part of the contract. This money was to be checked out over Baxter's name. Several checks were introduced in evidence, signed by Baxter, per appellant. The proof shows that the parties had no land at the time, except Baxter owned 160 acres which he occupied as a homestead, for which he had not paid. This, perhaps, is a sufficient statement of the case. A similar indictment was held good in *Baxter's Case*, and we are of opinion that this indictment is sufficient.

Appellant contends that neither he nor Baxter received any money of any sort, and that, while the money was placed to the credit of Baxter, it created only the relation of creditor and debtor as between Baxter and the bank, and therefore no money was in fact obtained. We have held in prior cases this proposition is not sound. Therefore we deem it unnecessary to review that question.

Nor is the contention of appellant that the court should not have charged in regard to principals correct. Under the facts the parties were acting together and both present. Medders knew the condition of things, and represented himself to be a party to the contract for the delivery of the cattle, and this money was sought to relieve a debt on the cattle, in order that they might consummate the trade with Martin. They were both present, and appellant did some of the talking, made some of the representations, and was acting with Baxter. White is corroborated by testimony of other bank officers. This made appellant as much a party to the transaction as it did Baxter. Other facts in the record show that appellant had no such land as he represented to have, and he knew that Baxter did not own such land. The charge in regard to principals was not error.

Appellant depended largely upon the theory that, as the indictment charged him with obtaining current money of the United States, the case was not made out; in fact, that there was a variance between the allegation in the indictment and the evidence introduced, because of the fact that no money really

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

passed between the parties, and the passing to Baxter's credit the \$1,000 less the one month's interest, was not sufficient to show a reception of money. As stated, we do not think there is any merit in this contention. It was as much a money transaction by passing the money to the credit of Baxter as if he in fact had received the money and placed it back in the bank, or had received the money and carried it away. It changed the possession and title to the money from the bank to Baxter. The court, therefore, did not err in refusing appellant's requested instruction covering this contention.

After a careful review of the entire record, we are of opinion that it presents no such error as requires a reversal of the judgment, which is therefore affirmed.

On Rehearing.

On a previous day of the present term the judgment in this case was affirmed. Appellant files his motion for rehearing, setting up several grounds.

The first ground alleges that the court in the opinion erred "in finding as a fact that appellant represented to the bank that he had a contract with one Martin to 'put up' some cattle, when the record discloses the fact that it was one R. L. Baxter who represented that he (not Medders) had this contract to 'put up' some cattle." Another ground alleges that the court is in error "when it makes the following deductions from the record: 'Under the facts the parties were acting together and both present. Medders knew the condition of things, and represented himself to be a party to the contract for the delivery of the cattle, and this money was sought to relieve a debt on the cattle, in order that they might consummate the trade with Martin. They were both present, and appellant did some of the talking, made some of the representations, and was acting with Baxter.'" This is a quotation from the original opinion. Appellant says in his motion: "Appellant fails to find anywhere in the record that he represented to the bank that he had a contract with Martin or any one else to put up cattle for him or them." He further states in this ground of the motion as follows: "Neither can appellant find from the record sufficient evidence to support the court in concluding that appellant knew all about the contract and intentions of Baxter with the bank." We have, in the light of the contention of appellant in his motion for rehearing, reviewed the facts; and, as appellant and the court do not understand this record alike, we have concluded to make quotations from the testimony.

The witness White testified that he was acquainted with the parties and had business transactions with them on the 6th of May, 1905, "in which they were both present. We loaned them \$1,000. I think that

is the date. Prior to that time we loaned them the \$500. On the 6th of May we made this \$1,000 loan. The negotiations were carried on in the office of the German-American National Bank. F. W. Lemberg, H. C. Durst, and myself were present for the bank, and R. L. Baxter and L. Medders were present, when the loan was made. As to the representations that were made by Medders and Baxter: I had just come down from dinner. Mr. Lemberg and Durst and Mr. Baxter and Mr. Medders were inside of the railing of the bank at the desk talking. I walked in, and Mr. Lemberg says to me: 'Mr. Baxter and Mr. Medders want to borrow \$1,000 for 10 days.' I says: 'Have we got the money to spare?' He says: 'Yes.' I says to them: 'What security have you got?' or 'How are you fellows fixed?' They both spoke up. Mr. Baxter first says: 'I own four sections of land out near the town of Voca, in McCulloch county, and unincumbered.' Mr. Medders says: 'I own four sections of land out there in McCulloch county, near the town of Voca.' They said they would put Jim Stiles on the note. They said the land was unincumbered. They said it was in their own names, they didn't owe anything on it, and it was unincumbered. I said: 'In that case we can let you have the money.' They said: 'We only want the money for 10 days.' I told them we would not make a note for less than 30 days. We made a note for 30 days and took the discount out. They carried the note off to get Stiles to sign it. In two or three, or three or four, days the note came back with Stiles' name on it. Both Baxter and Medders said they would give a note. They said: 'We will give our note.' I told them they must sign it, not as a firm, but to sign it as 'R. L. Baxter' and 'L. Medders.' We would not take a firm's name on a note. They said they had a contract with one Martin—I understood John Martin; I don't remember as far as that is concerned, but it was one Martin—for 500 two year old steers, and they had the steers all paid for with the exception of about \$1,000. As soon as they got this \$1,000 they were to deliver the steers; and as soon as they got the money they would straighten up all their notes. Mr. Baxter and Mr. Medders said they were both interested in the Martin contract and in paying for the cattle. Both parties were present. The note was signed by Baxter and Medders in the bank. At that time they owed the bank a note for \$500—I can't remember the date of it—and their account stood a little overdrawn. I think the note was returned about the 10th of May—about the 10th; the 9th or 10th. It probably came in on the night of the 9th or the night of the 10th. R. L. Baxter was given credit for it. The account was kept with Baxter by their own consent, and Baxter was to sign the checks. It was agreed there at that time that the money was to be deposited there in the name of R. L. Baxter, and he was to

give the checks to check it out." This is the testimony of J. W. White.

After a careful review of this testimony and the statements contained in the original opinion which have been criticised by appellant in his motion for rehearing, we are still of the opinion that the criticised statements are correct. White's testimony was credited by the jury, and this court was justified in finding that appellant represented himself as being a party to the Martin contract with Baxter and was borrowing the money to relieve the indebtedness hanging over the 500 head of cattle. If Baxter was guilty of a fraud upon the bank under the circumstances above detailed; the conclusion cannot be escaped that appellant was equally guilty. White says he made the representation—held himself out as interested in getting the money, in the cattle contract, and in paying off the indebtedness hanging over the cattle. Whatever fraud may have been perpetrated upon the bank by Baxter was done with appellant's knowledge, consent, and active participation. He was present, aiding and assisting Baxter in getting the money, making the representations stated by White; and under these representations he was equally interested in obtaining the money to be used for the purpose stated by him at the time. But, even if he was not interested to a dollar's extent, he knew the false representations that Baxter was making, and by joining and assisting him, as he did in getting the money, he became a principal, and was equally responsible with Baxter. He was present, aiding and encouraging Baxter in perpetrating fraud, knowing it was a fraud, knowing the representations were false, and this made him a principal with Baxter in the swindle, whether he had a dollar's interest in it or not, or whether he represented to the bank that he had any interest in it.

Nor is there any merit in appellant's further contention in his motion that the account was carried on in the name of Baxter on the bank's books. White testified that it was the understanding and agreement at the time that the money should be placed to the credit of Baxter. We are still of the opinion that the testimony we have quoted justifies the conclusion and statements made in the original opinion.

We are therefore of opinion that the motion should be overruled, and it is accordingly so ordered.

OLDS v. STATE

(Court of Criminal Appeals of Texas. Oct. 28, 1908.)

1. HOMICIDE (§ 310*)—ASSAULT WITH INTENT TO MURDER—EVIDENCE—INSTRUCTIONS.

Where, on a trial for assault with intent to murder, there was evidence that, while accused was quarreling with prosecutrix, a third person

struck him with a fire poker, and that accused thereupon chased the third person, and thought he was striking her with an iron bar, when he by mistake struck prosecutrix, and the court submitted the issues of assault with intent to murder and aggravated assault, a charge that, if accused assaulted the third person with intent to murder and struck prosecutrix, he was not guilty, was properly refused, because it did not present the issue of aggravated assault, which the law of mistake did not reach.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 310.*]

2. HOMICIDE (§ 310*)—ASSAULT WITH INTENT TO MURDER—EVIDENCE—INSTRUCTIONS.

An instruction, on a trial for assault with intent to murder, that if accused assaulted prosecutrix with an instrument likely to produce death or serious bodily injury with intent to kill prosecutrix, and if the assault was not an aggravated assault, the jury should find accused guilty of an assault with intent to murder, etc., was not prejudicial to accused.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 310.*]

3. HOMICIDE (§ 84*)—"ASSAULT WITH INTENT TO MURDER."

An assault accompanied with the specific intent to kill is an "assault with intent to murder" if malice is present, and the infliction of injury on the person assaulted is not necessary to a conviction.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 110; Dec. Dig. § 84.*]

For other definitions, see Words and Phrases, vol. 1, pp. 541-542.]

4. HOMICIDE (§ 95*)—ASSAULT WITH INTENT TO MURDER—PROVOCATION.

Where a third person committed such an assault and battery on accused as caused him pain and produced in his mind a degree of rage sufficient to render it for the time incapable of cool reflection, and accused in such state of mind committed an assault on prosecutrix by knocking her down with a dangerous weapon while he believed that he was assaulting the third person, he was guilty of aggravated assault, though the weapon used was a deadly weapon and the assault was made with intent to kill the third person.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 123; Dec. Dig. § 95.*]

Appeal from District Court, Marion County; P. A. Turner, Judge.

Mart Olds was convicted of assault with intent to murder, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This case is before us on a conviction of assault with intent to murder. The state's case is that appellant had been living in adultery for some time with Lulu Coleman, some children being the result of their living together, and that they sometimes had quarrels and trouble among themselves on account of what appellant thought was her misconduct, and on the occasion in question he came home and a quarrel resulted between them. He made an assault on her, and she fled. He picked up a bar of iron two or three feet long, an inch or an inch and a half in diameter, weighing 10 or 12 pounds, known by the witnesses as a window weight, and, overtaking, struck

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

her with it on the head and knocked her down to insensibility, and again struck her a very severe blow on the shoulder, making the remark that he got her at last, or words to that effect. He then turned and pursued Mag Coleman, a sister of the alleged injured party, but failed to overtake her. The appellant's theory of the case, in substance, is that, while he was quarrelling with Lulu, Mag came up and struck him with a fire poker two or three severe blows upon the head, and that he chased her and thought he was knocking her down at the time of and in place of Lulu. He also denies that he had used a window weight, but had used a much less dangerous instrument, which was a wagon spoke or buggy spoke, covered with sheet iron. It may be stated in this connection that Lulu Coleman was absent, in the city of Dallas, and did not testify in the case, and in fact she had been absent most of the time, after the assault, up to and including the time of the trial.

The charge of the court followed the usual line in submitting the law in cases of this character. The court left it optional, under the charge to the jury, to convict of assault with intent to murder or aggravated assault. Appellant requested the court to give two special charges, which were refused. The first was that if the jury should believe that defendant struck Lulu Coleman by mistake, taking her for Mag Coleman at the time, they would find him not guilty, because under that state of the case there would not be a specific intent on the part of appellant to kill and murder Lulu Coleman. The second was that where one commits an assault to murder on one person, and accidentally wounds another or third party, he would not be guilty of an offense by reason of the assault on the said third party, and therefore, if the jury should find that appellant committed an assault on Mag Coleman with intent to murder her, and accidentally assaulted Lulu Coleman, they would find defendant not guilty. We think the court was correct in refusing these charges. If appellant, intending to kill Mag Coleman, struck Lulu Coleman, the offense might be the same, in case of death, as if he had killed Mag Coleman. If he had the specific intent to kill one, and inadvertently killed the other, he would not be justified. There might, perhaps, be some question as to whether he would be guilty of assault to murder Lulu Coleman, under the circumstances; but there could be no question of the fact that it was an aggravated assault. But the charges which appellant requested did not present this issue. They presented a matter that under this theory of the case there must be an acquittal. The law of mistake does not reach that character of case, under facts as here developed, or, rather, claimed by appellant. Appellant excepts to that portion of the court's charge which is as follows: "If from

the evidence you are satisfied beyond a reasonable doubt that the defendant, Mart Olds, on or about the time charged in the indictment, etc., with a deadly weapon or instrument reasonably calculated and likely to produce death or serious bodily injury from the manner in which it was used, and with malice aforethought, did assault the said Lulu Coleman, knowing it to be her, with intent then and there to kill and murder her, by the means charged in the indictment, and if you are further satisfied by the evidence and beyond a reasonable doubt that said assault, if any, was not an aggravated assault, as the law of an aggravated assault is hereinafter defined in this charge to you, then you will find defendant guilty of an assault with intent to murder," etc. The criticism of this charge is that the expression "serious bodily injury," used in this connection, prejudiced the rights of defendant and made it more onerous on him to escape the felony charge than the law requires, and the use of those words in that connection is fundamental error. We do not believe that exception to be well taken. In fact, we are further of the opinion that the charge was more beneficial to the appellant than the law provides. If appellant made an assault on the woman with intent to kill her, actuated by malice, serious bodily injury was not a necessary element. The crime would have been as complete without any serious bodily injury as it would with it. Wherever the assault is made, as assaults are defined by law, accompanied with the specific intent to kill, the offense of assault with intent to murder is complete; malice being shown. Infliction of injury on the person is not absolutely necessary to a conviction of assault with intent to murder. Wherever there is an assault with malice aforethought, and the means used would have produced murder, and the parties in such relation that the assault could be consummated, the offense of assault with intent to murder is made out under the statute. It is therefore our opinion that there is no substantial merit in this contention.

Exception is taken to this portion of the charge: "A serious bodily injury is one which creates alarm or apprehension concerning the life of the injured party. I further charge you that if you believe, from the evidence, that Mag Coleman made an assault and battery on the defendant that caused him either pain or bloodshed, and that this produced in the mind of the defendant a degree of anger, rage, sudden resentment, or terror sufficient to render it for the time incapable of cool reflection, and in such state of mind the defendant committed an assault on Lulu Coleman, but he believed that he was making said assault on Mag Coleman, then you will find the defendant guilty of an aggravated assault, even if you believe from the evidence, beyond a reasonable doubt, that

the weapon used was a deadly weapon and the assault was made with the intent to kill Mag Coleman." The criticism of this charge is that if his mind was incapable of cool reflection from the blows received on his head at the hands of Mag Coleman, and in that state of mind, if he had struck Mag Coleman, it would have been an aggravated assault; but it was no offense against the law if he struck a third party, Lulu Coleman, by mistake. The opposite idea to that expressly charged was embodied in appellant's special charges, which we have held properly refused, and we are of opinion that appellant has no just criticism of this portion of the court's charge. If appellant had killed Mag Coleman under the circumstances, the offense would not have been reduced below manslaughter, under the charge given. If he had killed Lulu Coleman under these circumstances, it would not have been reduced to manslaughter, because under that state of case Lulu Coleman would not have given the provocation; but in making the mistake, and supposing that it was Mag Coleman who struck him on the head, if he struck Lulu Coleman under the impression that it was Mag Coleman he was striking, the offense, in case death had resulted, could not have been less than manslaughter. The law does not permit this character of mistake. Appellant either intended to kill or he intended to inflict injury of some character upon the woman that he did strike, and the fact that he made a mistake, or may have made a mistake, under such circumstances, would not justify him; for the law does not authorize him to strike either woman, under the facts stated. Under no view of the law would a mistake of this sort relieve criminality. The purpose of the defendant was to inflict injury. It was intentional, although under his theory he may have made a mistake in the individual he intended to strike. If he had been justified in striking Mag Coleman, and by mistake hit Lulu Coleman, there might be some plausibility in this contention; but under no view of the law, under the facts of this case, was he justified in striking.

It may be that the final contention of appellant, that the evidence is not sufficient to justify a conviction of an assault with intent to murder, has some merit in it. The jury found that his testimony was not true, and that of the state was correct; that he made the assault on Lulu Coleman as charged. The state's evidence was not as cogent as in some cases, yet we are of opinion that the jury was justified in finding the verdict they did. At least the evidence is sufficiently strong to prevent, or not authorize, this court to interfere and set aside the verdict.

The judgment is affirmed.

RAMSEY, J., absent.

MARTIN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 25 1908.)

1. CRIMINAL LAW (§ 1090*)—APPEAL—CONTINUANCE—REVIEW—BILL OF EXCEPTIONS—NECESSITY.

Alleged error in overruling an application for a continuance will not be reviewed, in the absence of a bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2812; Dec. Dig. § 1090.*]

2. INDICTMENT AND INFORMATION (§ 45*)—NEW AFFIDAVIT AND INFORMATION—EFFECT.

The filing of a new affidavit and information, after the granting of a new trial because of defective pleadings, on which accused was convicted, constitutes a new case.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 45.*]

3. CRIMINAL LAW (§ 603*)—CONTINUANCE—APPLICATION.

An application for a continuance to enable accused to prepare for trial by procuring the attendance of certain witnesses was not sufficient, where it did not state who the witnesses were and what could be proved by them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1353, 1354; Dec. Dig. § 603.*]

Appeal from Rains County Court; W. H. Clendenin, Judge.

Frank Martin was convicted of misdemeanor theft, and he appeals. Affirmed.

W. W. Berzett, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with misdemeanor theft, and convicted. Motion for new trial was granted on account of defective pleadings. New pleadings being filed, appellant was immediately arrested and placed upon a second trial, and again convicted.

He filed a motion to postpone the case, or rather a motion for a continuance. The substance of the motion is that the case was called for trial the same day upon which the pleadings were filed and the same day appellant was arrested, that he had no time to procure process for witnesses, that he has a good defense to the prosecution if he has time to have it before the court, that the defendant ought not to be forced to announce in a cause the same day an affidavit and information is filed, that the law does not contemplate that he should be called upon to announce on that date, that his rights would be jeopardized if he should be forced to announce, and that there are a number of witnesses defendant desires that he may make his defense. It may be noted in the first place that a bill of exceptions was reserved to the ruling of the court refusing to continue the case. This, legally, would dispose of the question. Alleged error in overruling a motion for continuance will not be noticed or revised in the appellate court in the absence of a bill of exceptions reserved to the ruling of the court refusing such a

tinuance. This rule has been adhered to in this state without intermission.

Appellant contends that the filing of the second affidavit and information constituted a new case. This position is unquestionably correct, under all the cases in Texas, so far as we are aware. The question is not a novel one. The law gives the defendant the opportunity of preparing himself for trial, if claimed in a legal manner. The application itself would not be sufficient, who the witnesses were, or what could be proved by them, is not stated. It will be observed that this appellant did not claim or undertake to claim the right to have two days allowed him in which to prepare and file written pleadings. Even if his motion would apply to that statute, his exception was not reserved. The record does not contain a statement of facts, and, as it presents the case, we are unable to review this supposed erroneous ruling of the trial court.

The judgment must therefore be affirmed, and it is accordingly ordered.

RAMSEY, J., absent.

BIARD v. STATE.

(Court of Criminal Appeals of Texas. Oct. 23, 1908.)

PERJURY (§ 5*)—WHAT CONSTITUTES—FALSE STATEMENT UNDER OATH.

Under Code Cr. Proc. 1895, arts. 282, 283, authorizing accused before the examination of the witnesses to make a statement, which shall be reduced to writing and signed, but not sworn to, a sworn statement, made before the examining magistrate by one charged with an assault, after waiver of examining trial, is not a statement on which perjury may be predicated, though, if the statement was voluntarily made, it may be the basis for a prosecution for false swearing.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 4-6; Dec. Dig. § 5.*]

Appeal from District Court, Lamar County; Ben H. Denton, Judge.

Frank Biard was convicted of perjury, and he appeals. Reversed, and prosecution ordered dismissed.

B. B. Sturgeon and W. F. Moore, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of perjury, and his punishment assessed at five years' confinement in the penitentiary.

The statement of facts show, in substance, that appellant, in conjunction with others, was arrested for assault with intent to murder, and, after they had waived their examining trial, appellant was requested to and did make a voluntary statement, which statement was sworn to by him, and upon this statement perjury is predicated. The indictment, among other things, contains the fol-

lowing: " * * * And wherein issue was duly joined between the said state of Texas and said Bub Crowley, Lee Blow, Frank Biard, Harrison Biard, and Sam Biard, defendants, came on to be heard in due form of law, and was then and there heard by and before the said W. F. Boyett, justice of the peace as aforesaid, and the defendant Frank Biard being then and there informed by the said W. F. Boyett that it was his right to make a statement relative to the accusation brought against him, but that he, the said Frank Biard, could not be compelled to make any statement whatever, and that if he did make such statement the same would be used as evidence against him. Whereupon the said Frank Biard then and there stated that he desired to make a statement and tell all about it, and the said Frank Biard then and there appeared as a witness in behalf of himself, the said Frank Biard, and Bub Crowley, Harrison Biard, Lee Blow, and Sam Biard, and was then and there duly and legally sworn, and did take his corporal oath before the said court as a witness to testify in said cause, which oath was then and there required by law and necessary for the ends of public justice, and which said oath was then and there administered to him, the said Frank Biard, by the said W. F. Boyett, justice of the peace, and judge of said court as aforesaid."

An oath is not necessary, under the statute of this state, where the defendant makes a voluntary statement in examining trial. Article 282 of the Code of Criminal Procedure of 1895 provides: "Before the examination of the witnesses the magistrate shall inform the defendant that it is his right to make a statement relative to the accusation brought against him, but shall at the same time also inform him that he cannot be compelled to make any statement whatever, and that if he does make such statement it may be used in evidence against him." Article 283 of the Code of Criminal Procedure of 1895 provides: "If the accused shall desire to make a voluntary statement, he may do so before the examination of any of the witnesses, but not afterward. His statement shall be reduced to writing by the magistrate, or by some one under his direction, or by the accused or his counsel, and shall be signed by the accused, but shall not be sworn to by him. If the accused be unable to write his name, he shall sign the statement by making his mark at the foot of the same, and the magistrate shall in every case attest by his own certificate and signature to the execution and signing of the statement." In passing on a similar question in the case of Walker v. State, 28 Tex. App. 112, 12 S. W. 503, Judge Willson, speaking for the court, used the following language: "We are of opinion that the written statement admitted in evidence against the defendant over his objec-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion thereto is incompetent evidence and should have been rejected. Said statement cannot be considered a voluntary statement such as is provided for by statute. It was not made by the defendant as a voluntary statement. It was sworn to by him. It was not authenticated as a voluntary statement by the magistrate before whom it purports to have been made. It is clear to our minds that the statement was not admissible in evidence as a voluntary statement under article 790 of the Code of Criminal Procedure." *Jackson v. State*, 29 Tex. App. 463, 16 S. W. 247.

The evidence in this case, as suggested above, shows that there was no examining trial held. All the parties waived the examination, and the statement upon which perjury is predicated taken. This might form a basis for a prosecution for false swearing, if anything, but is not a voluntary statement such as is authorized to be introduced in the course of a judicial proceeding, and hence cannot be a basis for perjury. If the statement is a voluntary statement within the purview of the statute, it is not required that the defendant swear to same. By the very terms of the statute it is provided that said statement shall not be sworn to by him. The statute prohibiting the justice of the peace from swearing him to a voluntary statement, if he swears him to it, then he performs an illegal act, provided it is a voluntary statement. If it is not a voluntary statement, then certainly the utmost the state could insist upon would be a prosecution for false swearing.

We do not deem it necessary to review the other errors complained of by appellant.

The evidence failing to charge a state of facts upon which perjury could be predicated, the judgment is reversed, and the prosecution ordered dismissed.

RAMSEY, J., absent.

MOSBEY v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1908.)

LARCENY (§ 7*)—ELEMENTS OF OFFENSE—OWNERSHIP OF PROPERTY.

Defendant, having been deputized by K. as Masonic grand master to organize a Masonic lodge, did so and elected R. treasurer. R. received the fees and dues, which he paid to defendant, who was authorized to receive them; he claiming that the money belonged to himself and K., and that he had paid K.'s part to him. *Held*, that defendant could not be convicted of theft of the money as the property of R., as it did not belong to him in any event.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 19; Dec. Dig. § 7.*]

Appeal from District Court, Atascosa County; E. A. Stevens, Judge.

W. H. Mosbey was convicted of theft, and he appeals. Reversed and remanded.

Jno. W. Preston and N. A. Rector, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft, and his punishment assessed at two years' confinement in the penitentiary.

The facts in the case show that appellant organized a Masonic lodge at Pleasanton in Atascosa county, being duly authorized to so do by one McKinney, whose home was in Sherman; that the prosecuting witness, Henry Ross, was elected treasurer of the lodge. Certain fees and dues for initiation and otherwise were turned over by Henry Ross to appellant, who was duly authorized under the facts in this case to receive same. Appellant claims that the money belonged to himself and to said McKinney, and there is evidence showing, on his part, that he paid McKinney his part of the money. But, be this as it may, appellant did not steal or embezzle any money, or obtain same as bailee from the prosecuting witness, Ross. Under the facts as disclosed by this record, if the money belonged to anybody other than appellant, it belonged to the said McKinney, who lived in Sherman, Tex., since Mosbey was working under the authority of said McKinney, who was grand master of the lodge. Appellant's employment coming from the said McKinney, and not from the prosecuting witness, Ross, it is clearly erroneous to base a prosecution upon any idea of embezzlement of Ross' money, or theft of property belonging to Ross, since it did not belong to said Henry Ross.

There being a fatal variance between the allegation and proof, the judgment is reversed, and the cause is remanded.

RAMSEY, J., absent.

YOUNG v. STATE.

(Court of Criminal Appeals of Texas. Oct. 23, 1908.)

1. CRIMINAL LAW (§ 365*)—EVIDENCE—RES GESTÆ.

The state could show that after shooting decedent accused shot his wife, with whom accused claims decedent was criminally intimate, as part of the *res gestæ*, showing accused's animus, purpose, and intent.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 807; Dec. Dig. § 365.*]

2. WITNESSES (§ 388*)—IMPEACHMENT—EVIDENCE—ADMISSIBILITY.

On cross-examination of accused's wife, the state could ask her concerning a statement made to a justice in accused's absence, to lay a predicate for her impeachment.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1240; Dec. Dig. § 388.*]

3. CRIMINAL LAW (§ 1091*)—APPEAL—BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions to the state being permitted to read from a statement was defective

for failing to contain the statement or to refer to any statement.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1091.*]

4. CRIMINAL LAW (§ 1110*)—APPEAL—BILL OF EXCEPTIONS—REVIEW.

The Court of Criminal Appeals will not refer to a statement of facts to supply a defective bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1110.*]

5. HOMICIDE (§ 181*)—EVIDENCE—DECEDENT'S CONDUCT WITH ACCUSED'S WIFE.

One accused of murder could show that a certain house was reputed to be, and was kept as, a bawdy house, and that decedent and accused's wife were there together the night preceding the killing, as tending to show that accused had reasonable basis for believing undue intimacy existed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 384; Dec. Dig. § 181.*]

6. CRIMINAL LAW (§ 530*)—CONFESSIONS—ADMISSIBILITY.

Under Code Cr. Proc. 1895, art. 790, as amended by Acts 30th Leg. p. 219, c. 118, § 1, a written confession must show on its face that accused was warned by the person to whom the same was made that it might be used against him, etc.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1208; Dec. Dig. § 530.*]

7. CRIMINAL LAW (§ 763*)—MURDER—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction that if the jury believed beyond reasonable doubt that accused, with implied malice and with a deadly weapon reasonably calculated to produce death, aroused without adequate cause, and not in self-defense, with intent to kill, killed decedent, he should be convicted, was not erroneous, as charging that defendant had implied malice and as being on the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 763.*]

8. HOMICIDE (§ 295*)—MURDER—INSTRUCTIONS.

An instruction that, in determining whether there was adequate cause for the killing, the jury could look to any and all provocations, was not erroneous, for failing to go further and enumerate the antecedent provocations.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 295.*]

9. HOMICIDE (§ 47*)—MANSLAUGHTER—ACT CONSTITUTING.

If, suspecting that decedent had been unduly intimate with accused's wife, accused sought him out to inquire as to the truth of the matter, and decedent's statement, "I have had her, and I can get her again if I want her," rendered accused's mind incapable of cool reflection, and he killed decedent, accused was guilty of no higher offense than manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 71; Dec. Dig. § 47.*]

Appeal from District Court, Red River County; Ben H. Denton, Judge.

Sam Young was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Chambers & Black, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punish-

ment assessed at five years' confinement in the penitentiary.

Appellant and deceased were negroes living in the same neighborhood in Red River county. From appellant's standpoint, deceased became intimate with his (appellant's) wife. He protested to the deceased in person against his attentions to his wife, and accused him on various occasions of being too intimate with her. He declared to various other parties that he was going to kill deceased on account of intimacy with his wife. On the morning of the homicide defendant informed his wife that he was going to take her back to her mother's on account of the intimacy of herself and the deceased. They started on this mission, and appellant's wife insisted that they should go by and get the deceased. They went where deceased was cutting wood; both of them calling to him. He finally came to where they were. A statement was made to him that they wanted him (deceased) to accompany them to a certain place in order to straighten up some lies, as they expressed it, that had been told, alluding to remarks and statements about the illicit intercourse between appellant's wife and deceased. Deceased accompanied them for some little distance. Finally they sat down near a fence close to a farm belonging to appellant's father-in-law. It seems, while sitting there, they talked over the troubles above alluded to. Then appellant and his wife got over the fence, and the following conversation occurred between appellant and deceased; deceased remaining on the outside of the fence: "I says to John Aikin, deceased: 'Does you want Sylvia?' He says: 'No.' I says: 'Why it seems like you does.' He says: 'She is your wife, hain't she?' I says: 'Yes, she is my wife; but I am fixing to carry her home, so you and her can associate, if you want to. There hain't no living for me and her to live together and you always picking at her.' He says: 'No, I don't want her.' He says: 'Do you want to know the truth?' I says: 'Yes.' He says: 'No, I don't want her. You asked me for the truth.' He says: 'Yes, I have had her, and if I want her I can get her again.' That is just what he spoke. 'I don't want her. She is your wife, and I don't want to interfere.' I says: 'You have done interfered with her.' He says: 'Yes, I have interfered with her; but I don't want her.' He had his jumper on just like this, and a coat over his apron, and it seemed that he was making an attempt or commenced carrying his hand up with his jumper and all, and when he says 'No, I don't want her,' why then I shot him. When I shot him he was standing about 10 steps from the fence on the outside and I was standing on the inside of the fence in the field." After appellant shot deceased two or more times he fell, and appellant then pursued his wife; the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

state's testimony showing that he was trying to kill her. His testimony showed that he was merely shooting to scare her or to make her stop. Appellant's wife ran on up towards her mother's house. Her mother came out and met her, and over protest of the mother appellant shot his wife, he claiming, however, that the pistol was accidentally discharged and wounded his wife, from which wound she recovered, and, the record shows, went back to live with appellant. There is other testimony in the record going to show divers meetings of appellant and deceased, and threats on the part of appellant towards deceased on account of his improper relations with his wife, which we do not deem necessary to rehearse, but believe the above statement sufficient to discuss the assignments of error raised by appellant.

Bill of exceptions No. 2 complains of the court permitting the state to prove the fact of defendant shooting his wife after shooting deceased. Appellant objects to same on the ground that it is another transaction, and because it is prejudicial to the defendant, and has no connection with this case, and is irrelevant and immaterial. This testimony was clearly part of the *res gestae*, and was admissible to show animus, purpose, and intent, to illustrate the condition of defendant's mind and motive that was prompting him throughout the entire homicide.

Bill of exceptions No. 3 relates to the same matter.

Bill of exceptions No. 4 complains that the state was permitted to read from a written statement theretofore made by Sylvia Young, wife of defendant, before Squire Story, in the absence of the defendant, about the transaction, to which counsel for defendant objected, because said statement, if made, was not made in the presence of the defendant, because said witness is the wife of the defendant, and because neither the defendant nor his attorneys were present at the time said purported statement was made, was not confronted with said witness, and had no opportunity to cross-examine her, and asks that said statement be excluded from the jury. This bill is given with the explanation that: "The defendant placed his wife, Sylvia Young, on the stand, and, while the district attorney was cross-examining her, he asked her certain questions, and at the time was looking on a paper and asking her if she did not make the statements. He was simply laying a predicate to impeach her upon the very questions about which she had testified for the defendant." Clearly, with this explanation, the testimony was admissible. However, the bill is defective, even without this explanation, for the reason it does not contain the statement and does not allude to any statement. We will not consult a statement of facts to make out a bill. In view, however, that this case will have to be tried again, we have examined the statement introduced, and find that same is a legitimate

cross-examination of appellant's wife, since the same shows that it has relation to nothing but what she had testified to; many statements in this statement being adverse and contrary to her testimony on the trial of this case.

Bill of exceptions No. 5 shows that appellant offered to prove by Wash Martin and Dave Beaty that they and each of them lived in the neighborhood of Ida Little, that they knew the reputation of the house kept by said Ida Little, and that he expected to prove by each of said witnesses that they knew the reputation of said house, and that it was kept by the said Ida Little as a house of public prostitution, and by other witnesses that John Alkin, the deceased, and the wife of the defendant, were there the night before the killing together. State's counsel objected, and the court sustained the objection. This testimony was admissible, since it is corroborative of the suspicions of appellant, and goes to show that he was acting in good faith and had a reasonable basis for believing that deceased and his wife were unduly intimate. This is rendered doubly true, in view of the statement of facts, which shows that appellant went to Ida Little's house and found his wife in company with deceased.

Bill of exceptions No. 6 shows that the state offered to read in evidence a statement purporting to have been made by the defendant, to which counsel for the defendant objected for the following reasons: Because said statement does not show that the same was voluntarily made, and it does not show that it was stated to the defendant that this evidence would be used against him, and not for him, and the court overruled said objections. The court, in signing the bill, says: "The written statement was in accordance with the statute." Under the explanation of the court there was no error in admitting the statement; but we wish to call the court's attention, in view of another trial, to the peculiar phraseology of the statute authorizing the introduction of this character of testimony. Article 790, Code Cr. Proc. 1895, as amended by Acts 30th Leg. p. 219, c. 118, § 1, reads as follows, to wit: "The confession shall not be used if at the time it was made the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of the accused taken before an examining court in accordance with law, or be made in writing and signed by him, which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made, or unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted

or stolen property, or the instrument with which he states the offense was committed; provided that where the defendant is unable to write his name and sign the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness."

The statement found in the record starts off as follows: "Sam Young, after having been informed that he cannot be compelled to make any statement whatever, and that, if he does make any statement, same will be used as evidence in the case against him for murdering John Alkin, and also in the case for shooting his wife, freely and voluntarily makes the following statement." Then follows appellant's statement, which is signed "Sam Young," as indicated in the record. It will be noticed that that portion of the statement copied does not contain one of the requisites of a written confession as prescribed by the acts of the last Legislature, in that same does not show that he had been warned by the person to whom the same is made. This statute is in derogation of the former statute, and in the opinion of the writer a statute that ought never to have been passed. Yet the same lays down a rule on the question of criminal evidence that becomes purely statutory, and in order to introduce the evidence it must comply strictly with the statute. The statement does not do so, since the same does not show upon its face that he was warned by the person to whom the same was made. The evidence dehors the statement, perhaps, may do so, and probably does; but the Legislature, in its wisdom, has seen fit to say that a voluntary statement that does not contain this clause is inadmissible. We are impotent to change the law, even if we were inclined to do so. The writer thinks the rule is too restrictive and ought to be repealed; but this is a matter left to the discretion of the Legislature.

Bill of exceptions No. 7 complains of the same matter discussed in bill of exceptions No. 4.

Appellant's amended motion for a new trial complains of the sixteenth paragraph of the court's charge, which is as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant, with his implied malice as that is hereinbefore explained, and with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in a passion aroused without adequate cause, and not in defense of himself against an unlawful attack or demonstration reasonably producing a rational fear or expectation of death or serious bodily injury, with the intent to kill, did in Red River county, Texas, at any time prior to 28th day of November, 1907, unlawfully shoot and thereby kill John Alkin, as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment at confine-

ment in the state penitentiary for any period that the jury may determine and state in their verdict, provided it be for not less than five years." Appellant complains that the charge is on the weight of evidence, and virtually charges the jury that the defendant had implied malice against the deceased when he shot him. The charge is correct, and has been frequently approved by this court.

The second ground of the motion complains of the following charge: "In determining whether or not there was adequate cause, you have the right to look to any or all provocations, if there were any, arising at the time or before the killing." Appellant complains that said charge should have gone further and charged the jury that, in considering the question as to whether appellant was guilty of the offense of manslaughter, they would consider all the antecedent provocations, enumerating them, in passing upon the question as to whether his mind was capable of cool reflection. In other words, the charge should have applied the principles of law to the facts proven, and should have submitted to the jury the question as to whether or not the course of conduct of the deceased toward defendant's wife, coupled with what occurred at the time of the killing, was an adequate cause to reduce the homicide to manslaughter. It is never correct nor proper for a court to collate the facts. The charge was correct as far as it went.

The fourth ground of the motion complains because the court's charge on manslaughter did not pertinently and affirmatively charge on that phase of the case wherein the facts show that deceased, John Alkin, just before the shooting, asked defendant, Sam Young, if he wanted to know the truth, and defendant told him "Yes," when the deceased replied, "Well, then, I have had her, and I can get her again if I want her," upon which the defendant shot and killed deceased. That the court should have charged the jury that if they believed that the defendant prior to the killing had suspected adulterous relations between deceased and his (defendant's) wife, but was not possessed of sufficient information to make his mind sure of that fact, and in order to satisfy his mind as to the truth or falsity of said act, on the morning of the killing he sought out the deceased to inquire as to the truth or falsity of said matter, and that at said meeting with deceased the deceased used the language above referred to, and if such language produced in the mind of defendant sudden rage, anger, passion, or resentment, which rendered his mind incapable of cool reflection, and while in such state of mind he shot and killed deceased, he would be guilty of no higher grade of culpable homicide than manslaughter. In the case of *Richardson v. State*, 28 Tex. App. 222, 12 S. W. 872, in discussing a similar question to that raised by appellant, Chief Justice White of this court used the following language: "We are also

of opinion that the charge of the court failed and omitted pertinently and affirmatively to instruct the jury upon that phase of the law of manslaughter which we have above indicated. Nowhere in the charge were the jury told what would be the law if defendant called deceased out, or went out on invitation of deceased, and then asked him concerning the insulting language, and deceased repeated the same in person to him, thereby offering a new insult." Then, on page 221 of 28 Tex. App., page 872 of 12 S. W., we find the following: "If defendant asked the deceased out of the house for the purpose of ascertaining from him whether or not he had used the insulting language about his mother, as he had been informed, and deceased, in reply to this question, stated that he had said and meant every word imputed to him, and the defendant, under the immediate influence of the sudden passion this insulting language aroused, slew him, he would only be guilty of manslaughter, provided the jury believed the passion was such as to inflame his mind, so as to render it incapable of cool reflection." The record in this case shows that defendant had been laboring for a year or more under the belief that deceased had been unduly intimate with his wife, but had not gone to the extent of wreaking his vengeance upon him for said act; but certainly he had many bases for his suspicions, as the record before us discloses, but when he had the same confirmed by the deceased's own declaration to him, he had absolute confirmation of his suspicions. Then, certainly, if the jury believed the statement of this fact to him rendered the appellant's mind incapable of cool reflection, he would not be guilty of any higher offense than manslaughter. This phase of the law was not given in the main charge of the court. For authorities on this question, see *Tucker v. State* (Tex. Cr. App.) 50 S. W. 712; *Bays v. State*, 50 Tex. Cr. R. 548, 99 S. W. 562; *Williams v. State*, 24 Tex. App. 637, 7 S. W. 836; *Paulin v. State*, 21 Tex. App. 436, 1 S. W. 453; *Maxwell v. State* (Tex. Cr. App.) 56 S. W. 62; *Richardson v. State*, 28 Tex. App. 216, 12 S. W. 872; and *Eanes v. State*, 10 Tex. App. 421.

For the error pointed out, the judgment is reversed, and the cause is remanded.

RAMSEY, J., absent.

HINMAN v. STATE

(Court of Criminal Appeals of Texas. Oct. 28, 1908.)

1. CRIMINAL LAW (§ 1084*)—ENTRY OF SENTENCE—TIME.

Code Cr. Proc. 1895, art. 837, provides that, on failure to enter judgment and pronounce sentence during the term, the judgment may be entered and sentence passed at any succeeding term, unless a new trial has been granted,

ed, or an appeal has been taken; and by article 884, an appeal suspends all further proceedings in the trial court until the judgment of the appellate court is received by it, but where, after notice of appeal, any part of the record has been lost, it may be substituted in the trial court, if it is then in session, but, if not, the court of appeals shall postpone the appeal until the next term, so that the record may be substituted. Accused was convicted of seduction, and a motion for a new trial was overruled, and notice of appeal given; but sentence was not passed until the following term of court. Held that, after notice of appeal, the trial court could not amend the record, except to substitute the record where a part of it had been lost, etc., so that the trial court could not pass sentence at the succeeding term.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2731; Dec. Dig. § 1084.*]

2. CRIMINAL LAW (§ 1023*)—APPEAL—DECISIONS REVIEWABLE—NECESSITY OF SENTENCE.

A sentence is the final judgment, without which an appeal cannot be taken, except in capital cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2596; Dec. Dig. § 1023.*]

3. CRIMINAL LAW (§ 1017*)—APPEAL—APPELLATE JURISDICTION.

The Court of Criminal Appeals must decide the question of its own jurisdiction, and not the trial court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1017.*]

4. CRIMINAL LAW (§ 1086*)—APPEAL—DISMISSAL.

An appeal in a criminal case will be dismissed, where the record contains no legal sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2769; Dec. Dig. § 1086.*]

Appeal from District Court, Eastland County; J. H. Calhoun, Judge.

Owen Hinman was convicted of seduction, and he appeals. Appeal dismissed.

Scott & Brelsford and T. L. Hutchinson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted at the August term, 1907, of the offense of seduction. Motion for a new trial was overruled, and notice of appeal given. On account of the sickness of the judge, or for some cause, sentence was not pronounced at that term of the court. Sentence was, however, at the following January term, passed upon appellant. Under this state of the case the question is: Had the court the legal authority to pass sentence when he did?

Under our statute and decisions this question must be answered in the negative. Article 837, Code Cr. Proc. 1895, reads as follows: "Where, from any cause whatever, there is a failure to enter judgment and pronounce sentence upon conviction during the term, the judgment may be entered and sentence pronounced at any succeeding term of the court, unless a new trial has been granted, or the judgment arrested, or an appeal

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

has been taken." Article 884, Code Cr. Proc. 1895, provides: "The effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had until the judgment of the appellate court is received by the court from which the appeal is taken; provided, that in cases where, after notice of appeal has been given, the record or any portion thereof is lost or destroyed, it may be substituted in the lower court, if said court be then in session, and when so substituted the transcript may be prepared and sent up as in other cases. In case the court from which the appeal was taken be not then in session, the court of appeals shall postpone the consideration of such appeal until the next term of said court from which said appeal was taken, and the said record shall be substituted at said term, as in other cases." This latter article has been construed in many decisions. These decisions hold that prior to the adoption of the above article, in cases where an appeal had been taken, the rule was that the appeal suspended all proceedings in the trial court, and it had no authority to amend or substitute the record. Since the enactment of the latter article, however, it has been held to mean that after notice of appeal has been given, and pending appeal to this court, the court in which the conviction occurred can take no further steps with reference to the case until this court has finally disposed of such appeal, except where some portion of the record has been lost or destroyed after the notice of appeal, in which case the lost or destroyed portion may be substituted.

Going back to article 837, *supra*, it has been held that where motion for new trial has been overruled, and notice of appeal given, but no entry of final judgment, a judgment subsequently entered *nunc pro tunc* is without authority and void. *Estes v. State*, 38 Tex. Cr. R. 506, 43 S. W. 982. And such seems to be the holding and ruling in this state. A sentence under our procedure is the final judgment, and without that an appeal cannot be consummated, except in cases where the death penalty is inflicted. When the August term of the court adjourned, all power of the district judge over it ceased, except to substitute lost or destroyed records, as provided in article 884, *supra*. That court could in no manner amend the record or add to it, otherwise than stated. It was without power, pending the appeal to this court, to sentence, or to enter a judgment on the verdict even. The notice of appeal had attached the jurisdiction of this court, had ousted the jurisdiction of the trial court, and until this court has passed upon the appeal the trial court is without authority to enter a judgment or sentence.

It is true, legally speaking, that this court, without a sentence, would dismiss the ap-

peal; but this court passes upon its jurisdiction, and not the trial court, and, as the statutes quoted have provided that the trial court is powerless under the circumstances to enter any judgments, or make any orders or decrees, any act of said court would be without authority. Finding the record in this condition, and no legal sentence in the record, it is the duty of this court to dismiss this appeal, with instructions to the trial court to enter a proper sentence at its next term of court.

The appeal is therefore dismissed.

RAMSEY, J., absent.

NOBLE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1908.)

1. HOMICIDE (§ 291*)—CAUSE OF DEATH—INSTRUCTIONS.

Where decedent, injured by accused sticking a knife into his head, breaking the blade, and leaving a part thereof in the head, did not for several days consult physicians, and the physicians testified that the wound was not necessarily fatal, and that if they had reached decedent immediately after he received the wound, or within 24 hours thereafter, they could have saved his life, the court was required to charge the substance of Pen. Code 1895, arts. 651, 652, defining homicide, and that, unless decedent died from gross neglect or improper treatment, accused was guilty of some degree of homicide, while if gross neglect or improper treatment caused death the jury should find accused not guilty of homicide, but should consider whether he was guilty of assault with intent to murder or aggravated assault, defining such offenses.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 596; Dec. Dig. § 291.*]

2. HOMICIDE (§ 5*)—ACTS CONSTITUTING HOMICIDE—MISCONDUCT OF PERSON INJURED—IMPROPER TREATMENT OF PERSON INJURED.

Accused cannot be convicted of a homicide unless his act caused the same, and where decedent was negligent in caring for himself after receiving the injury, or where his physicians grossly mistreated him and caused death, accused is not responsible for the death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 7-10; Dec. Dig. § 5.*]

Appeal from District Court, Mitchell County; James L. Shepherd, Judge.

Pat Noble was convicted of murder in the first degree, and he appeals. Reversed, and cause remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at imprisonment for life.

The facts in substance show that appellant was sitting in a negro church, when the deceased entered same at the instance of the one having charge of the church, with instructions to turn the lights off at an ordinary electric switchboard. He did so. Appellant became enraged, turned the lights

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

back on, and deceased returned and turned the lights off again. Thereupon appellant became enraged, and remarked to deceased, "It looks like you are trying to start something." Deceased said, "No, it looks like you are trying to start something." Thereupon appellant rushed at him and stuck a knife in his head an inch and three-sixteenths, and the blade was broken off, leaving that much of the knife in the side of deceased's head. This occurred on Friday night. Saturday deceased worked at the compress, and complained Saturday night and Sunday, and Monday became unconscious, and Tuesday morning physicians were sent for. They trepanned his head, cutting about an inch of the skull out and extracting the knife blade. The physicians testified that the wound was not necessarily fatal, and believed, if they could have reached deceased immediately after he received the wound, or within 24 hours thereafter, that he could have gotten well. They appeared in their testimony to somewhat contradict this statement, by stating that the wound caused deceased's death, since the same had begun to suppurate at the time they reached him on Tuesday. One of them testified that he did not know whether the wound was necessarily a fatal one or not; that wounds of that character do not usually prove fatal if they are looked after right in the beginning; and that he believed the deceased would have lived if the operation had been performed immediately before suppuration began. Then he used this language: "I think it was the wound that caused his death; but the fact that that blade was in there for so long, creating that pressure there, with no chance for drainage, caused the blood to flow to that part and produce suppuration." The doctors testify that the operation was done skillfully, and the utmost care used by them to preserve deceased's life. So, then, the matter relates back to the question as to whether or not the deceased himself was guilty of gross neglect.

On this question the court charged the jury as follows: "Although the injury which caused death might not, under other circumstances, have proved fatal, yet, if such injury be the cause of death, without it appearing that there has been any gross neglect, such as by some other person, such as deceased, it would be homicide. And if you believe from the evidence that Pat Noble stabbed the deceased with a knife, and inflicted upon him a wound which was not, in itself, necessarily mortal, and that the wound inflicted produced suppuration in the brain, or any other effect which resulted in the death of the deceased, the party inflicting the injury would be as guilty as if the wound was one which would of itself inevitably lead to death, unless it appears from the evidence that there was gross neglect by some other person, such as the deceased. You are instructed, also, that if the wound inflicted

would not necessarily result in death, and it appears that there was gross neglect on the part of the deceased, it is not homicide in him who inflicts the first injury; but if the injury, though not necessarily fatal, or if said injury results in death, then it would amount to homicide, unless it appears that there has been gross neglect on the part of the deceased himself."

Appellant criticises this charge in his motion for new trial on the ground that the same is upon the weight of the evidence and is misleading, and is not the law applicable under the facts raising the issue as to whether or not deceased died of a wound inflicted by appellant or from his own neglect; that the jury, in this connection, should have had an affirmative instruction that if they believed from the evidence that the deceased was guilty of great neglect in not having and securing medical attention sooner, and that this neglect was the cause of his death, then they could find the defendant guilty of no higher offense than assault with intent to murder; further, that said charge is erroneous, in that it does not present this issue of the case in a manner so that a jury could intelligently pass upon the issue, and is more onerous than the law will allow, because the jury should have been told that, if they had a reasonable doubt as to whether or not death resulted from neglect or from the wound, the same should be resolved in favor of the defendant.

We do not think the charge is upon the weight of the evidence; but the same is not drawn as we understand the law to be, and clearly appellant's criticism is correct, wherein he says the court should have told the jury the defendant could not be guilty of any higher offense than assault to murder, if he was not the complete cause of the death of the deceased. The court should have charged articles 651 and 652 of the Penal Code of 1895. The court, after charging said articles, should have applied the law to the facts of the case, and told the jury that unless the deceased died from some gross neglect or manifest improper conduct of the person injured, or treatment of the deceased at the hands of the doctors, appellant would be guilty of some degree of homicide as defined in the charge; but if the gross neglect or manifest improper treatment of the physicians, or his own neglect, caused the death of deceased, or if the jury have a reasonable doubt of these facts, they should find the defendant not guilty of any degree of culpable homicide, but should then consider whether he is guilty of assault with intent to murder or aggravated assault. Then the charge should proceed, as it did, to define these offenses. But if the jury should believe that the acts of appellant were the direct cause of the death of deceased, and there was no improper treatment or neglect on his part or that of the doctor, then the jury would consider as to whether the defendant was guilty

of some degree of culpable homicide. In other words, the defendant cannot be convicted of a homicide unless his act, agency, procurement, or culpable omission caused same. If the deceased is negligent in caring for himself after receiving injury, or if his physicians or others so grossly mistreat him as to cause his death, then the defendant is not responsible, under the law of this state, for the death of the deceased. The charge nowhere tells the jury what the defendant would be guilty of if deceased, through his own gross neglect, or his physicians', caused deceased's death; but the charge merely tells the jury that, if defendant's act did not kill deceased, he would not be guilty of homicide, and does not state what grade of offense he would be guilty of if he did not commit the homicide. See *Morgan v. State*, 16 Tex. App. 503. It follows, therefore, that the court's charge is erroneous, as is insisted upon by appellant.

Various criticisms are made of the court's charge and of the argument of the prosecuting attorney. Many of these arguments were not proper. In view of the reversal of the case on another matter, we do not deem it necessary to comment on same.

For the error discussed, the judgment is reversed, and the cause remanded.

RAMSEY, J., absent.

HARVILLE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1908.)

1. CRIMINAL LAW (§ 752½*)—DISMISSAL OF PROSECUTION.

Where, on motion of one of two persons jointly indicted, a severance had been granted, and he placed on trial first, and a motion to quash as against the other accused had been overruled, the district attorney could dismiss the case as against such other accused after the jury had been impaneled to try the first.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 752½.*]

2. WITNESSES (§ 114*)—COMPETENCY—ACCOMPLICES.

The prosecution being dismissed as to one of two jointly indicted, the district attorney might properly tender her as a witness to the accused on trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 487; Dec. Dig. § 114.*]

3. WITNESSES (§ 896*)—IMPEACHMENT—EVIDENCE IN REBUTTAL.

Where a prosecuting witness is shown by accused, on cross-examination of another witness, to have made statements out of court differing from his testimony at the trial, testimony of a witness for the state as to what the prosecuting witness had told him of the transaction is admissible, though accused was not present and the prosecuting witness was able to testify himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1261-1264; Dec. Dig. § 396.*]

4. WITNESSES (§ 54*)—EXAMINATION—QUESTIONS FORCING WIFE TO TESTIFY AGAINST HUSBAND.

In an incest case, a question asked a witness whether he had ever heard accused or any member of his family deny that the other party to the offense was accused's stepdaughter, the daughter of his wife, was improper, as indirectly forcing accused's wife to testify against him; she being a member of his family.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 54.*]

5. INCEST (§ 14*)—EVIDENCE—RELATIONSHIP OF PARTIES—VALIDITY OF MARRIAGE—DEATH OF PREVIOUS HUSBAND.

In a prosecution for incest alleged to have been committed with the daughter of accused's wife by a former husband, divorce from or death of the first husband before the wife's second marriage being essential to conviction, affirmative proof is necessary, and the statement by a witness that he understood that the former husband was dead was inadmissible.

[Ed. Note.—For other cases, see Incest, Dec. Dig. § 14.*]

6. CRIMINAL LAW (§ 721½*)—TRIAL—CONDUCT OF PROSECUTOR—IMPROPER ARGUMENT.

Calling attention to the fact that accused had not called as a witness one jointly indicted with him, but against whom the prosecution had been dismissed, and asking the jury to consider the fact as a strong circumstance showing accused's guilt, is improper argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. § 721½.*]

Appeal from District Court, Red River County; Ben H. Denton, Judge.

Frank Harville was convicted of incest, and he appeals. Reversed and remanded.

S. W. Harman and W. W. Johnson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of incest, and his punishment assessed at imprisonment in the penitentiary for five years.

Appellant and Lela May Brotherton were jointly indicted for incest. Appellant asked for severance and was placed on trial. The case against Lela May Brotherton was dismissed. The facts in substance show that appellant and Lela May Brotherton were seen to leave the public road and go out into the river bottom by the prosecuting witness. His statement of the facts is as follows: "After they passed me there was some tree tops that had fallen, and the leaves were still green on the trees, and that put them out of my sight; and when I could see them again they were out of the buggy, and she walked up against a sapling, or pretty close to a sapling, and he pulled up her clothes, and it looked to me like, the best I could see, that he pulled out his male organ. I don't know that he had it out, only from the action that he made from that part of his body. After he went through those actions, as if taking out his organ, he went right up against her, the best I could tell about it, and placed the lower part of his body against the part of her body where the female organ would be,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and after he got in that position he was in motion like having intercourse with her. That is all I could say. Her clothes were still up at this time. I think I was some 50 or 60 yards from them; could have been closer or further. There was nothing between me and them to obstruct my view. Of course, it was heavy timber, but no undergrowth at that place. It was not very long that I saw him continue these motions. I think she saw me. It looked like she pushed him away from her, the best I could tell, and then she got in the buggy and just as quick as he could get himself in shape, from the way he was acting, he got in the buggy. His back was to me, and he was standing up, and he just bent himself over this way, and it seemed to me that he was working with his organ, and as quick as he could do that he got in the buggy and drove away, not very fast. Neither one of them took off their hats while I saw them. Frank Harville's back was to me at the time they were out of the buggy. It was not all the time. When they got out of the buggy, they were going from me, and of course his back was to me. I was something like 50 or 60 yards from them. I could not tell whether he had his privates out; only just from the actions led me to believe that he did. I never saw them. I never saw his pants unbuttoned, I just saw him acting like he was unbuttoning his pants. I could not say how much taller Frank is than the woman, because I have not measured them. The place that I saw them was supposed to be reasonably level ground. They were both standing up. The woman was some lower than the man, there may be a foot difference. I have not measured them. I don't know."

Bill No. 1 shows that after the jury was impaneled and the indictment read to them, but before introducing any testimony in the above case, the state, through her district attorney, asked the court to dismiss the case against Lela May Brotherton, who was indicted jointly with the defendant, and tendered the said Lela May Brotherton to the defendant as a witness in his behalf. Defendant objected to the dismissal of the case against Lela May Brotherton, because there was one case already pending before the court, and the jury impaneled in the trial of this case, and the court could not act upon another case at the same time; that there has been a motion to sever, and defendant's motion made before the court to quash the indictment against this party, and the court has seen fit to overrule both of those motions, and counsel for appellant asked a severance in the case, the court having forced them to ask for a severance by refusing to dismiss the case against her; because it is indirect allusion to a defendant's testimony before the jury in the case; because she is a defendant, and the counsel says that he tenders her to counsel for appellant as a witness, she being one of the defendants, who is charged in

this case; and because it is an allusion to the defendant's right to testify or failure to testify. The bill is approved with this explanation: "That the defendant had filed a motion to sever, and it had been granted, and he was placed on trial first on his own motion." There was no error in the ruling of the court. Where two parties are jointly indicted, the district attorney, for proper cause and showing, can dismiss the case. There being no prosecution, it is not amiss to tender him or her to the appellant as a witness, if the appellant desires to use him.

Bill No. 2 shows that the district attorney asked O. M. Tubbs the following question, to wit: "When you first met Rosson in here on the day of the election, two years ago, I will ask you what he then told you as to who it was that he saw in this attitude down there on the creek?" Defendant objected to the question, because they have no right to prove what the witness said to other people in the absence of this defendant, when that witness is present to testify in the case. The objection was on the ground of hearsay. The district attorney then asked: "I will ask if it is not a fact that he told you about this when he first came into town, or soon after he got into town? A. Well, I do not know that it was soon after he got here. It was not very long. I never saw Mr. Criner until the next day. Mr. Rosson told me then that he thought that he knew this party by sight." The court appends this explanation: "The Court of Criminal Appeals will see, upon examination of the facts, that the defendant, upon cross-examination of Jno. Criner, proved that the witness had made different statements out of the court to what he did on the trial, and for this reason this testimony was admitted." Under the explanation of the court the ruling is correct.

Bill No. 3 shows that the state's attorney propounded to J. W. Westerman the following questions: "Now, did you ever hear Frank Harville or any member of his family deny this being the stepdaughter—daughter of his wife?" Defendant objected on the ground that same is hearsay, immaterial, and not pertinent to the issue in this case. This testimony should not have been admitted. It is indirectly forcing the wife to testify against the husband, since she certainly was a member of appellant's family. The state, under this statement, is permitted to prove that the wife never denied the fact that her daughter was appellant's stepdaughter.

Bill of exceptions No. 4 shows the state's counsel proved the following by J. W. Westerman: "Do you know the general understanding as to where Mrs. Brotherton's first husband died, and when he died?" Defendant objected to the question, because it would be hearsay. The court overruled the objection. The witness answered that "he was understood to be dead. I have heard Mrs. Harville state that he was dead." The defendant objected to any statement made

by Mrs. Harville, because no statement made by the wife is admissible against the husband. All of which objections were overruled. The witness continued to answer as follows: "He died over at Mt. Vernon. Some fellow killed him. Mr. Harville has been living down in that country about ten years. I did not know Mrs. Brotherton before she married Mr. Harville." This bill is approved with this explanation: "No objection was made to the first answer in the bill; that is, 'I have heard Mrs. Harville state that he was dead.'" In the case of *McGrew v. State*, 13 Tex. App. 342, appears the following language: "Nowhere, however, is it made to appear that at the time of the second marriage the first had been annulled, either by divorce or by the death of the first husband. Upon this point the only evidence in the record is a statement in the testimony of Ann McGrew to the effect that 'my first husband died in Grimes county, as I understand.' From this statement it is extremely uncertain that the first husband is dead; and, if dead, did he die before or after her second marriage? If after, then the second marriage was a nullity, provided she had not been divorced from him, and she could not become the lawful wife of McGrew by virtue of such illegal marriage. If she was not his lawful wife, then the illicit connection of McGrew with her daughter by the previous marriage, however reprehensible in morals, would not constitute the crime of incest in law. Divorce from or the death of the first husband at the time of the second marriage should have been proven affirmatively, because absolutely essential to the establishment of the crime charged, and to the validity of a conviction under the circumstances stated." Clearly, under this authority, the ruling of the court was erroneous in permitting the witness to state that he understood that her former husband was dead.

Bill No. 5 complains that the district attorney commented upon the fact that appellant did not put Lela May Brotherton upon the stand, she having been indicted conjointly with her stepfather, the appellant, for the crime that appellant was being tried for, the district attorney having previously dismissed the case against her, and that the district attorney in his speech called on the jury to consider appellant's failure to put her on the stand, she being in attendance upon the trial, because it was a strong circumstance to show that he was guilty. The court appends to the bill the statement that no written charge was requested by appellant to be given to the jury to disregard such remarks. Upon another trial this argument should not be indulged.

For the errors pointed out, the judgment is reversed, and the cause remanded.

RAMSEY, J., absent.

VANHOOSER v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1908.)

1. ASSAULT AND BATTERY (§ 96*)—ASSAULT—INSTRUCTIONS.

The defense's testimony on a prosecution for assault on C., suggesting that there was no conspiracy between defendant and his son, but that all defendant did was in a peaceable manner after the son started the difficulty, defendant was entitled to an instruction that if he saw C. draw a knife and attempt to use it on the son, and did not go on the premises to raise a difficulty, and knew nothing of the son's intention to attack C., and all he did was to take the knife from C., he was not guilty.

[Ed. Note.—For other cases, see *Assault and Battery*, Dec. Dig. § 96.*]

2. WITNESSES (§ 303*)—IMPEACHMENT.

It being a circumstance indicating that there had been a previous understanding and agreement of an unlawful character between defendant and his son, if the son anticipated there would be trouble with C. at his house, and therefore followed his father there, it was permissible to impeach his testimony that he did not anticipate it by proving his contrary statements in justice court.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1252-1257; Dec. Dig. § 303.*]

3. CRIMINAL LAW (§ 304*)—RES GESTÆ.

It being the state's theory that defendant and his son were acting together, in which case he would be equally guilty with the son, it may be shown that the son, after his assault on C. in the house, ran him out of the house and chased him; this being part of the *res gestæ*, and it being a continuous fight.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 810; Dec. Dig. § 364.*]

4. CRIMINAL LAW (§ 364*)—RES GESTÆ.

Conspiracy between defendant and his son being asserted by the state on a prosecution for assault on C., testimony that just before the difficulty the son came and remarked to C., "C., I hear you are a bad man," and immediately assaulted him, and, on C. denying any claim to being a bad man, said, "It makes no difference; * * * they say you are a bad man," is admissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 810, 813; Dec. Dig. § 364.*]

5. CRIMINAL LAW (§ 364*)—RES GESTÆ.

Evidence that, after defendant's son and C. had gone away, defendant put his fist in the face of C.'s wife and otherwise used violence and insulting language to her, is not admissible as part of the *res gestæ* on a prosecution for assault on C., if the difficulty had then ended, though it was claimed defendant and his son were acting together.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 804, 816, 817; Dec. Dig. § 364.*]

6. CRIMINAL LAW (§ 364*)—RES GESTÆ.

Evidence that, during the fight between C. and defendant's son, defendant hit C.'s wife, is admissible as part of the *res gestæ* on a prosecution for assault on C.; it being claimed defendant and his son were acting together, and the evidence showing they were all mixed up in a general row.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 810; Dec. Dig. § 364.*]

7. ASSAULT AND BATTERY (§ 88*)—EVIDENCE—THREATS.

Testimony that C. sold his crop for less than it was worth, because advised that de-

defendant would kill him if he remained on the place, is admissible on a prosecution for assault on C.; threats prior to a difficulty being always admissible.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 128; Dec. Dig. § 83.*]

8. ASSAULT AND BATTERY (§ 83*)—EVIDENCE—RELEVANCY.

Evidence that defendant and his son sometimes swear is irrelevant on a prosecution for assault, on which it is claimed defendant and his son acted together.

[Ed. Note.—For other cases, see Assault and Battery, Dec. Dig. § 83.*]

Appeal from Jack County Court; Sil Stark, Judge.

John Vanhooser appeals from a conviction. Reversed and remanded.

Nicholson & Fitzgerald, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault upon Jess Calihan, and his punishment assessed at a fine of \$25.

Jess Calihan was renting land from appellant. Appellant became dissatisfied with his tenancy and intended to make an effort through the courts to dispossess Calihan of the place so rented. Prior to doing so, however, appellant, in company with his wife and one Jap Hill, went to Calihan's house with a wagon load of household effects, with a buggy trailing to the wagon. Appellant walked to the edge of the porch of the house occupied by Calihan, and asked Calihan if the door to the room which contained his things was locked, and he told him it was. Witness further testifies: "He then asked me to open it, as he wished to get some things out of the room. I got up and went into the house, got the key, went through the room, and opened the door. When I opened the door, defendant came into the house, and then I saw Vester Vanhooser come into the house, and as he reached the door he remarked to me, 'Calihan, they tell me you are a bad man.' I said, 'No, I don't fess to be a bad man.' Vester Vanhooser then grabbed my shirt collar and tore my shirt. I told him that I did not want any trouble, and begged him not to bother me; but he kept on fighting me, and said 'It makes no difference; they tell me you are a bad man, and I am a bad man, too.' About this time the defendant run in and took my knife out of my pocket. My wife had hold of defendant, and Vester Vanhooser had hold of my arms, holding me with his arms around my shoulders. I was standing by the side of the door facing that leads into the room in which me and my wife had our bed, and when defendant got my knife he turned me loose, and my wife grabbed hold of Vester Vanhooser, and we scuffled until we went into our room and fell across the bed. Vester Vanhooser was on top of me, and my wife had hold of him, trying to get him loose from me, and while

we were on the bed in this shape Vester called for some one to take the woman away, saying that he would fix the bad man. I was begging all the time for them not to hurt me. Defendant started to pull off my wife; but Jap Hill stopped him, and told him to stand back. Finally we scuffled to the edge of the bed, and Jap Hill caught hold of me and pulled me up and away from Vester Vanhooser, and I told Jap Hill to let me go. He asked me if I would run if he would let me go, and I said I would, and he turned me loose, and I run out of the house, and Jap Hill and Vester Vanhooser went out after me; Vester Vanhooser trying to catch me. I ran out, and jumped over the fence, and went off to my father-in-law's house." The above is the state's case. The defense's evidence shows that appellant took the knife out of the prosecuting witness' hand. In addition to the above testimony for the state, the evidence clearly suggests that the father and son were acting together in the assault upon Calihan. Whether this be true or not is a question of fact for the jury. The defense denies this.

The record does not contain any general charge of the court. We therefore presume that, if any charge was given by the court, it was a verbal one. Appellant asked the court to instruct the jury as follows: "You are instructed that if you find and believe from the evidence in this case that John Vanhooser, upon or about the 25th day of March, 1906, at his place in Jack county, Texas, saw Jess Calihan draw a knife from his pocket and attempt to use the same on Vester Vanhooser, the son of defendant, and you further find that defendant did not go on said premises for the purpose of raising a difficulty, and knew nothing of any intention on the part of Vester Vanhooser to unlawfully attack Jess Calihan, and you further find and believe that all the defendant, John Vanhooser, did on said date was to take away from Jess Calihan said knife, you will find defendant not guilty." The defense's testimony suggests that there was no conspiracy or acting together on the part of father and son whatever, and that all appellant did was to go in a peaceable manner after some household effects, and the son started the difficulty. If this is true, and all appellant did was to take the knife away from the party who was attempting to cut his son, certainly he would not be guilty of any offense, and the court should have so charged.

Bill of exceptions No. 1 shows that the state propounded the question to Vester Vanhooser and he answered as follows: That he did not swear that he turned around and went back to the premises where the fight between himself and Jess Calihan occurred, and did not go on to feed his steers; that the reason he went back was because he anticipated some trouble. Bill No. 2 shows

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the state proved by G. R. Moore that Vester Vanhooser did swear in the justice court that he met the prosecuting witness, Jess Callihan, and his wife, between the John Vanhooser place and Baker's; that he turned and went back because he was expecting some trouble. This testimony, as embodied in the two bills, was admissible. If Vester Vanhooser was anticipating trouble, it is a circumstance to indicate that there had been a previous understanding and agreement of unlawful character between himself and his father, and it is permissible to impeach his testimony, indicating that he did not so understand, by proving contrary statements made in the justice court.

Bill No. 5 shows the state was permitted to prove by Jess Callihan that on the occasion in question Vester Vanhooser assaulted him and ran him out of his house and chased him over the fence. This testimony was part of the *res gestæ*. It was one continued fight. Of course, appellant, if not participating in same, under a proper charge of the court, would not be convicted by the jury; but the state's theory was and is that he and his son were acting together. If they were, he would be equally guilty with his son.

Bill No. 6 shows that the state proved by Mrs. Vina Callihan that just prior to the difficulty Vester Vanhooser came in at the door and remarked to her husband, "Callihan I hear that you are a bad man," and immediately assaulted him by taking hold of his shirt collar, and further, "It makes no difference, by God; they say you are a bad man." This testimony was also part of the *res gestæ*.

Bill No. 7 shows the state proved by Vina Callihan that, after Jess Callihan and Vester Vanhooser had left the house and place, the defendant, John Vanhooser, popped his fist in her face and said, "What are you acting a God damn fool about this place for?" Appellant objected, for the reason that said testimony was not relevant and material to the state's charge in this case, and no part of the *res gestæ*. Certainly, if the difficulty had ended, and appellant used the insulting language to the prosecuting witness' wife as contained in this bill, it would not be a part of the *res gestæ*, and ought not to be admitted.

Bill No. 8 shows that Vina Callihan was permitted to testify that during the fight between her husband and Vester Vanhooser the defendant hit her in her side. Certainly, if defendant hit Callihan's wife in the side during the fight between Vester Vanhooser and the prosecuting witness, Jess Callihan, this testimony would be admissible as part of the *res gestæ*, since the evidence shows they were all mixed up in a general row.

Bill No. 10 shows that the state was permitted to prove by Jess Callihan that he sold

his crop for less than it was worth, because he was advised that defendant would kill him if he remained on the place. This testimony was admissible. Threats prior to the time a difficulty occurs are always admissible.

Bill No. 11 shows that Vina Callihan, while on the stand, testified that, after Jess Callihan and Vester Vanhooser had run away from the place, John Vanhooser, appellant, caught hold of her and shook her until her dress fell off of her in the floor, and that she went away from the place without any dress on. As stated above, if the difficulty between appellant's son and Jess Callihan had ended, and appellant used any violence to the person of Callihan's wife, this testimony would not be admissible in the trial of the case for assault on Callihan prior to said time. Of course, if it occurred contemporaneous with the assault on Callihan, it would be admissible.

Bill No. 12 shows the state proved by Vester Vanhooser that he and his father sometimes swear. We see no relevancy of this testimony in the trial of the case for assaulting Callihan.

For the errors pointed out, the judgment is reversed, and the cause remanded.

RAMSEY, J., absent.

ASKEW v. STATE.

(Court of Criminal Appeals of Texas. Oct. 28, 1908.)

1. CRIMINAL LAW (§ 1115*)—APPEAL—BILL OF EXCEPTIONS—QUESTIONS REVIEWABLE.

A bill of exceptions, so framed as not to show whether the district attorney or counsel for accused first opened on the examination of jurors the question whether they had heard of the previous trials of the case, one of which resulted in a hung jury, fails to present for review the question whether the district attorney erred in making such inquiries from the jurors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2927; Dec. Dig. § 1115.*]

2. CRIMINAL LAW (§ 1171*)—TRIAL—MISCONDUCT OF DISTRICT ATTORNEY.

The misconduct of the district attorney, when his questions to accused on cross-examination as to whether absent witnesses had not on a previous trial testified that he shot decedent were excluded, in arguing to the jury that such absent witnesses had testified on a former trial that accused shot decedent, was reversible error, where the court refused to withdraw the remarks from the jury and instruct them not to consider them.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1171.*]

Appeal from District Court, Hopkins County; R. L. Porter, Judge.

Frank Askew was convicted of murder, and he appeals. Reversed and remanded.

C. E. Sheppard, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. This is the second appeal of this case; the former appeal being found in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

47 Tex. Cr. R. 362, 83 S. W. 706. It is there reported as *Frank Asken v. State*. The evidence on the trial which resulted in this conviction is different, to a very considerable extent, from that on the former appeal. Quite a number of criticisms are urged against the charge in regard to manslaughter and self-defense. A careful review of these charges we think, sufficiently present the law of the case, so that appellant was not injured.

Exception was reserved to the manner of examining the jurors on their voir dire by the district attorney. The particular point is that the district attorney asked them if they had heard the previous trials, one of which resulted in a hung jury. In his qualification the district judge says that the defendant's counsel asked many questions of the jurors in regard to their knowledge of the former trials. The bill is so framed that it is practically impossible for this court to understand exactly who brought about these questions. If the defendant's attorney first opened up the matter in his examination of the jurors, he cannot complain. If the district attorney did so, then, of course, defendant had the right to probe that matter. So we say, as the bill is presented, it leaves us in doubt as to who first interrogated the jurors. Examination of the qualification of jurors can be ascertained without allusion to former trials.

Appellant reserved two bills of exceptions in regard to the conduct of the district attorney. The first relates to his manner of examining the defendant while testifying in his own behalf. The bill recites that the district attorney questioned the defendant as follows: "Walter and Arthur Lewis, who testified upon the former trial of this case, were cousins of yours, were they not?" To which the defendant replied, "Yes. Q. You were here in court, and heard them testify against you at a former trial of this case? A. Yes, sir. Q. Is it not a fact that they, your cousins, each testified upon a former trial of this case in this court in your presence and hearing that you shot the deceased in the back while he was running from you, and did they not also testify that after the shooting that you cut your own clothes and hat and then took the knife and put it down by the deceased's hand? And is it not a fact that you heard Walter Lewis and Arthur Lewis both testify upon the former trial of this case to all of these facts?" Appellant urged various objections, which were sustained by the court in so far as answers were concerned. The further exception was reserved that it was material error to permit the district attorney to ask such questions. The other bill refers to the same subject-matter, and came out in the district attorney's argument as follows: "If the defendant's counsel are so honest and are always so fair in their cases, and if they wanted you to know the whole truth, and wanted to be fair in this case, why

did they object to the defendant testifying as to what his cousins, Walter and Arthur Lewis, had testified to upon a former trial of this case, as to his having cut his own clothes and hat, and then putting the knife down by the hand of the deceased after so doing; and if they are so honest, why were they not willing for all the facts to be known to you, and why did they object to this defendant telling you as to what his own cousins had testified to as to how he shot and killed the deceased and what he did after he so shot and killed him?"

Various objections were urged to this argument, among other things, that it was improper, prejudicial, and calculated to inflame the minds of the jury against the defendant, and was a discussion of facts not admitted in evidence by the court and that had been by the rulings of the court rejected as evidence. The court explains this bill by stating that the defendant's counsel in their arguments to the jury had stated that the district attorney objected to certain evidence offered by defendant, but so far as they were concerned they were willing to turn on the light and let everything in; that they wanted to be fair and honest with the jury, and desired that they know everything in connection with the whole case, and the above remarks complained of by the defendant were provoked by the argument of defendant's counsel. What these remarks were of defendant's counsel is not shown; but by reference to another bill in regard to the absence of a witness named McLure, whose testimony they sought to have reproduced before the jury, we are led to believe that defendant's counsel referred to the action of the court in refusing to permit them to introduce McLure's testimony stenographically reported. Be this as it may, the two bills reserved by appellant to the examination of the defendant in regard to what the two absent witnesses, his cousins, had stated on a previous trial in connection with the statement by the district attorney as to what they would have sworn, constitutes such error and injury as should cause this judgment to be reversed. There was a direct reference and statement to the fact that there had been a former trial. There was an attempt to get before the jury the testimony of the two absent witnesses, relatives of appellant, showing that he had manufactured a defense, which was refused by the court, but placed before the jury by the statements of the district attorney over the rulings of the court. The court was requested to withdraw these remarks from the jury and instruct them not to consider same, but this was refused by the court. The statements of the district attorney to the jury as to what these witnesses would have sworn was clearly outside of the record, was not justified as evidence, and if it had been admitted through the mouth of the witness with objections reserved, it would have been clearly reversible error. Certainly it would not

take any reasoning to show that it would be error for a district attorney to state as facts before a jury such matters as he could not and would not be permitted to introduce as evidence. This court has been a little cautious about reversing cases on arguments, but the court has not considered it right to affirm cases in the face of such arguments and statements as detailed in this bill of exceptions. If the prosecution will continue to transgress legal rules in trials of cases, it will force this court to reverse judgments of conviction. Accused parties are entitled to fair trial.

The judgment is reversed, and the cause is remanded.

RAMSEY, J., absent.

SMITH v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1908. Rehearing Denied Oct. 21, 1908.)

1. STATUTES (§ 71*)—"GENERAL LAWS."

Under Const. art. 3, § 56, prohibiting local or special laws as to certain enumerated matters and in other cases where a general law can be made applicable, a general law need not be one general to the extent that it has a uniform operation throughout the state, but simply that in its nature and character it should apply equally to all persons within the territorial limits describing it, and is one whose operation is equal in its effect on all persons or things on which the law is designed to operate at all.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 70-76; Dec. Dig. § 71.*

For other definitions, see Words and Phrases, vol. 4, pp. 3063-3071; vol. 8, pp. 7669, 7670.]

2. STATUTES (§ 77*)—"SPECIAL LAWS."

A statute which relates to particular persons or things of a class is special, and comes within the Const. art. 3, § 56, prohibiting special laws as to certain matters and in other cases where a general law can be made applicable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79-82, 95; Dec. Dig. § 77.*

For other definitions, see Words and Phrases, vol. 7, pp. 6577-6584; vol. 8, p. 7802.]

3. STATUTES (§ 85*)—"LOCAL LAWS"—"GENERAL LAW."

Acts 30th Leg. (Laws 1907, p. 269, c. 139) providing for the drawing of jurors in counties having a city or cities containing a population aggregating 30,000 or more according to a census, is a general law within the Const. art. 3, § 56, prohibiting the passage of any local or special law regulating the summoning of jurors, though the act contains no clause authorizing other cities to come within its provisions, and though the act differs from the jury law applicable to the rest of the state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 94; Dec. Dig. § 85.*]

Davidson, P. J., dissenting.

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

Bob Smith was convicted of murder in the first degree, and he appeals. Affirmed.

A. S. Baskett, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death.

There is no statement of facts in the record. In the absence of statement of facts, none of the bills of exception can be considered save and except bill of exceptions No. 1. This bill presents the constitutionality of the law authorizing the organization of juries by drawing their names from a wheel, which law was passed by the Thirtieth Legislature (Laws 1907, p. 269, c. 139); appellant insisting that said law is a local or special law. However, in deference to the fact that this question is presented to this court for adjudication in various cases, we will state what we deem all of the objections to said law as urged in each of the cases in passing upon the validity thereof in this case.

The following are the objections to the constitutionality of said act:

"(1) Said act of the Thirtieth Legislature under which same was drawn is unconstitutional and void. The ground of said motion in support of the unconstitutionality of said law being, in substance, as follows:

"(2) That said act of the Legislature was a special law, and violative of section 56, art. 3, of the Constitution, which inhibits the enactment of any local or special law touching the summoning or impaneling of grand and petit jurors.

"(3) That said law is unconstitutional, in that the names of jurors for jury duty are listed for a period of two years, and excludes from jury duty all other qualified jurors who may become of age or acquire the right to serve upon the jury, and denies to the litigant the right to select his triors from the qualified jurors of the county, and further exempts from jury duty in capital cases all qualified jurors who have served as much as four days within said two years provided by said law.

"(4) That said law is further unconstitutional, in that it is discriminatory, and made applicable only to counties having cities aggregating 20,000 in population according to the census of 1900, and thereby limits and restricts the operation of said law to counties of a class, and excludes from the operation of said law counties as a class that may hereafter or now have cities aggregating twenty thousand in population. Said law limits its operation to said counties possessing said qualifications named, and the census of 1900 excludes all others and applies to them a different law. * * *

"(5) Said law is further unconstitutional, in that it repeals the existing jury law as to such counties having cities aggregating twenty thousand population under the census of 1900, and otherwise leaves that law operative in all other counties. That said partial repeal is unconstitutional and void, and, further, said law revives the repealed law

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

under the contingencies provided in said act, and, further, under said act delegates to the judge within said counties where said law is operative the discriminatory power under the conditions in said law named, to suspend the act of the Thirtieth Legislature and revive the old law as to such judge or court, and said law is violative of section 56, art. 3, of the Constitution, and section 28 of the Bill of Rights.

"(6) That said act is not in accordance with due process of the law of the land, and is violative of section 19 of the Bill of Rights.

"(7) That said law is not equal and uniform, and is discriminatory, and is violative of the Constitution of the United States in section 1, art. 14, thereof."

To support appellant's contention under the above grounds to quash the venire, he cites us to section 56, art. 3, Const., which provides: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing 'the summoning or impaneling of grand or petit juries.'" Section 56 of article 3 of the Constitution of this state reads as follows: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing—First, the creation, extension or impairing of liens; regulating the affairs of counties, cities, towns, wards or school districts," etc., and then, among other things, "summoning or impaneling grand or petit juries." Various other matters and things are enumerated, and the Legislature inhibited from passing any special or local law applicable to any of said things. Then immediately follows this clause: "And in all cases where a general law can be made applicable, no local or special law shall be enacted." Then section 56, art. 3, Const., reads as follows: "No local or special law shall be passed, unless notice of the intention to apply therefor, shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the Legislature of such bill and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the Legislature before such act shall be passed."

Under this last cited article of the Constitution, various special laws have been passed. It will be noticed from the terms of the last cited section that the same to a large extent defines what a local or special law is, in that it stipulates that notice of the intention to apply therefore shall have been published in the locality where the matter or thing to be affected may be situated. If one, therefore, proposes to legislate on a matter or particular thing, then it is under the terms of this section of the Constitution a local or special law; but, if the legislation applies equally to all persons

within the territorial limits describing it, it becomes a general, as contradistinguished from a special, law. *Cordova v. State*, 6 Tex. App. 206; *Davis v. State*, 2 Tex. App. 430. In the case of *Lastro v. State*, 3 Tex. App. 363, this court held that the stock law of 1876 was not a local law because it exempted many counties. Nor is an act changing and fixing the term of the district courts a local law. See *Cordova v. State*, supra. In the case of *Cox v. State*, 8 Tex. App. 255, 34 Am. Rep. 746, and others, the insistence was made that an act prescribing the time for holding the district court in the Twenty-Second judicial district was unconstitutional on the ground that same is a local law, and not a general law. After quoting from the case of *Orr v. Rhine*, in 45 Tex. 345, this court then proceeds to discuss the question in the following language: "Turning to the Constitution, we find enumerated in the fifty-sixth section of article 3 the subjects upon which the Legislature is restricted from passing any local or special laws, and laws changing the times of and terms for holding courts are not mentioned amongst the subjects therein prohibited. If such laws are at all embraced in that section, it can only be under the general language of the last paragraph, where it is declared that 'in all other cases where a general law can be made applicable no local or special law shall be enacted.' Section 56, art. 3, provides for and prescribes the rules to be observed and the forms necessary to be followed in all cases where local or special laws are desired and their passage is expressly prohibited, unless these forms are pursued. We take it that this latter section (56) relates more especially to that class of legislation which seeks the adjudication of private matters, in which the general public is not supposed to be concerned. Mr. Bouvier defines such acts to be 'those which operate only upon particular persons and private concerns,' whilst he defines general or public acts to be 'those which bind the whole community.' 'Of these,' he says, 'the courts take judicial cognizance.' To our minds it is evident the framers of our Constitution intended by the use of the phrase 'general act,' not that such acts should be general to the extent that they should have a uniform operation throughout the state, but simply that in its nature, character, and passage such law could be enacted, as any general law might be, without going through the forms and complying with the requisites prescribed for local or special laws by the fifty-sixth section of article 3. To illustrate the idea: As we have seen, the seventh section of article 5 expressly says: 'The Legislature shall have power by a general act to authorize the holding of special terms of the district court in any county for the dispatch of business.' A special term for such purpose in but one county could not in the nature of things have a uniform operation throughout the state; and it would be

an absurdity to hold that it was necessary in such a case, or could ever have been intended, that the general act by which such a purpose or object might be accomplished should include and embrace within the range and scope of its provisions the 150 or 200 other counties in the state that could have no possible interest in the subject-matter. Technically speaking, an act to hold a special term in a particular county would appear to be both a special and a local law. Doubtless the intention was that in the passage of such an act the same forms were to be observed as in any other ordinary general act, as contradistinguished from those essential to the validity of local or special laws. Any other construction, it seems to us, would make the expression 'general act' not only contradictory of the provision, but unintelligible in its meaning." Further along in said opinion it is stated that: "A general law is one whose operation is equal in its effect upon all persons or things upon which the law is designed to operate at all. All laws operate upon persons or things. Are we, then, to understand that a general law is only one which operates upon all persons or upon all things? If so, it is obvious that our general laws are very few, if, indeed, there are any of that class. Obviously such cannot be the meaning of the words 'of a general nature' as here used. The word 'general' comes from 'genus,' and relates to a whole genus or kind; or, in other words, to a whole class or order. Hence a law which affects a class of persons or things, less than all, may be a general law"—citing *Brooks v. Hyde*, 37 Cal. 366. Then the court goes on, and holds that the act providing for five annual terms in Bexar county was intended to form part of the general machinery to be used in the administration of the laws of the state, affecting equally the whole citizenship of the state which came within its range; and, being such, it cannot be considered either special or local in the view contemplated by the Constitution; citing, among other cases, the case of *Bohl v. State*, 3 Tex. App. 685.

In the case of *Clark v. Finley*, 93 Tex. 171, 54 S. W. 343, Chief Justice Gaines in delivering the opinion of the court says: "A law is not special because it does not apply to all persons or things alike. Indeed, most of our laws apply to some one or more classes of persons or of things and exclude all others. Such are laws as to the rights of infants, married women, corporations, carriers, etc. Indeed, it is perhaps the exception when a statute is found which applies to every person or thing alike. Hence it cannot be that the statute under consideration is special merely because it is made to operate in some counties of the state and not in others. The definition of a general law, as distinguished from a special law, given by the Supreme Court of Pennsylvania in the case of *Wheeler v. Philadelphia*, 77 Pa. 338, and approved

by the Supreme Court of Missouri, is perhaps as accurate as any that has been given. *State v. Tolle*, 71 Mo. 645. The court in the former case say: 'Without entering at large upon the discussion of what is here meant by a "local or special law," it is sufficient to say that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition.' The law in question is applicable to every county of the designated class. Now, we do not propose to be led off into any extended discussion as to what is a proper class for the application of a general law. The tendency of the recent decisions upon the subject, as it seems to us, is to drift into refinements that are rather more specious than profitable. It is said in some of the cases that the classification must be reasonable; in others, that it must not be unreasonable or arbitrary, etc. If it is meant by this that the Legislature cannot evade the prohibition of the Constitution as to special laws by making a law applicable to a pretended class, which is, in fact, no class, we concur in the proposition. Such was the law passed upon in the case of *Commonwealth v. Patton*, 88 Pa. 258. That statute was made applicable to all counties in which there was a population of more than 80,000, and an incorporated city with a population exceeding 8,000, 'situate at a distance from the county seat of more than twenty-seven miles by the usually traveled public road.' There was but one city in the state which came within the pretended class. The court held this a covert attempt at special legislation, and that the act was a nullity. * * * To what class or classes of persons or things a statute should apply is as a general rule a legislative question. When the intent of the Legislature is clear, the policy of the law is a matter which does not concern the courts. A Legislature may reach the conclusion that the compensation of certain officers in certain counties of the state is excessive, while in others it is not more than enough. By the reduction of the fees of office throughout the state they may correct the evil in those in which the compensation is too great, but they would probably inflict a greater evil by making the compensation too small in all the others. In such a case it becomes necessary to make the law applicable to some, and not to all. There must be a classification. That classification may be either by population or by taxable values. One Legislature might do, as the Legislature of Texas did, make the classification by population; another, as was done by the Legislature of Arizona, might make the taxable values of the respective counties the basis of the classification. Shall the courts inquire which is correct? Can they say that the work of an officer is not in some degree proportionate to the population of his coun-

ty? On the other hand, can they say that, the more the property of a county, the more the crime? To ask these questions is to make it apparent that they are questions of policy, determinable by the political department of the government, and not questions the determination of which by the Legislature is subject to review by the courts. Therefore, should we adopt the rule that, in order to make an act a general law, the classification adopted should be reasonable, we should still be constrained to hold the statute in question a general law, and valid, under our Constitution; for we cannot say that the classification is unreasonable. It may be, as urged in the argument, that there are counties in the class to which the law is made applicable the population of which very slightly exceeds that of other counties which are without it, and that it seems unreasonable to make a discrimination upon so slight a difference. To this the answer is: The line must be drawn somewhere, and that a similar difficulty would probably result if the classification were made upon any other basis. Exact equality in such matters, however desirable, is practically unattainable."

The jury law in this state provides that same shall apply only to counties having cities aggregating twenty thousand in population according to the census of 1900. This is nothing but a rational classification warranted by the Constitution, and is not a local or special law within the contemplation of the constitutional clause under consideration. The only difference between the jury law under consideration and the fee bill that was passed on in the *Clark v. Finley* Case, *supra*, is the fact that the jury law makes no provision for counties having the requisite population thereafter to come within its provisions, whereas the fee bill does, but a careful perusal of the *Clark v. Finley* Case will show that the court did not attempt to say nor do they intimate that the opinion of the court in that case was based, as appellant insists, upon the clause authorizing other counties each recurring four years to come within its provisions. In fact, to have so held would have been non sequitur. That is to say, there would have been no rational reason for holding that the fee bill was a general law, and not a special law, because it provided that other counties might come within its provisions each recurring four years. This provision would make it no less a general law, and no more a special law. If appellant's insistence in this case is correct, then the Legislature cannot name a classification and pass a general law that would be constitutional at all. Suppose the jury law had provided that a county having a population of 20,000 according to the census of 1900 should be under its provisions, and counties that thereafter according to each recurring census having a city of said population should be within its provisions, **then we would have had this condition:** For

10 years many counties, or some counties at least, would have a city of said population before the expiration of the 10 years, and yet said counties would not be within the terms of the jury law. The Legislature had a right to use its own yardstick, its own basis for classification, and, as indicated in the *Clark v. Finley* Case, *supra*, it is a matter of legislative, and not of judicial, discretion as to what the classification shall be. If we were to assume to pass on this character of question, we would be usurping the legislative discretion in order to render invalid a statute. The Legislature desired to fix a special mode of selecting juries in certain cities. In order to do so, they had to classify the cities on some basis. We are not apprised of but two bases upon which they could predicate the classification, either the taxable value of the city or the number of people that live within it, and the mere fact that they did not provide that cities hereafter that have said population may come within its provisions is a matter of legislative policy that does not in any degree affect the constitutionality of the act. So to our minds, for all practical purposes, we think the *Clark v. Finley* Case, above cited, is decisive of this question. However, appellant has cited us to a long line of authorities which he claims hold adversely to our decision in the case, as follows: 1 *Lewis' Sutherland on Statutory Construction*, § 200; *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *Dunne v. Kansas City Cable Railway Co.*, 131 Mo. 1, 32 S. W. 641; *State v. Herrmann*, 75 Mo. 354; *State v. Wofford*, 121 Mo. 61, 25 S. W. 851; *State v. County Court*, 89 Mo. 237, 1 S. W. 307; *Smith v. Grayson County*, 18 Tex. Civ. App. 153, 44 S. W. 921; *Young v. State*, 51 Tex. Cr. App. 366, 102 S. W. 118; *Holly v. State*, 14 Tex. App. 514; *Cordova v. State*, 6 Tex. App. 220; *Davis v. State*, 2 Tex. App. 425; *Orr v. Rhine*, 45 Tex. 352; *Cox et al. v. State*, 8 Tex. App. 254, 286, 289, 34 Am. Rep. 746; *Womack v. Womack*, 17 Tex. 1; *Graves v. State*, 6 Tex. Cr. App. 234; *Gonzales County v. Houston* (Tex. Civ. App.) 81 S. W. 118; *Ellis v. Ft. Bend County*, 31 Tex. Civ. App. 596, 74 S. W. 45; *Flewellen v. Ft. Bend County*, 17 Tex. Civ. App. 155, 42 S. W. 775; *Hill County v. Atchison* (Tex. Civ. App.) 49 S. W. 144; *Coombs v. Block*, 130 Mo. 668, 32 S. W. 1139; *Glover v. Melnrath*, 133 Mo. 292, 34 S. W. 72; *McMahon v. Pac. Ex.*, 132 Mo. 641, 34 S. W. 479; *Dallas v. Elec. Co.*, 83 Tex. 243, 18 S. W. 552; 1 *Lewis' Sutherland*, *Con. Stat.* § 203; *Murray v. Bd. Co. Commissioners*, 81 Minn. 359, 84 N. W. 103, 51 L. R. A. 828, 83 Am. St. Rep. 379.

The lateness of this term and the enormous length that an opinion would necessarily reach to take up seriatim all of the authorities that appellant has cited or any of them would make it entirely too long. We candidly concede that the authorities on the question as to what is a special or local law dif-

fer nearly as widely as the number of decisions that have been rendered. We also readily concede that many of the authorities cited by appellant above hold that the act in question is unconstitutional because of the fact that there is no "enabling clause" in the jury law whereby other counties can come within the provisions of said jury law. On the contrary, however, we have found several decisions that combat this position and they appear to us more in consonance with reason, and enunciate more clearly the distinction between a general and a special law than any that appellant has cited above. In the case of *Elkin v. Moir*, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. Rep. 801, the Supreme Court of Pennsylvania held that a statute for the government of cities based upon classification cannot be held unconstitutional as local or special, although it was intended, and the classification made, so as to apply to only a limited number of existing cities; furthermore, that such an act was not unconstitutional because it provides for methods of government and administration different from those required in the other classes, in particulars where there is no real difference, if the classification is made with reference to municipal, and not to irrelevant or wholly local, matters. The court further says that the courts have nothing to do with its wisdom, propriety, or justice, or with the motives which are supposed to have inspired the passage of the act; that it is a matter of legislative and political policy addressed to the discretion of the Legislature. Furthermore, in said case the court, among other things, used the following language in quoting from *Pittsburgh's Petition*, 138 Pa. 401, 21 Atl. 757, 759, 761, as follows: "It was urged that certain sections of the act then in question made the act local 'by fixing dates at which acts necessary to put the government in operation are to be done,' which were possible only to one city, the city of Pittsburgh, and which are impossible to the city of Allegheny, which has come into the class since the act was passed. The reply to this objection is that at the date when the act became a law there was but one city in the second class. The provisions of the act were general in their character. They related to all cities of the second class. If there had been several such cities, the terms employed would have applied to all alike. It was necessary, in order to give effect to the change in the system of municipal government, that a definite time should be fixed upon at which the change should take place and the new system be put in operation. The trouble with the act is not that it made such provisions for cities then entitled to a place in the second class, but that it did not also make similar provisions for cities that should thereafter be entitled to come into the class. We cannot hold, however, that the failure to provide a date for the organization of cities afterwards to come into the class deprives

such cities of the benefit of the law, or renders it local, and so inoperative, in the cities to which it would otherwise be applicable." This authority is one of the most elaborate and best considered decisions that we have had access to, and the last proposition cited therefrom conclusively answers the insistence of appellant that the jury law is unconstitutional because it has no enabling clause whereby other cities may come under the jury law. The court here very explicitly hold that it is a general law, although it applies to certain cities and does not apply to others, nor is it rendered invalid by failing to provide that others may come within the provisions of the law. In the case of *Cook v. State*, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183, the court hold that the Dortch law is not unconstitutional as class legislation by reason of the fact that it is confined in its operation to counties having 70,000 inhabitants and to cities having 9,000 inhabitants computed by the federal census of 1880, or that should have such number of inhabitants by any subsequent federal census. In said case the court holds that the Legislature is the judge of the means to be adopted and their necessity when it comes to classification of cities. That the power to regulate and reform the right of franchise in said cities is in said Legislature. They are presumed to know the conditions and wants of the state.

In the case of *State of Iowa v. Forkner*, 94 Iowa, 1, 62 N. W. 772, 28 L. R. A. 206, the law was held not to be a local or special law that provided for a different mode and method of regulating the sale of whisky for certain cities from that provided in cities of a different class. In the case of *Caven v. Coleman*, 96 S. W. 774, Judge Talbot of the Fifth Court of Civil Appeals of Texas in passing upon the act of the Twenty-fifth Legislature which required every city having underground sewers to create a board for the examination of plumbers with authority to issue licenses to plumbers who would pass a regular examination therefor, and from prohibiting any person from conducting the business of plumbing until he or they shall have passed the required examination, held that said act was constitutional. The rule there in reference to local or special laws is very tersely stated as follows: "We think it well settled that a statute which selects particular individuals from a class and imposes upon them special obligations or burdens from which others in the same class are exempt is unconstitutional; but such is not in our opinion the character of the statute under consideration." In this last cited case we have a statute under consideration held valid by the court wherein it was provided that cities having underground sewers at the time of the passage of the law should have licensed plumbers. There is no provision in the act authorizing other cities to come within its provisions, but the act applies to all cities that then had underground sewerage. This

case, we take it, is also in point on the jury law now under consideration. See, also, *State v. Barrett*, 138 N. C. 630, 50 S. E. 506, 1 L. R. A. (N. S.) 626. In the case of *Douglas v. People*, 225 Ill. 536, 80 N. E. 341, 8 L. R. A. (N. S.) 1116, 116 Am. St. Rep. 162, the court held that a law requiring all engaged in the plumbing business in municipalities containing more than 5,000 inhabitants to procure a license, and requiring the appointment of a board of examiners in those of more than 10,000 inhabitants, is not an arbitrary classification, so as to render the statute invalid; that a statute requiring the procurement of a license by persons working at the business of plumbing in municipalities of more than 5,000 inhabitants throughout the state is not invalid as special legislation. Further commenting upon the question, the court says: "The general rule is that a classification of the cities, towns, and villages of the state by population as a basis for legislation may be made if such classification is based upon a rational difference of situation or condition found in the municipalities placed in the different classes; otherwise legislation based upon such classification will not be sustained." They hold that there is a clear and rational difference in the situation or circumstances so far as the plumbing business and appointment of a board of examiners of plumbers is concerned in cities of 10,000 inhabitants or more.

It is also urged that the act is not general in terms, and does not apply to all persons in the state alike, and for that reason it is class or special legislation. "The act does apply uniformly to the persons engaged in or working at the business of plumbing as master plumbers, employing plumbers, or journeymen plumbers in the several classes of cities, towns, and villages created by the act throughout the state, and we think, therefore, it is not subject to the criticism of want of uniformity in its application. A law is said to be general and uniform, not because it operates upon every person in the state alike, but because it operates alike upon every person in the state who is brought within the conditions and circumstances prescribed by the law. *Steed v. Edgar County*, 223 Ill. 187, 79 N. E. 123. In *Meyer v. Hazelwood*, 116 Ill. 319, 6 N. E. 480, it was said: "Laws are general and uniform, and hence not obnoxious to the objection that they are local or special, when they are general and uniform in the operation upon all in like situation." So we have in this case a uniform application of the jury law to all cities that come within its operation. It is a law in which the public at large have an interest in its enforcement and in its passage, in that there is a congested condition of population in the larger cities that to the legislative wisdom suggested that a different mode and method of selecting juries for said large congested centers should apply to the jury than that which applies throughout the balance of

the state. To ask the question as to whether or not a different condition exists is to suggest a governmental policy which, of course, addresses itself to the sound discretion of the Legislature, and not to the courts. This law applies to all of the people of the county where the city of the population named is located and is uniform upon each. In the case of *Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199, the court had under review the law to provide for the re-establishment of lost record titles to real estate. This is a case from the Supreme Court of California in which their Constitution in reference to the exception of certain things from special legislation is very similar to the exceptions in our own Constitution. They hold that said act is constitutional, and that it is not necessary that the law shall affect all the people of the state in order that it may be general or that a statute concerning procedure shall be applicable to every action that may be brought in the courts of the state. A statute which affects all the individuals of a class is a general law, while one which relates to particular persons or things of a class is special; citing *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71. The Legislature has the right to enact laws applicable only to one class where the classification is authorized by the Constitution or is based upon intrinsic differences requiring different legislation. A law which operates only upon a class of individuals is none the less a general law. See, also, *Reed v. Rogan*, 94 Tex. 177, 59 S. W. 255. In the last-cited case the principle is laid down that where the public at large have an interest in the matter, and the legislation merely applies to a locality, but affects all who live in said locality, or whose interests may be drawn to same, that the law is a general law, and not a special one. We therefore hold that the jury law passed by the Thirtieth Legislature is in all things constitutional. That it is a general law applicable to all within its provisions, and the fact that it does not have a clause authorizing other cities to come within its provisions, does not render it invalid, nor does the fact that the jury law mentioned by appellant in his objections above stated differ from those of the jury law that applies to the rest of the state in any respect render said law unconstitutional.

There being no other question in appellant's case, in the absence of statement of facts that can be considered, the judgment is in all things affirmed.

DAVIDSON, P. J. (dissenting). Not being able to agree with my Brethren in holding the act of the Thirtieth Legislature a general law, but believing it is a special law, I have thought it proper to file some reasons upon which I base my dissent.

That portion of the act which enters into

this discussion is found in the following language: Section 1. "That between the 1st and 15th day of August, A. D. 1907, and between said dates every two years thereafter, in all counties in this state having a city or cities therein containing a population aggregating twenty thousand (20,000) or more people, as shown by the United States census of the year 1900, the tax collector, or one of his deputies, and the tax assessor, or one of his deputies, and the sheriff, or one of his deputies, and the county clerk, or one of his deputies, shall meet at the courthouse of the county and select from the qualified jurors of the county the jurors for service in the district and county courts in such county for the ensuing two years, in the manner hereinafter provided." This is the only part of the act which fixes the criterion of classification or which attempts to classify the counties which are to be included in the operation of this act. At a glance it will be seen that all counties are excluded from the operation of this act, and perpetually so, except those which include a city or cities of 20,000 inhabitants as determined by the United States census of 1900. This act is exclusive, and perpetually so, inasmuch as there is no provision in its terms which included counties with cities of 20,000 inhabitants at the time of its passage, or such counties as may thereafter be similarly situated. Then it is not debatable that every county in Texas was excluded from the operation of the act except those having a designated class of a city or cities as evidenced by the United States census of 1900. Several reasons were urged in the court below as well as in this court why this act was not a general one, but special, and therefore interdicted by the terms of the Constitution. I am of opinion these contentions are correct, and that the law is in direct violation of the spirit, as well as the letter, of the Constitution. An inspection of the Constitution makes patent the proposition that under our representative form of government, which is one of delegated power to departments of government, every citizen of this state stands upon an equal basis unless for reasons otherwise stated in the Constitution. It will necessarily follow from this that unless there is some reason manifested in the Constitution, or it is otherwise therein provided, all laws in regard to jury trials must be general and apply alike to all of our citizenship, and the duties, obligations, rights, privileges, and immunities are the same to each and all. This is the general proposition, and every law infringing this idea will be unconstitutional unless it is otherwise provided in the organic law and it is not "otherwise provided" in regard to jury trials. Article 1, § 3, of that instrument provides: "All free men, when they form a social compact, have equal rights." Section 15 of article 1 says: "The right of trial by jury shall remain inviolate.

The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency." Section 19 of article 1 ordains that "no citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land." Article 3 § 42, of the same instrument thus reads: "The Legislature shall pass such laws as may be necessary to carry into effect the provisions of this Constitution." Section 56 of article 3 provides: "The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing the summoning or impaneling of grand or petit juries." It further inhibits the passage of such special laws in the following language: "And in all other cases where a general law can be made applicable, no local or special law shall be enacted; provided, that nothing herein contained shall be construed to prohibit the Legislature from passing special laws for the preservation of the game and fish of this State in certain localities."

So it will be seen by the provisions quoted that equality of rights and uniformity of legislation applicable alike to the citizenship of this state in jury trials is the underlying principle of the organic law, and to get away from this broad organic principle we must find somewhere in the Constitution that it is "otherwise provided." That instrument may be searched in vain for any provision which will justify the Legislature in passing the act in question for by the express terms of section 56 of article 3 the Legislature is specially prohibited from passing any special law in regard to such "summoning and impaneling of grand and petit juries," and this is emphasized by the other clause which says that no special law shall be enacted where a general law can be made applicable, excepting out of the provision of this clause laws with reference to the protection of game and fish. There could not be a more special emphasis of the prohibition of special laws than by the words employed. This section not only expressly forbids such special laws, but emphasizes this by excepting out certain things. It is therefore emphasized, doubly so, that special laws with reference to matters contained in article 3, § 56, are not subject to special legislation. This is sought to be avoided by classifying counties by the criterion set forth, to wit, the census of 1900. It occurs to the writer that the provisions of section 1 of the act of the Thirtieth Legislature, but emphasizes the fact that this law is special, and that it was an attempt on the part of the Legislature to evade the provisions of the Constitution above quoted. Even when the doctrine of classification is resorted to, it is found to be uniformly held by all the authorities that, when the act applies alike to all of a class, it may be held to be a general law; but, when it does not apply to

all of a class so specified, it is a special law. This doctrine was recognized by our Supreme Court in *Clark v. Finley*, 93 Tex. 171, 54 S. W. 343, and it was by virtue of this rule that that high tribunal was enabled to hold the "fee bill" constitutional. In what is known as the "fee bill" law, provision was made, however, that all counties in Texas could be brought under the operation of the law on the happening of a certain contingency. Therefore the idea of perpetual exclusion was not in that law, and it was so found by the Supreme Court. It was upon that theory, and that alone, that the fee bill law was upheld by our Supreme Court. Now, our Constitution provides specially and definitely that there shall be no special laws in regard to "summoning and impaneling grand and petit juries," and that no such law shall be passed when a general one could be made applicable. In other words, the Constitution makes it plain that legislation in regard to summoning and impaneling grand and petit juries must be of universal application throughout Texas, and it could not have been more plainly written if the wording had been expressed that such laws shall apply alike to every county in the state. Jury trials must "remain inviolate" and any discrimination in favor or against such jury trials would be violative of the Constitution, and would not constitute "due process of law." Every county in Texas should alike be brought under the operation of such laws, and no citizen subject to jury duty or who has the right to sit upon juries can be excluded without violating these plain provisions of the Constitution. Every citizen in Texas has equal rights in trials by jury under the terms of the Constitution. Have these rights been accorded under the provisions of the act in question? The answer is plainly in the negative. Why? Because the citizenship of the state at large are placed under a different rule and on different lines of procedure than in those counties which are within the purview of said act. All counties are excluded except those which had in 1900 a city or cities aggregating a population of 20,000 inhabitants. Is this in accord with the provision of the Constitution with reference to "due process of law"? To this the answer must be in the negative. Will it be doubted that the Legislature could have as readily and as easily passed an act which could be made applicable to every county in the state? If not, why not? Some fancied reason why some of the counties should have a different rule from the others in regard to "summoning and impaneling juries" would not justify nor authorize a Legislature to pass an act otherwise than as provided in the Constitution. The police power or matters of policy on the part of the Legislature must be subordinate to the plain provisions of the organic law. I have been unable to find any tangible reason why the act in question could not have easily been made appli-

cable to every county in the state as it was to the few counties made subject to the law, and under all the authorities that have come under my observation this law would be special in its operation. There is no reason, in view of the provisions of the Constitution, why Dallas county should come within this classification, and the adjoining counties of Ellis, Kaufman, Collin, and Hunt should not. The rights of the citizenship of these various counties are said to be equal in the Bill of Rights. All counties in Texas are on an equal basis, territorially speaking, as divisions of the state, and certainly the citizenship, personally speaking, and their rights, ought to be the same in regard to jury trials. I cannot conceive a reason that would require or authorize the citizens of one county to be tried under a different jury system or method of procedure from those in any other or all other counties in view of constitutional provisions quoted. Why a method pursued in one county in these respects should be different from a method pursued in another and maintained in the face of the Constitution is not apparent. It is not giving to "all free men" "equal rights" from the standpoint of jury trials. Therefore it seems to me that all laws in regard to "summoning and impaneling of grand and petit juries" can be but special laws, and therefore unconstitutional, when not of uniform general application to all the counties and all the citizenship of this state alike. I perhaps might rest with safety my dissent at this point, but there are other phases urged and my Brethren have to some extent discussed them.

It is urged that the classification by the act under discussion is arbitrary. This to some extent has been noticed in what I have previously said. The act certainly does not apply to all counties similarly situated at the time of its passage, and by its provisions excludes all those that may be similarly situated in the future. It sometimes occurs that the line of demarcation between what is termed general and special laws is not as clear as should be under the decisions, many of which are more than doubtful in reasoning and wrong in effect. This confusion has doubtless arisen very largely because courts have a tendency to rather magnify their sense of courtesy or comity towards the legislative branch of the government, and withhold proper obedience to the Constitution, and these decisions have at times had the effect of overriding very largely the letter and real purposes of the Constitution. Certainly the Constitution is the paramount law, and to it all departments of the government should render obedience, for they are simply creatures of the people through the terms of that instrument. This comity may speak well for the courtesy and chivalry of the courts towards the co-ordinate branches of the government, but rather disparagingly of their real and true loyalty to the organic and paramount law. It should be the undeviating

purpose of all departments of government, as created by the Constitution, to adhere to the letter as well as to the real purpose and intent of that instrument. This is necessary to the end that the people who ordained and made it the paramount law may not lose or be deprived of its benefits. No act of the Legislature ought to be passed which infringes the intent or real purpose of the Constitution. Much less should one be enacted violative of the plain provisions of that instrument. If the Constitution is thought to be weak or inadequate, it can be amended or changed, but in no instance can any department of the government be authorized to do so. This must be done by a vote of the people. If it can be evaded in one respect, it would necessarily follow that it could be so done in every respect, and solely by legislative acts upheld by evasive rules of construction by the courts. It was well said in *Morrison v. Bachert*, 112 Pa. 328, 5 Atl. 740: "It ought to be unnecessary for this court to make this judicial declaration, but it is proper to do so in view of the amount of legislation which is periodically placed upon the statute book in entire disregard of the fundamental law. Much of this legislation may remain unchallenged for years only to be overturned when it reaches this court. In the meantime parties may have acted upon it, rights may have grown up, and the inconveniences and losses entailed thereby may not be inconsiderable. As we view it, this note of warning at this time is needed." The confusion, inconveniences, troubles, and losses which may arise from such legislation should warn our legislative body to be careful and guarded in the enactment of laws to the end that they may stand and not fall, and that courts may not be called upon to set them aside. The courts should not hesitate to declare unconstitutional laws invalid to the end that our form of government may be preserved as intended by its founders.

Recurring to the terms of the act in question, the proposition is urged that it is not a general law, is not uniform or equal, but special and local in its operation, and does not properly but arbitrarily classify. If this is true, the law is invalid. 1 Lewis' Sutherland, *Statutory Construction*, § 199, is quoted as follows: "Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances. Local laws are special as to place. When prohibited, they are severally objectionable for not extending to the whole subject to which their provisions would be equally applicable, and thus permitting a diversity of laws relating to the same subject. The object of the prohibition of special or local laws is to prevent this diversity. 'Every subject of legislation,' says the Supreme Court of Ohio, 'is either of a general nature, on the one hand, or local and special, on the other. It cannot be in its nature both general and special because the two

are inconsistent.'" *State v. Spellmire*, 67 Ohio St. 77, 81, 65 N. E. 619; *Fitzgerald v. Phelps et al.*, 42 W. Va. 570, 26 S. E. 315. As the decisions are, it is somewhat difficult to fix any definite rule by which to solve the question as to whether a law is special or general. Often it is found to be expedient to leave the matter largely to be determined upon the circumstances of the particular law. If the operation and effect of the law is necessarily special, the act itself would be special without reference to the form of the act. If, on the contrary, the act would operate upon all of the class of things present and prospective, the act might be general. That this question is not solved by mere matter of form has been expressly held or necessarily implied in practically all the cases. If this were not true, the Constitution could be very easily evaded by using language for special laws that would make it appear in the guise of a general statute. Lewis' Sutherland, *Statutory Construction*, § 200; *Duffy v. New Orleans*, 49 La. Ann. 114, 21 South. 179; *State v. Herrmann*, 75 Mo. 340; *State v. Nelson*, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317, and a great number of cases.

So, with reference to the classification of subjects for legislation, when an act is assailed as class or special legislation, the attack is necessarily based upon the claim that there are persons or things similarly situated to those embraced in the act, and which under the terms of the act are excluded from its operation. The question, then, generally speaking, is whether the persons or things embraced by the act form by themselves a proper and legitimate class with reference to the purposes of the act. It seems to be agreed on all hands that the Constitution does not forbid a reasonable and proper classification of the subjects for legislation. Lewis' Sutherland, *Statutory Construction*, § 203. One of the troubles arising in discussing these matters has been to fix a definite and absolute rule, and thus far it seems to have been found practically impossible, and, as before stated, it seems to be generally held that the question must be determined under the law as it arises. But, in whatever shape the question may come, it must not be a mere arbitrary selection or classification. See *State v. Jacksonville Terminal Co.*, 41 Fla. 363, 27 South. 221. The Minnesota court lays down the following proposition in regard to the solution of these questions: (1) "The fundamental rule is that all classification must be based upon substantial distinctions which make one class really different from the other." (2) "Another rule is that the characteristics which form the basis of the classification must be germane to the purpose of the law; in other words, legislation for a class, to be general, must be confined to matters peculiar to the class. There must be an evident connection between the distinctive features to be regulated and the regulation adopted." (3) "Another rule is that to whatever class a

law applies it must apply to every member of that class." The fifth rule is as follows: "The last proposition to which we will refer is that the character of an act as general or special depends on its substance, and not on its form. It may be special in fact, although general in form, and it may be general in fact although special in form. The mere fact is not material." *State v. Cooley*, 56 Minn. 540, 58 N. W. 150. In a subsequent case, to wit, *Murray v. Board of Co. Com.*, 81 Minn. 359, 84 N. W. 103, 51 L. R. A. 828, 83 Am. St. Rep. 379, that court said: "A law is general and uniform in its operation which operates equally upon all subjects within the class for which the rule is adopted, provided the classification be a proper one. The Legislature, however, cannot adopt an arbitrary classification, for it must be based on some reason suggested by such difference in the situation and circumstances of the subjects placed in the different classes as to disclose the necessity or propriety of different legislation in respect thereto. Any law based upon such classification must embrace all, and exclude none, whose condition and wants render such legislation to them as a class or appropriate to them as a class. Legislation limited in its relation to particular subdivisions of the state, to be valid, must rest on some characteristic or peculiarity plainly distinguishing the places included from those excluded." See, also, *Duluth Banking Co. v. Koon*, 81 Minn. 486, 84 N. W. 335. The above seems to lay down the general rule as held by all the courts as drawing a proper distinction under the circumstances mentioned between what would constitute general and special laws. Referring to the decisions of our own state, we find as far back as *Janes et al. v. Reynolds*, 2 Tex. 250, the same rule announced and followed. The above doctrine has been approved in *Harding v. People*, 160 Ill. 464, 43 N. E. 624, 32 L. R. A. 445, 52 Am. St. Rep. 344; *Millet v. People*, 117 Ill. 301, 7 N. E. 631, 57 Am. Rep. 869; *Kalloch v. Superior Court*, 56 Cal. 238; *Eames v. Savage*, 77 Me. 212, 52 Am. Rep. 751. So it has been held the term "laws of the land" are general public laws binding on all under similar circumstances, and not partial or private laws, affecting the rights of private individuals or private classes. Speaking on this matter in *Clark v. Finley*, supra, Chief Justice Gaines, delivering the opinion of the court, says: "The definition of a general law, as distinguished from a special law, given by the Supreme Court of Pennsylvania in the case of *Wheeler v. Philadelphia*, 77 Pa. 338, and approved by the Supreme Court of Missouri, is perhaps as accurate as any that has been given. *State v. Tolle*, 71 Mo. 645. The court in the former case say: 'Without entering at large upon the discussion of what is here meant by a "local or special law," it is sufficient to say that a statute which relates to persons or things as a class is a general law, while a statute which relates to particu-

lar persons or things of a class is special, and comes within the constitutional prohibition.' * * * The tendency of the recent decisions upon the subject, as it seems to us, is to drift into refinements that are rather more specious than profitable. It is said in some of the cases that the classification must be reasonable, in others, that it must not be unreasonable or arbitrary, etc. If it is meant by this that the Legislature cannot evade the prohibition of the Constitution as to special laws by making a law applicable to a pretended class, which is, in fact, no class, we concur in the proposition. Such was the law passed upon in the case of *Commonwealth v. Patton*, 88 Pa. 253. That statute was made applicable to all counties in which there was a population of more than 60,000, and an incorporated city with a population exceeding 8,000, 'situate at a distance from the county seat of more than twenty-seven miles by the usually traveled public road.' There was but one city in the state which came within the pretended class. The court held this a covert attempt at special legislation, and that the act was a nullity." Tested by the rule laid down in the *Clark v. Finley* Case, supra, and which has been followed in this state since the case of *Janes v. Reynolds*, supra, I am of the opinion this law is not general, but special. Our Supreme Court in the decision quoted lays down two rules: The law is general where it covers all of the class, but special when it does not cover all or every member of that class. Therefore under the decisions of our own state, the act of the Thirtieth Legislature under discussion is special, and not general.

My Brethren refer to the case of *Douglas v. People*, 225 Ill. 536, 80 N. E. 341, 8 L. R. A. (N. S.) 1116, 116 Am. St. Rep. 162. This case supports the writer's views of the subject of classification. In that case, as I understand, the Legislature was classifying cities. If the classification was proper, the Legislature had the right to do so. That question, as applied to classification of cities and towns, would hardly be debatable in Texas by reason of the fact that the Constitution expressly provides that the Legislature has power and is clothed with full authority to pass special laws or acts with reference to cities of a population of 10,000 or more inhabitants, and general laws in regard to towns with less population. The immediate subject of discussion in *Douglas v. People* was an act regulating the business of plumbing, etc. This significant expression is found in that opinion: "A law is said to be general and uniform, not because it operates upon every person in the state alike, but because it operates alike upon every person in the state who is brought within the conditions and circumstances prescribed by the law. *Steed v. Edgar County*, 223 Ill. 187, 79 N. E. 123. In *Meyer v. Hazelwood*, 116 Ill. 319, 329, 6 N. E. 480-486, it was said: "Laws are general and uniform, and hence

not obnoxious to the objection that they are local or special, when they are general and uniform in their operation upon all in like situation." That is the rule I am invoking and which I held correct in *Clark v. Finley*, supra. Wherever the Legislature has the right to classify, the rule referred to is correct. That opinion recognizes the doctrine contended for here; that is, that the Legislature has no right to classify when arbitrary or when it excludes persons or things similarly situated. Viewed in the light of the constitutional provisions heretofore noticed in this dissenting opinion, the proposition is supported by the authorities relied upon by my Brethren, that wherever classification is resorted to the act must apply to all alike who are similarly situated, whether upon persons or things, and the objection urged to the act of the Thirtieth Legislature is that it does not apply to all counties alike similarly situated, and that it institutes rules for those similarly situated both as to counties and persons which are dissimilar. It fixes the manner of "summoning and impaneling grand and petit juries" entirely different in some portions of the state from what it does in others, and it directly excludes counties in the state similarly situated at the time of the passage of the law, and forever debars their coming under its operation. As before stated, if the Constitution with reference to this subject means anything, it means that every county in Texas shall have the same procedure in regard to "summoning and impaneling grand and petit juries," and every citizen shall be tried under the same procedure with reference to "summoning and impaneling grand and petit juries." That the same rule should govern alike every county and that every citizen should stand upon the same plane where his life and his property are involved in so far as jury trials are concerned ought to be self-evident, and the Constitution so directly ordains. This matter of jury trials has perhaps been regarded by our race as being one of its most sacred reserved rights. At the time of the passage of the act under discussion there were other counties in Texas containing a city or cities whose population numbered 20,000 inhabitants. These were and are excluded for all time to come, and every county in Texas was excluded, except perhaps seven or eight. This act cannot be sustained upon any known or rational theory of classification in my judgment. In fact, there is no attempt at classification. It was but a mere exclusion of certain counties, and, in fact, nearly all counties, in the state. It is but a mere designation of a few counties, and makes no provision by which any other county in the state may by reason of its increase of population in the growth of cities in the future come within its provisions. See authorities already cited. In *Scowden's Appeal*, 96 Pa. 422, this language was used: "The act of June 12, 1879, makes

no attempt at classification of cities. It is merely an effort to legislate for certain cities of the fifth class, to the exclusion of all other cities of the same class." See, also, *City of Scranton v. Silkman*, 113 Pa. 191, 6 Atl. 146; *State ex rel. West v. Des Moines*, 96 Iowa, 521, 65 N. W. 818, 31 L. R. A. 189, 59 Am. St. Rep. 381; *Campbell v. City of Indianapolis*, 155 Ind. 186, 57 N. E. 925; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *State v. Scott*, 70 Neb. 683, 100 N. W. 812. The latter case construed an act regulating county offices, which, in its terms, limited the operation of counties having a population of 50,000 according to the census of 1900, which is the same as our jury act under consideration, and held the act local and special since it can never apply to any of the counties except the two that were in the class at the time of the passage of the act. See, also, *Central Trust Co. v. Railway Co. (C. O.)* 82 Fed. 1. In *De Hart v. Atlantic City et al.*, 63 N. J. Law, 223, 43 Atl. 743, the act discussed authorized creation of district courts in counties of 20,000 or less which should by resolution adopt the act within three months from its passage. It was held a special law, because it denied to all then existing cities whose necessities might at any time after the three months have demanded a district court as well as two new cities, and the effect of the limitation as a restriction of the class to which the law may apply. The same proposition is laid down in *Murphy v. Long Branch (N. J. Sup.)* 61 Atl. 593. *State v. Queen*, 62 S. C. 247, 40 S. E. 554, is a South Carolina case. That act designated certain counties by name (our jury law does this in effect), and provided for the drawing and listing of grand juries which was held to be a special law and obnoxious to a similar prohibition of our Constitution as found in article 3, § 56. This case is directly decisive of the constitutionality of the act of the Thirtieth Legislature under discussion. To the same effect, see *Railway Co. v. Martin*, 53 Ohio St. 386, 41 N. E. 691. That law was held to be a mere evasion, and was really but an exclusion of future cities. In regard to evasion, see *Endlich*, Stat. Con. § 521; *State v. Schwab*, 49 Ohio St. 229, 34 N. E. 736. The act then under discussion was held special although written in general terms. It only applied to one city, and never could to any other; only one census being named as a criterion for determining the class. See, also, *State v. Ellet*, 47 Ohio St. 90, 23 N. E. 931, 21 Am. St. Rep. 772, is to the same effect, as is *State v. Anderson*, 44 Ohio St. 247, 6 N. E. 571. See, also, *State v. Board of Managers*, 89 Mo. 237, 239, 1 S. W. 307; *Wanser v. Hoos*, 60 N. J. Law, 482, 38 Atl. 449, 64 Am. St. Rep. 600; *State v. Messerly*, 198 Mo. 351, 95 S. W. 913; *Burnham v. City*, 98 Wis. 128, 73 N. W. 1018. It was held in *Re Henneberger*, 155 N. Y. 420, 50 N. E. 61, 42 L. R. A. 132, that a mere designation

is not a classification. In *Angell v. Cass County*, 11 N. D. 265, 91 N. W. 73, it was said: "A law is general and uniform in its operation which operates equally upon all subjects within the class for which the rule is adopted, provided the classification be a proper one. The Legislature cannot, however, adopt an arbitrary classification, for it must be based on some reason suggested by such a difference in the situation and circumstances of the subject placed in different classes as to disclose the necessity or propriety of different legislation in respect thereto. * * * Legislation limited in relation to particular subdivisions of the state, to be valid, must rest on some characteristic or peculiarity plainly distinguishing the places included from those excluded." See, also, *State v. Ritt*, 76 Minn. 531, 79 N. W. 535; *Duluth Banking Co. v. Koon*, 81 Minn. 486, 84 N. W. 336. Other cases might be cited almost without number supporting the same proposition.

As to another phase of this law and its constitutionality, to wit, that it is exclusive and operates for the present only, to the exclusion of the counties which might come within its operation, all the authorities support the contention of appellant. *Hetland v. Board*, 89 Minn. 492, 95 N. W. 305, holds an act special where its operation was limited to such counties as had at the time of its passage expended at least \$7,000 for courthouse purposes. The court says the classification was both illusive and arbitrary, and that it was unique and novel. "To approve it would open the door to all sorts of special legislation, general in form but special in fact, the only limitation to which would be the ingenuity of legislators in devising new classifications." Without going into a further discussion of this particular phase of the subject, I cite in support of my views the following cases: *State v. Simon*, 53 N. J. Law, 550, 22 Atl. 120; *Bennett v. Common Council*, 55 N. J. Law, 72, 25 Atl. 113; *Parker v. Common Council*, 57 N. J. Law, 83, 30 Atl. 186; *Coutler v. City*, 44 N. J. Law, 58; *Zelgler v. Gaddis*, 44 N. J. Law, 363; *Douglas v. People*, 225 Ill. 536, 80 N. E. 341, 8 L. R. A. (N. S.) 1116, 116 Am. St. Rep. 162. In my opinion it is a safe proposition to assert that the act of the Thirtieth Legislature does not apply to every county in the state and is therefore void; that, to make it a general law, it must not legislate only for present or unchangeable conditions. I am persuaded that no case can be found in the reports which holds a law to be general which failed to provide for and anticipate the wants of the future. On the contrary, wherever the question has arisen, every court has held a law special which created a classification which was arbitrary or illusive, and which operated upon unchangeable conditions and failed to provide for future localities or ob-

jects to come within the class, no matter how ingenious the evasion employed to make a special law assume the guise of a general law may have been. Perhaps there may be no limit to the ingenuity displayed by legislative bodies intentionally or otherwise to make a mere designation assume the form of a classification.

I have written beyond what I intended but it occurs to me that the act under consideration is so entirely obnoxious to our Constitution and to the authorities and to our jurisprudence that I have amplified beyond my first intention. To my mind there is no reason why this law should be upheld; that it is fundamentally violative of the Constitution, and that it is an arbitrary designation operating upon a few counties and excluding from its operation all counties wherein cities may accumulate a population that ought to entitle them to come under its operation. But it is still farther objectionable, because it is at fundamental variance with that uniformity and equality of the equal rights of our citizenship. It strikes at the great inviolability of jury trials. It makes those trials and procedure under them different in different localities, leaving the great body of the state and different sections under entirely different rules, and it injects in jury trials a procedure different in parts of the state from those obtaining in other parts, thereby directly and expressly violating the plain provisions of the Constitution as enunciated in article 3, § 56, which says no special law shall be passed in regard to "summoning and impaneling of grand and petit juries."

I will express in conclusion a sense of obligation and appreciation to the attorneys in other cases involving this question. My Brethren selected this case in which to write the opinion. The arguments and briefs in the case of *Brown v. State* (Tex. Cr. App.) 112 S. W. 80, by Messrs. Crawford & Lamar, Messrs. Crane, Gilbert & Crane, and Messrs. Muse & Allen, and the arguments and brief in the case of *Pate v. State*, 113 S. W. 750, by Messrs. Thomas & Sewell and Messrs. Crawford & Crawford, and the argument and brief in the case of *Lee v. State*, 113 S. W. 301, by Mr. E. T. Branch, are able and convincing, and have been of great service to the writer in his investigation of the questions involved. I deem it but right that I should make this statement in view of the fact that I have been so greatly assisted by them in the cases represented by them respectively. I also mention my high appreciation of the brief in this case of Mr. A. S. Baskett, who represented appellant, and who so ably presented the questions involved.

I shall pursue no further a discussion of the questions involved, but for the reasons suggested I respectfully dissent from the conclusion reached by my Brethren.

LEE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 21. 1908.)

1. JURY (§ 70*)—DRAWING OF JURORS—OFFICERS—STATUTES.

Under Acts 30th Leg. (Laws 1907) p. 269, c. 139, providing that the keys for the wheel containing the names of jurors shall be kept by the sheriff and the district clerk, and providing that the clerk of the district court and the sheriff shall draw from the wheel the names of jurors, etc., and that, when a special venire is ordered, the "clerk" shall draw from the wheel the names required, a special venire in the criminal district court of a county is properly drawn by the district clerk of the county.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 70.*]

2. HOMICIDE (§ 282*) — MANSLAUGHTER — QUESTIONS FOR JURY.

Evidence held to require the submission of the issue of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 574; Dec. Dig. § 282.*]

3. HOMICIDE (§ 276*) — SELF-DEFENSE — EVIDENCE.

Evidence held to require the submission of the issue of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 569; Dec. Dig. § 276.*]

4. HOMICIDE (§ 295*)—MANSLAUGHTER—EVIDENCE—INSTRUCTIONS.

Where accused testified that decedent hit him on the breast and knocked him down, and that the blow hurt him for two days, and that decedent called him a "son of a bitch," and threatened to kill him, an instruction on manslaughter which failed to state the language of Pen. Code 1895, art. 702, that an assault and battery by decedent, causing pain or bloodshed, constituted an adequate cause, and which stated that insulting words or an assault and battery so slight as to show no intention to inflict pain were not adequate causes, was erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 606; Dec. Dig. § 295.*]

5. CRIMINAL LAW (§ 1186*)—TRIAL—INSTRUCTIONS.

Accused is entitled to have the jury correctly charged on the law of the case, and, where that has not been done, the court on appeal must reverse the judgment, though the defense of accused rests on an unsubstantial basis of fact.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1186.*]

6. CRIMINAL LAW (§ 1189*)—INSTRUCTIONS—MOTIONS FOR NEW TRIAL.

Where errors in the instructions were called to the attention of the court in the motion for new trial, the court erred in denying the motion, and the court on appeal has no discretion but to reverse the conviction and remand the case for new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3225, 3226; Dec. Dig. § 1189.*]

Appeal from District Court, Harris County; J. K. P. Gillaspie, Judge.

Henry Lee was convicted of murder in the second degree, and he appeals. Reversed and remanded.

E. T. Branch and S. B. Ehrenwerth, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the criminal district court of Harris county, charged with the murder of one James S. Simpson. He was tried therein on the 29th day of April, and was convicted of murder in the second degree, and his punishment assessed at 20 years' confinement in the penitentiary.

Many of the questions raised on the appeal have been decided adversely to the contention of appellant. He raises, among other questions, the validity of what is known as the "jury wheel law." This question has been decided against appellant in the case of *Smith v. State* (not yet officially reported) 113 S. W. 289, and need not be further discussed.

In the same connection appellant contends that the special venire in this case was improperly drawn in that same was drawn by the district clerk of Harris county, and not by the clerk of the criminal district court of said county. We do not believe that this contention can be maintained. Section 3 of the act of the Thirtieth Legislature (Laws 1907) p. 269, c. 139, provides that, after the cards containing the names of jurors shall be deposited in the wheel, same shall be kept locked at all times, except when in use as hereinafter provided, and that the keys to such locks shall be kept one by the sheriff and the other by the district clerk. It is provided by section 4 of said act that not less than 10 days prior to the first day of the term of court the clerk of the district court, or one of his deputies, and the sheriff, or one of his deputies, in the presence and under the direction of the district judge if the jurors are to be drawn for the district court, shall draw from the wheel containing the names of jurors, after the same has been well turned, so that the cards therein are thoroughly mixed, one by one the names of 36 jurors, or a greater or less number where such judge has so directed, for each week of the term of the district court. By section 9 of said act it is provided that, whenever a special venire is ordered, the clerk or his deputy, in the presence and under the direction of the judge, shall draw from the wheel containing the names of jurors the number of names required for such special venire. Attention is called to the fact that the law does not provide that the "district clerk," but that the "clerk," shall draw the names from the wheel, and the contention is made that this general designation "clerk" was so used that it might include the criminal district clerk, and it does not mean the clerk of the district court, or the clerk of a district court having no criminal jurisdiction, but that the intent of the entire act is that the clerk of the court in which the lists are to be used shall draw the names. We think in view of the entire statute, and particularly with reference to section 3, which provides

that one of the keys shall be kept by the district clerk and the other by the sheriff, and the sections of the act in question where the general word "clerk" is used in respect to their duties concerning jurors, that it was not the intention of the Legislature that any special significance should be attached in section 9 of the act in question to the fact that the word "clerk," and not "district clerk," is used therein. It will be noted, too, that, when a special venire is drawn, it is made the duty of the clerk to prepare a list of such names in the order in which they are drawn from the wheel, and attach such list to the writ and deliver the same to the sheriff, and the cards containing such names shall be sealed up in an envelope and shall be retained by the clerk for distribution, as herein provided. So that we believe the court below took the proper view of this matter, and was clearly right in having the list drawn by the district clerk of Harris county.

The facts of the case show that appellant shot and killed James S. Simpson in a saloon in Houston very early in the morning. The proof shows that the parties, with others, had been up all night, and were all drinking, and that Simpson was in an advanced state of intoxication. Appellant, deceased, one Chumley, and a young man named Hayne all came into George Voss' saloon about 5 o'clock on the morning of March 4, 1908. Hayne left some half hour or more before the killing. The others remained. Practically all the testimony except that of appellant is to the effect: That deceased voluntarily gave up his pistol and belt to the witness Frank Casey, and the same was placed behind the bar. The conversation between the parties took a pretty wide range, and, just before the killing, Simpson said to Chumley, "Go away and leave me alone," and pushed him back, and he fell on the floor. At this time, according to the testimony of Casey and most of the witnesses, appellant was standing by the counter, some six or seven feet from Simpson, and thereupon appellant pulled his pistol, and fired three shots at Simpson. That at the time Simpson was not doing anything. When the first shot was fired, Casey testifies: Simpson made one step towards the door, and was facing appellant. That at the second shot deceased fell, with his head under the swinging doors. At the first shot he had his hands over his stomach, clasped in front of him over his stomach, and, after appellant commenced shooting, deceased kept his hands in the same position. That he fell after the second shot. That he fell, with his head underneath the screen door. That after deceased fell appellant made one step towards deceased's feet, and fired the third shot when deceased was lying on his back on the floor with his head under the screen door. The witness Casey gives a very full and circumstantial detail of all the facts of the killing.

His testimony makes a very strong case against appellant, and it is corroborated, to a large extent, by the testimony of all the other witnesses, except appellant, as well as the physical facts testified to on the trial. There is, however, some contradiction between the testimony of Casey and other witnesses concerning the killing which we do not deem it necessary to set out.

Appellant testified in his own behalf, and the following is a brief summary of his testimony as it relates to the particular facts of the killing: He says in the first place, and this seems to be conceded, that he and deceased were very friendly; both of them being policemen in Houston. He testifies that, after they had taken the last drink at 'Voss' saloon, Simpson seemed to be in a bad humor. That, when Chumley went up to him and spoke to him, he knocked him back against the wall and he fell, and that after he did that that he, appellant, walked up to him and said, "Jim, don't do that." That Simpson then hit him in the breast, and knocked him down. That the blow hurt for two days. That after he fell Simpson came towards him with his hands going back under his coat, and said, "God damn you son of a bitch, I will kill you," and that as he, appellant, was getting up from the floor, he pulled his gun and fired three shots at Simpson. Appellant also testifies that, when Simpson knocked him down, it made his watch fall out of his pocket, that he shot Simpson because he believed he was going to kill him, and that he would not have shot Simpson if he had known he was unarmed. He denies shooting Simpson while he was lying on the floor. He says the effect of the shots was that the room was full of smoke; that, when he fired the shots, Simpson was right in front of him; that all the shots were fired close together; that, when he fired the shots, Simpson had stepped up and thrown his hands behind him; that he pulled his gun and fired as he was getting up from the floor where he had just been knocked down by Simpson; that he fired no more shots after he saw Simpson had fallen; that he had other loads in his gun, and there was nothing to prevent him from shooting him again. This testimony is sufficient to demand and require a charge on the subject of manslaughter as well as self-defense.

Article 702 of the Penal Code of 1895 is as follows: "The following are deemed adequate causes: (1) An assault and battery by the deceased, causing pain or bloodshed." Construing this statute, it has been held that, to constitute this ground of adequate cause. It is not required that both pain and bloodshed should be caused by the assault and battery. *Foster v. State*, 8 Tex. App. 248; *Tickle v. State*, 6 Tex. App. 623; *Hill v. State*, 8 Tex. App. 142; *Bonnard v. State*, 25 Tex. App. 173, 7 S. W. 862, 8 Am. St. Rep. 431; *Childers v. State*, 33 Tex. Cr. R. 509, 27 S. W. 133; *Williams v. State*, 15 Tex. App. 617; *High v.*

State, 26 Tex. App. 545, 10 S. W. 238, 8 Am. St. Rep. 488; *Spivey v. State*, 30 Tex. App. 343, 17 S. W. 546. On the subject of manslaughter the court gave the following instructions: "Manslaughter is voluntary homicide, committed under the influence of sudden passion arising from an adequate cause, but neither excused nor justified by law. By the expression 'under the influence of sudden passion' is meant: (1) The provocation must arise at the time of the commission of the offense, and the passion is not the result of a former provocation. (2) The act must be directly caused by the passion arising out of the provocation, and not a provocation given by some other person than the party killed. (3) The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not is adequate cause, in law. And when there are several causes to arouse passion, although no one of them alone would constitute adequate cause, it is for you to determine whether or not all such causes combined might be sufficient to do so. Insulting words and gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, are not adequate causes. In order to reduce a voluntary homicide to the grade of manslaughter, it is necessary, not only that adequate cause existed to produce the state of mind referred to—that is, of anger, rage, sudden resentment or terror, sufficient to render the mind incapable of cool reflection—but that also such state of mind did actually exist at the time of the commission of the offense. Although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty in determining the adequacy of the provocation, if any, to consider in connection therewith all the facts and circumstances in evidence in the case, and if you find by reason thereof the defendant's mind was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof of sufficiency of the provocation satisfies the requirements of the law, and so in this case you will consider all the facts and circumstances in evidence, the threats, if any, an assault, if any, the past conduct and bearing of said James S. Simpson towards the defendant, and all the facts and circumstances transpiring before, at the time of, and after the homicide in determining the condition of the defendant's mind at the time of the alleged killing, and the adequacy of the cause, if any, producing such condition. If you believe from the evidence beyond a reasonable doubt that the defendant, Henry Lee, with a pistol, a deadly weapon that is as used was calculated reasonable and probably to kill, in a sudden transport of passion, aroused by adequate cause, as the same is herein explained, and not in his

own self-defense and against an unlawful attack or threatened assault reasonably producing a rational fear or expectation of death or serious bodily injury, did shoot and kill James S. Simpson, in Harris county, Tex., on or about the 4th day of March, A. D. 1908, then find him, the defendant, guilty of manslaughter, and assess his punishment by confinement in the state penitentiary for not less than two or more than five years." It will be noticed from a careful reading of this charge that nowhere were the jury in terms instructed that an assault and battery causing pain was adequate cause. The failure of the court so to charge and the injury resulting therefrom was increased, as we believe, by the following portion of the charge on manslaughter: "Insulting words and gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, are not adequate causes."

The case is very much like that of *Warthan v. State*, 41 Tex. Cr. R. 385, 55 S. W. 55. In that case it seems the court gave a charge to the jury on manslaughter, which, after containing certain statutory provisions in reference to passion and adequate cause, instructed the jury substantially that the provocation must arise at the time of the commission of the offense, and that any circumstances or conditions which would arouse passion in the mind of a man of ordinary temper sufficient to render a person incapable of cool reflection would be adequate cause, and that the jury could look, not only to the provocation at the time, but to all the facts and circumstances surrounding the parties which might have a bearing on the provocation at the time. In that case, as in the case at bar, it was the contention of appellant that the only evidence requiring a charge on manslaughter consisted in the testimony of the defendant himself, and in that case another witness who had stated that just prior to the shooting, deceased, who had been ordered to get out of the house, advanced towards defendant and struck him a blow in the breast, and that the court, on this testimony, should have pertinently instructed the jury that if they believed from the testimony that deceased, prior to the shooting, struck defendant a blow which caused him pain, and if they believed his passion was thereby excited and he was rendered incapable of cool reflection, and under such circumstances slew deceased, then to find him guilty of manslaughter. Passing on the question there raised, Judge Henderson, speaking for the court, says: "We understand it to be the duty of the court in charging the jury to instruct them upon the very phase of the case suggested by the testimony. The only issue presented by the evidence requiring a charge on manslaughter was the provocation which arose at the very time of the homicide. This provocation was the blow, which, according to the testimony of defendant and another witness, deceased

struck him when he commanded him to cease the disturbance and leave his premises. Our statute makes a blow, under certain conditions, adequate cause to reduce a homicide to manslaughter. The blow must cause pain, and must also engender passion which renders the mind incapable of cool reflection. Now, while it is true that the charge of the court was comprehensive enough to include the adequate cause here presented, was it sufficiently pointed to direct the attention of the jury to the very act of the deceased on which appellant predicated his defense of manslaughter? We think not. If the jury had been told that, as a matter of law, a blow which caused pain was adequate cause, this obstacle would have been removed from their pathway; and then it would have only been necessary for them to find that the blow was struck, and that it caused pain which rendered the mind of defendant incapable of cool reflection. As it was, they were left without any suggestion from the court to determine the matter of law in the first instance." As we have seen, the charge of the court in the case at bar is subject to all the objections pointed out in the case which we have just quoted from, and the failure of the court in this case to charge that an assault and battery causing pain was adequate cause was intensified by the instruction that an assault and battery so slight as to show no intention to inflict pain or injury is not adequate cause. The testimony of the state in this case is very strong. The circumstances all indicate to our mind, if we were the arbiters of matters of fact, that the claim and contention of appellant as to the circumstances of the shooting rests on a very insubstantial basis of fact, but it must be conceded in every case that every appellant is entitled to have the jury charged the law of the land and charged correctly. For us to undertake, where this has not been done, to write a judgment of affirmance, is to deny him the right of trial by jury and to make ourselves what the law of the land never contemplated we should be, the arbiters of matters of fact. The charge of the court is erroneous. These errors were called to attention in a motion for a new trial. This should have been granted. Not having been done, we have no discretion but to reverse the same and remand it for a trial in accordance with law, which is here done.

HAMM v. GUNN.

(Court of Civil Appeals of Texas. June 20, 1908. Rehearing Denied Oct. 17, 1908.)

1. NUISANCE (§ 18*)—ABATEMENT.

The right to abate nuisances is a well-established doctrine of equity courts, based on the maxim that the owner of property must so use it as not to materially injure another.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 49; Dec. Dig. § 18.*]

2. NUISANCE (§ 34*) — NUISANCES PER SE—COTTON GIN.

A cotton gin is not a nuisance per se, it being among the beneficial appliances of modern life, which, to be abated as nuisances, must be shown to be so operated as to materially injure another or interfere with the comfortable use of his own property.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 91; Dec. Dig. § 34.*]

3. NUISANCE (§ 33*)—COTTON GIN.

Evidence held not to show that a cotton gin near a private residence was so operated as to constitute it a nuisance.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 33.*]

Appeal from District Court, Taylor County; J. H. Calhoun, Judge.

Action by Mrs. Nannie Gunn against John C. Hamm to abate a nuisance. There was a judgment perpetually restraining the acts complained of, and defendant appeals. Reversed and remanded.

Hardwicke & Hardwicke, Harry Tom King, and Theodore Mack, for appellant. Wagstaff & Davidson, for appellee.

CONNER, C. J. This appeal is from a judgment perpetually restraining appellant from operating a gin on certain lots near appellee's residence, and the only question that we deem worthy of discussion is whether the evidence sufficiently supports the judgment. The evidence shows that appellee's residence is situated in the northeast corner of block 23, and that for several years prior to the institution of the suit appellant had operated an electric light plant located in block 22, which is east of block 23; that appellant made what is designated in the evidence as a "gin addition" to the light plant. The light plant extends north and south on one of the southern tiers of lots in block 22, and the gin was extended east from the south end of the light plant, forming an L. No additional motive power was installed by reason of the gin addition; the gin being operated by the motive power of the light plant. Appellee has a small orchard and garden south of her house, and a street 60 to 80 feet wide extends between block 23 and block 22. Cotton to be ginned is taken from loaded wagons by means of a suction pipe on the south side of the gin. The nearest point of the gin to appellee's residence is about 200 feet. Lots 14 and 15 and said street intervening between the gin and appellee's premises.

T. C. Weir testified, in behalf of appellee, to the erection of the gin, and that he "did not see any difference between this gin and other gins. Sometimes there is very little dust in cotton, and sometimes there is a great deal. There is always some dust in cotton in this country. When cotton goes into the gin stand and saws, it has dust in it. That is when the dust begins to fly. It has lint in it when it first reaches the saws, and then the lint begins to fly. Dust goes out into the

room, and from there passes out through the windows and doors and through the flues. There are two flues to this gin. A few days ago I passed while they were ginning a bale of cotton, and could plainly hear the noise; saw no difference in the running of this gin and other gins as to noise. There was lint and dust in the upper part of the flues, and I could see it; looked like fine dust passing out of the flues. There was just a little smoke. You could see it by looking at the smokestack. The smokestack is about 45 feet high. I have never seen a gin that did not let lint escape from it. At the time I speak there was some lint lodging on some screens of some kind there; did not examine to see how thick the screens were." On cross-examination T. C. Weir again testified concerning the conditions usually following the operations of a gin, stating that he "did not testify as a gin expert at all; that when he was there and looked at the building they were ginning a bale of cotton; that he stopped a few minutes on the southwestern corner of the gin, and from the sidewalk made his observation; that while there saw a little dust pass out of the ventilator at the top; that the ventilator was about 45 feet high; it was concentrated at the two flues as it passed out at the top; that the dust I saw coming through had come from cotton then being ginned. I could see the dust with the naked eye. It comes out of the top of the house through a galvanized opening. I saw some lint on screens that had been put in around the top of the ventilator; did not see lint flying in the air; saw it catch on the screens which was catching the lint. I saw the dust pass off a little here and there and settle somewhere."

Appellee testified that "she was the head of a family, and owned and resided in the residence involved. In speaking of the operation of the gin, she said: 'I think the first bale was ginned last Saturday a week. I was at home at the time. I was at home another day while they were ginning, but do not remember the day of the week. On the Saturday I noticed the gin and heard the noise, and saw the lint coming from the windows and passing around and flickering about the light plant, and dust. I did not notice the flues; did not know what the flues were for; did not look in the direction of the flues. Dust was whipping around on the east side and coming through the windows. It came toward my house, some of it got to my fence or very near it. The wind was blowing more away from me than toward me. Lint of considerable size came towards me, large enough that you could see it distinctly from my place to the gin. Some of it fell in my yard, and I sent out and had it picked up to be confident it was lint cotton.' 'Q. Did you see the lint and dust in considerable quantities? A. No, sir; I can't say in considerable quantities, because it was the first day

they had been ginning there. I think I was in the house when the bale was being ginned. I could hear the gin running; I could hear them all the time. Q. Well, was the noise of the running of that gin, and the dust and lint, does that disturb you any? A. It does. Q. What effect does it have on you? A. Just worries me in a nervous way; and, as far as to the lint, I consider that the lint and dust are unhealthy. Q. Is it there all the time, or practically all the time? A. Yes, sir; the noise is, and of course the lint is if they are ginning. Q. When you are in the house can you hear that noise? A. I can; it is a buzz there all the time. There is hollering there at night.' On cross-examination she stated: 'Q. Did you see dust? A. Yes, sir; I saw dust. Of course, in no great quantities—in all probability it would light before it got there. It would reach my premises if there was a strong breeze. Q. And it might have gone over the house if there had been a very strong breeze? A. Yes, sir; of course. But any obstruction always stops anything like that. I did not say I saw great quantities of lint. I know some lint came over there. I watched it as it flew from the gin.'"

Appellant and Hugh Hunt, a gin expert, testified to the effect that the gin was a modern one, and so arranged and equipped that neither dust nor lint will escape therefrom, and that by means of a "muffler" the noise was in a great measure subdued. J. H. Oliver testified that he was at the gin when the first bale of cotton had been ginned, and walked around to observe conditions; that he saw no dust and saw no lint escape; that there was but little noise, less than generally about a gin. O. W. Williams testified that he was at the gin when the first and third bales were ginned, and that there was no lint or dust that he could tell flying, and that there was very little noise. M. Crowder testified that his shop is about one lot east of the gin, and that he had not noticed any dust from it; none had been blown into his shop. Charles Stephens and J. C. Holland, living about as far from the gin as appellee, testified that they could hear the gin machinery running, but neither testified that they had observed whether there was dust or lint projected. O'Brien testified: "The light plant is just across two 50-foot lots and an alley from me. When I am at home I can hear the machinery running over there distinctly. I don't think I have been at home any time while the gin was running."

It appears that at the time of the trial but few bales of cotton had been ginned at all, and the foregoing is substantially all of the testimony on the subject. In our judgment the evidence is altogether too inconclusive and unsatisfactory to support the decree. The right to abate nuisances is a well-established doctrine of courts of equity, for it is a maxim of our law that the owner of property must so use it as not to materially

injure another. But it cannot be successfully contended that a gin is a nuisance per se. Cotton gins are among the beneficial and useful appliances of modern life, and in a large part necessary to the rapid utilization of one of the staple products of the South, and before a citizen should be permitted to abate a business or enterprise of this kind, he should be required to show that its operation was so conducted as to in some material way injure him or interfere with the comfortable use of his own property. For a general discussion of the subject, see *Rouse v. Martin*, 75 Ala. 510, 51 Am. Rep. 463; *Railway Company v. Oakes*, 94 Tex. 155, 58 S. W. 999, 52 L. R. A. 293, 86 Am. St. Rep. 835. Under the court's charge, before the jury were authorized to find for appellee, it was necessary that they find from a preponderance of the evidence that the operation of appellant's gin would materially interfere with the comfortable enjoyment of appellee's home as a private residence, or by reason of dust and lint reasonably threaten the health of appellee or members of her family, thus charging the law as we have indicated it to be. But, as before stated, we think the evidence wholly fails to establish such to be the case. The evidence entirely fails to show that any of the dust or lint spoken of by the witnesses penetrated appellee's residence. On one occasion only, it appears, a small particle of lint was picked up in her yard, and while she may have heard the noise, nothing in the testimony shows that it was of such character or volume as to reasonably and materially affect the comfort or health of a person of ordinary sensibilities. Counsel for appellee does not very vigorously insist that the testimony adverted to establishes a nuisance, save that it is contended, in effect, that the operation of a gin so near appellee's residence necessarily constitutes a nuisance; that it is impossible to so operate it as that material inconvenience and injury can be avoided. If this contention be sound, it would necessarily follow that a gin so located would constitute a nuisance per se, and it cannot be so affirmed. Inhabitants of the modern city are necessarily subjected to more or less of noise, of dust, and of other disagreeable things, and the only way in which they can be avoided is by seclusion from among the busy activities of the age, unless, indeed, we would destroy many progressive features and necessary enterprises of the time. If we live in a city, it is but reasonable that we abate somewhat of our own comfort and convenience for the common good.

We find no merit in appellant's exceptions to the petition, nor material error in the charge of the court; but, because of the insufficiency of the evidence, it is ordered that the judgment be reversed and the cause remanded.

MISSOURI, K. & T. RY. CO. v. HOPKINS.
(Court of Civil Appeals of Texas. Oct. 31, 1908.)

1. CARRIERS (§ 103*)—CARRIAGE OF GOODS—DELAY IN DELIVERY—ACTIONS—PLEADING—PETITION.

A petition, alleging that plaintiff delivered to defendant railway company at A. goods consigned to a buyer at K., and received a bill of lading therefor, providing that the consignees should be allowed to inspect the goods before acceptance, that the consignment was in accordance with a contract with the consignees to buy at a certain price f. o. b. at A., and that defendant knew of the terms of the contract and the importance of the provision for inspection, was not subject to general demurrer as showing that title passed from plaintiff by delivery f. o. b. at A.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 436; Dec. Dig. § 103.*]

2. CARRIERS (§ 105*)—CARRIAGE OF GOODS—FAILURE TO DELIVER—ACTIONS—DAMAGES.

Where the contract between a buyer and seller that the buyer should have the right to inspect the goods before acceptance was communicated to the carrier, and it refused to allow inspection, which resulted in a refusal to accept, and plaintiff allowed the consignee to handle the goods on consignment, thereby realizing a sum less than the contract price, the carrier was liable for the difference between the sum received and the contract price.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 451; Dec. Dig. § 105.*]

3. CARRIERS (§ 105*)—CARRIAGE OF GOODS—FAILURE TO DELIVER—ACTIONS—DAMAGES.

The carrier having refused consignees the right to inspect until too late to inspect and unload on Saturday, it was liable for damages to the time the goods were taken in charge by the consignees on Monday morning; they not being bound to unload on Sunday to lessen the damage.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 451; Dec. Dig. § 105.*]

4. EVIDENCE (§ 355*)—DOCUMENTARY EVIDENCE—STATEMENTS OF ACCOUNT.

In an action against a carrier for failure to deliver potatoes according to contract, which resulted in the consignees' refusal to accept and a sale on commission at a price less than the contract price, certificates of sale, attached to the deposition of the commissionman, which purported on their faces to be accounts of sale of the same potatoes shipped by the carrier, reciting the number of sacks sold, which corresponded with the number specified in the bill of lading, showing the price obtained and the commission, which was the customary charge, the freight and the net proceeds were admissible; though not verified as correct, where the price obtained corresponded to evidence of the market price of potatoes at the time and the amount of deterioration through delay in delivery.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1484; Dec. Dig. § 355.*]

Appeal from Wood County Court; J. O. Rouse, Judge.

Action by F. N. Hopkins against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ooke, Miller & Coke and Stafford & Geddie, for appellant. Bozeman & Campbell, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

BOOKHOUT, J. Plaintiff brought this suit in the court below for damages in the sum of \$300, and alleged that on the 13th day of June, 1906, he entered into a contract with the Walker-Brewster Grocery Company, brokers of Kansas City, by which he sold to said brokers two cars of potatoes, to be delivered f. o. b. cars at Alba, Wood county, Tex., at the price of 70 cents per bushel, said potatoes consisting of approximately 893 bushels; that the agent of the appellant at Alba knew of the terms of the contract and the character of the goods shipped, and was instructed to mark on the waybill, "Allow inspection," so that the consignee would be allowed to inspect said potatoes; that the agent failed to so mark the waybill, and when the potatoes arrived at Kansas City on the morning of the 15th of June, 1906, the agents of the carrier there refused to allow inspection, and that thereby the delivery of the potatoes was delayed, and the consignees refused to accept the same, and breached the contract, and that the plaintiff had to allow, or did allow, the consignees to handle the potatoes on consignment, and that plaintiff realized \$330.45 only for said potatoes, and here sues for the difference in the contract price and the amount that he received for the potatoes, and in the alternative for damages in the sum of \$300 for failure to properly mark the billing for said freight. The case was tried before the court, and judgment rendered by the court for the sum of \$204.54, the difference in the price that appellee was to have received for the potatoes from the consignees under the contract between them and the amount of money remitted to the appellee by the commissionmen to whom he delivered the potatoes. From this judgment appellant prosecutes this appeal.

1. It is contended that the court erred in overruling defendant's general demurrer to plaintiff's amended original petition because said petition showed upon its face that the plaintiff had no such interest in the subject-matter of this cause as entitled him to sue. The petition alleged that heretofore, about June 13, 1906, plaintiff delivered to defendant, its agent, and employes at Alba, Tex., 607 sacks of Triumph Irish potatoes, approximating 893 bushels, consigned to Walker-Brewster Grocery Company, Kansas City, Mo., and received a bill of lading therefor, expressly providing that said consignees should be allowed to inspect said potatoes before acceptance thereof; that prior to said consignment he had negotiated a sale with said consignees, Walker-Brewster Grocery Company, at 70 cents per bushel f. o. b., Alba, Tex., and that the consignment was in accordance with said contract and agreement with said consignees. It was further alleged that the agent of appellant knew at the time of shipment of the terms of the contract between appellee and the consignees, Walker-Brewster Grocery Company, and of the importance of the stipulation in the bill of lad-

ing allowing the said consignees the privilege of inspecting said potatoes before acceptance thereof by them. We think it clear from the petition that the title to the potatoes was not to pass until they were delivered at Kansas City, Mo., and the consignees had inspected and accepted the same. The petition did not show on its face that the title of the potatoes passed out of plaintiff by their delivery on board of the cars at Alba, Tex., and the court properly overruled the exceptions.

2. It is contended that the petition did not allege the proper measure of damages; that the true measure of damages was the difference in the market value of the potatoes at the time they should have been delivered to consignees in Kansas City and the time they were actually tendered to consignees. We do not concur in this contention. As stated, the petition alleged that at the time of the shipment the defendant company knew of the contract of sale between plaintiff and Walker-Brewster Grocery Company, and the importance of prompt delivery and of allowing consignees the privilege of inspection. The bill of lading delivered at the time to the plaintiff stated that inspection was to be allowed the consignees, but the waybill did not, by reason of the agent's negligence, mention this fact, and because of this failure the defendant refused to permit the consignees to inspect the same. The special terms of the contract between plaintiff and the consignees having been communicated to the carrier, the appellant became liable for the damages resulting from its breach. *Express Co. v. Darnell*, 62 Tex. 639; *Wells Fargo Co. v. Battle*, 5 Tex. Civ. App. 532, 24 S. W. 353.

3. Error is assigned to the court's action in overruling a demurrer to the petition, in effect, that the same was insufficient wherein it sought a recovery of defendant for the damages to the potatoes after they were turned over to Walker-Brewster Grocery Company. The shipment reached Kansas City on Friday morning of June 15th. The potatoes were delivered on the afternoon of Saturday, June 16th. They were not unloaded from the car until Monday, the 18th. The petition alleges that the potatoes were damaged by the sun and exposure to the weather. The consignees, Walker-Brewster Grocery Company, having the right of inspection before acceptance of the potatoes, and inspection having been refused by the appellant until too late to inspect or unload them on Saturday, and the consignees having unloaded them on Monday and disposed of them on commission, the carrier was responsible for the damages up to the time that the consignees took charge of the same on Monday morning. They were not required to unload the potatoes on Sunday to lessen the damage accruing to them by reason of appellant's negligence. There was no error in overruling the exception to the petition.

4. The seventh assignment of error is to

the effect that the court erred in admitting as evidence, and considering in the rendering of his judgment, the two certificates of purchase attached to the deposition of C. E. Walker and marked "Exhibit A," over the objections of the defendant and the motion of the defendant to suppress and strike said certificates out, because said certificates did not of themselves show that they were correct and truthful statements of the expenses incurred in handling said potatoes by Walker-Brewster Grocery Company. The proposition presented under this assignment is that, the certificates of purchase attached to the deposition of the witness C. E. Walker falling to show on their faces that they were true and correct statements of the matter they purported to show, and the witness having failed to verify them as within his own knowledge to be true and correct records of the matters they purported to show, they were inadmissible as evidence on any issue in the case. C. E. Walker testified that he was president of Walker-Brewster Grocery Company, and resided at Kansas City; that the potatoes were in the cars on appellant's railroad tracks in Kansas City until Monday, the 18th of June, when they examined them, and found them in an inferior condition and beginning to rot; that they refused to accept them on the contract; that plaintiff then delivered them to his company to be handled on a consignment basis, and the railroad company was so instructed; that they were exposed to the sun and weather for four days, standing in defendant's yards; that the potatoes were damaged 33 cents per bushel on account of rot and unfitness for market; that after the potatoes were turned over to them to be handled on consignment, they disposed of them on consignment for account of plaintiff, and rendered an account of sales on this basis, charging him regular commission. There were two certificates, one showing a sale of 303 sacks of potatoes sold on account of F. N. Hopkins, Alba, Tex., for \$326, showing the charges of Walker-Brewster Grocery Company to be \$32.65, and freight \$126.40, leaving net proceeds, \$167.55. The other showed a sale of 304 sacks of potatoes for \$313, and charges of Walker-Brewster Grocery Company \$31.50, and freight \$118.80, net proceeds \$162.90. Plaintiff testified that he received from Walker-Brewster Grocery Company \$330.45 for the potatoes. Walker-Brewster Grocery Company, at the time they paid the plaintiff, also inclosed him an account of sales, being the original account of sales, of which the certificates read in evidence were copies. The plaintiff in his pleading alleged that he turned the original account of sales over to the railroad, and notified the defendant to produce the same on trial, or secondary evidence of the contents of the same would be introduced by plaintiff. No objection was made to the cer-

tificates on the ground that they were not the originals. The objection to their introduction was that they were not verified by any one as being true and correct. The certificates purported on their face to be accounts of sale of potatoes sold by Walker-Brewster Grocery Company for the account of F. N. Hopkins, of Alba, Tex. The number of sacks correspond with the number of sacks specified in the bills of lading. They show that the potatoes sold for an aggregate sum of \$634; that the grocery company charged for its services \$63.95, which the testimony shows was the usual charge. The freight was \$341.45, leaving the net proceeds, \$330.45. The evidence was that the market value of potatoes in Kansas City on Monday, June 18th, was 60 cents per bushel. It further shows that these potatoes had diminished 33 cents per bushel by exposure to the sun and weather while on the railroad tracks in Kansas City. There was no error in admitting the certificates in evidence.

The evidence was sufficient to support the judgment, and the same is affirmed.

Affirmed.

COCA COLA CO. et al. v. ALLISON et al.

(Court of Civil Appeals of Texas. Oct. 24, 1908. Rehearing Denied Nov. 14, 1908.)

1. CORPORATIONS (§ 634*)—FOREIGN CORPORATIONS — PERMIT TO DO BUSINESS IN THE STATE—EFFECT.

Rev. St. 1895, art. 745, requiring a foreign corporation to procure a permit to transact business in the state and providing that on obtaining such permit it shall enjoy the rights and privileges conferred on domestic corporations, does not fix the domicile of a foreign corporation in the state granting such permit, but merely places a foreign corporation holding such a permit on the same footing as domestic corporations in the transaction of its business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2498; Dec. Dig. § 634.*]

2. CORPORATIONS (§ 666*)—ACTIONS—VENUE.

The venue of an action against a foreign corporation-obtaining a permit to transact business in the state as provided by Rev. St. 1895, art. 745, is fixed by article 1194, subd. 25, and the fact that a foreign corporation has taken out a permit to transact business in the state and has established its principal office in a county in the state does not require that a suit against it shall be brought in that county.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2601; Dec. Dig. § 666.*]

3. JUSTICES OF THE PEACE (§ 128*)—JUDGMENT—EQUITABLE RELIEF.

The court in a suit to enjoin the execution of a justice's judgment for want of jurisdiction over the person of defendant, entitled to be sued in another county, will presume that the evidence supported the judgment, and that the plea in abatement setting forth the right of defendant to be sued in another county was not sustained, but was properly overruled where the evidence is not set out in the petition.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 128.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. JUSTICES OF THE PEACE (§ 128*)—JUDGMENT—EQUITABLE RELIEF—GROUNDS.

The district court may enjoin the execution of a void judgment of a justice of the peace for less than \$20.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 402; Dec. Dig. § 128.*]

5. JUSTICES OF THE PEACE (§ 128*)—JUDGMENT—EQUITABLE RELIEF—GROUNDS.

Where a plea of privilege to be sued in another county is ignored by the justice of the peace or improperly overruled, the district court may enjoin the execution of the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 402; Dec. Dig. § 128.*]

6. JUSTICES OF THE PEACE (§ 128*)—JUDGMENT—INJUNCTION—PETITION.

A petition in a suit to enjoin the execution of a justice's judgment based on the erroneous overruling of defendant's plea of privilege to be sued in another county should set out the evidence in support of the plea and the evidence, if any, disproving it, and an allegation that petitioner proved the truth of the plea is insufficient, being at most the conclusion of the pleader.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 407; Dec. Dig. § 128.*]

7. JUSTICES OF THE PEACE (§ 128*)—JUDGMENT—EQUITABLE RELIEF—GROUNDS.

Where there was evidence both ways on the plea of privilege interposed by defendant in justice's court, and the justice in overruling the plea merely committed an error of law, the judgment rendered by him could not be enjoined.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 402; Dec. Dig. § 128.*]

8. JUSTICES OF THE PEACE (§ 128*)—JUDGMENT—EQUITABLE RELIEF—PLEADING.

A petition in a suit to enjoin the execution of a justice's judgment based on the improper overruling of defendant's plea of privilege to be sued in another county should allege the existence of a valid defense to the action and set out the facts of the defense, and a mere allegation that the answer showed a good defense was insufficient where the answer was a general denial.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 407; Dec. Dig. § 128.*]

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by the Coca Cola Company and another against E. M. Allison and others to enjoin the levy of an execution on a justice's judgment. From a judgment dissolving the injunction as to the Coca Cola Company, but perpetuating the same as to the J. W. Crowder Drug Company, the Coca Cola Company appeals. Affirmed.

J. J. Phillips and W. D. Simpson, for appellant.

BOOKHOUT, J. It appears from the petition that C. B. Gunn, a citizen of Wise county, Tex., brought suit in justice court of precinct No. 1 of Wise county against the Coca Cola Company, a corporation incorporated under and by virtue of the laws of the state of Georgia, on an account for \$8.25. The defendant was cited, and appeared and filed its plea in abatement, alleging in substance that it is a corporation duly incorporated under the laws of the state of Georgia; that it has now, and had prior to the filing of the

suit, a permit to do business in the state of Texas; and that it has its principal office and place of business in the county of Dallas. The plea alleged that said defendant has never been a resident of Wise county, or in precinct No. 1 thereof, nor did it reside in or have its place of business or office, or have an agent or representative, in Wise county, Tex., or in justice precinct No. 1 of said Wise county, either at the time of filing of said suit, or before or since, nor has it ever resided or had its place of business or its general office or any office or ever had an agent or representative, in said precinct No. 1 of Wise county, or in Wise county, Tex. The plea negatived the existence of other grounds which might authorize the bringing of the suit in justice court of precinct No. 1 of Wise county. The plaintiff alleges that the justice of the peace overruled its plea in abatement, and proceeded to render judgment against it for the amount sued for. The petition does not show upon whom the citation issued by the justice of the peace was served, nor does it show that it was not served upon some one upon whom the statute authorized service. The contention of the appellant, as we understand it, is that a corporation incorporated under the laws of another state upon securing a permit to do business in this state is entitled to all the privileges and immunities of a domestic corporation, including the right to be sued in the county of its domicile, and that its domicile is the place of the location of its principal office. Article 745 of the Revised Statutes of 1895, provides, in substance: That a corporation for pecuniary profit organized under the laws of another state, desiring to transact business in this state, shall procure a permit from the Secretary of State to do so, and "on obtaining such permit it shall have and enjoy all the rights and privileges conferred by the laws of this state on corporations organized under the laws of this state." This statute was not intended to fix the domicile of a foreign corporation in this state. It only intends to place a foreign corporation, upon procuring a permit to do business in this state, upon the same footing as domestic corporations in the transaction of its business. The venue of suits against foreign corporations is fixed by subdivision 25 of article 1194 of the Revised Statutes of 1895. The fact that the appellant took out a permit to transact business in this state, and established its principal office in Dallas county, did not make it a domestic corporation or require suit against it to be brought in the justice's court of precinct No. 1 of Dallas county. It was a foreign corporation, and it could be sued in any court within this state having jurisdiction over the subject-matter in any county where the cause of action or a part thereof accrued, or in any county where such company

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

may have an agency or representative, or in the county in which the principal office of such company may be situated, or, when the defendant corporation has no agent or representative in the state, then in the county where plaintiff resides. Mr. RAINEY, C. J., is not prepared to agree with this construction of the statute, but as the issue was raised by the plea in abatement as to whether the appellant had its principal office and place of business in Dallas county, and the evidence on this issue is not set out in the petition, it will be presumed that the evidence supported the justice's judgment, and that the plea in abatement in this respect was not sustained, but was properly overruled. He therefore agrees to the conclusion reached in the opinion.

The judgment of the justice of the peace being for less than \$20, it could not be appealed from. If the judgment was void, then the district court had power to enjoin it. *Railway Co. v. Rawlins*, 80 Tex. 579, 16 S. W. 430. If the appellant was entitled to have the suit brought in Dallas county, and a proper plea of privilege to be sued in Dallas county was presented and ignored by the justice, or the evidence was all one way in the support of such plea and the justice arbitrarily overruled the same, then the district court, upon the matter being properly presented to it, had power to grant an injunction. *Jennings v. Shiner* (Tex. Civ. App.) 43 S. W. 276.

The petition alleges that the plea of privilege was presented to the justice and by him overruled. It further alleges that the petitioner presented his plea of privilege in the justice's court, "and proved the truth of the contents of the same." It does not set out the evidence tending to sustain the plea and state that there was no other evidence, or negative the fact that plaintiff also introduced evidence tending to disprove the plea. The allegation that appellant proved the truth of the contents of its plea is at most a conclusion of the pleader. The evidence in support of the plea should have been set out as well as that, if any, tending to disprove the allegations therein. If there was evidence both ways on the plea, and the justice of the peace in overruling the same simply committed an error of law, then the judgment could not be enjoined. Again, the petition alleges that appellant filed in the justice's court its answer subject to the ruling on its plea of privilege, which answer showed "a good and valid defense to the petition of said C. B. Gunn." This is the only allegation that we find in the petition that appellant has any defense to the account sued on in the justice court. Looking to the answer filed in the justice court, we find that a general denial is the only answer filed therein, except the plea of privilege. This allegation was insufficient in a suit asking

for equitable relief. The petition should have alleged that the appellant had a valid defense to the cause of action sued on in the justice court, and set out the facts showing such defense. *Foust v. Warren* (Tex. Civ. App.) 72 S. W. 404.

Appellant filed a motion for new trial in the justice court on the ground that the judgment was contrary to law and contrary to, and not supported by, the evidence. This motion was not prosecuted or presented in that court, but overruled by operation of law. No question was raised by appellant in the trial court as to the power of the district court of Dallas county to grant this injunction, or to hear and determine the same, and none is raised in this court. We conclude that the trial court did not err in sustaining a general exception to the petition, and in dissolving the injunction and dismissing the cause as to appellant.

The judgment is affirmed.

STOKER v. FUGITT et ux.†

(Court of Civil Appeals of Texas. Oct. 24, 1908. Rehearing Denied Nov. 14, 1908.)

1. ADVERSE POSSESSION (§ 116*) — INSTRUCTIONS—DEFINITION OF TERMS.

In trespass to try title, the defense being the statute of limitations and that the deed under which plaintiff claimed was fraudulently procured, an instruction that if the jury believed that defendants executed the deed because of false representations, etc., and if they further believed that defendants had held peaceable and adverse possession of the tract for so long a period as 10 consecutive years next before filing of the suit, and such possession has been open, notorious, peaceable, distinct, continued, and inconsistent with the claims of all others, they should find for defendant, was sufficient, though not defining peaceable and adverse possession separately, and in the language of the statute.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. § 116.*]

2. DEEDS (§ 70*) — VALIDITY — FRAUDULENT REPRESENTATIONS—RELIANCE ON REPRESENTATIONS.

If defendants in trespass to try title were induced to sign the deed under which plaintiffs claimed by fraudulent representations, and would not have signed it but for such representations, defendants could recover, and it was not essential that the false representations were the sole inducement to its execution, if it would not have been executed but for such representations.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 167; Dec. Dig. § 70.*]

3. DEEDS (§ 196*) — VALIDITY—FALSE REPRESENTATIONS—PRESUMPTIONS.

False representations are never presumed, but must be established by legal and competent evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 587; Dec. Dig. § 196.*]

4. TRIAL (§ 252*) — INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

A charge, though correct as a general proposition of law, is properly refused if not called for by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

Appeal from District Court, Hill County ;
W. C. Wear, Judge.

Trespass to try title by H. R. Stoker
against A. B. Fugitt and wife. From a judgment for defendants, plaintiff appealed. Affirmed.

A. M. Frazier and Vaughan & Hart, for
appellant. Morrow & Smithdeal, for appellees.

TALBOT, J. This case was before us on a former appeal, 102 S. W. 743. The action is in form of trespass to try title, and involves the title to about 22⁸⁰/₁₀₀ acres of land. The litigation grows out of a dispute as to the true location of a division line. It seems that appellant, who was the plaintiff below, with the knowledge of appellees, in company with the county surveyor, J. F. Wright, went upon the land, surveyed it, and established the line where appellant claims it should be. After the land was surveyed by Wright, he went to the home of appellees and prepared a partition deed in accordance with the survey he had made, and appellees signed and acknowledged it, the acknowledgments being taken by Wright, he being a notary public. This deed was dated April 24, 1906, and was also signed and acknowledged by appellant. To appellant's petition appellees pleaded not guilty, the statutes of three, five, and ten years' limitation, and specially that said deed of April 24, 1906, was without consideration and procured by the false representations of appellant and the said Wright, and that said Wright was acting as the agent of appellant in the transaction. They prayed that said deed be canceled. On the 20th day of September, 1907, a trial before the court and jury resulted in a verdict and judgment in favor of the defendants, and the plaintiff has appealed.

Appellant's first assignment of error complains of the court's action in refusing to give his special charge No. 1. The issues made by the evidence and submitted to the jury were whether or not appellees were induced to execute the instrument dated April 24, 1906, by the false representations of appellant, and whether or not appellees had held peaceable and adverse possession of the land in controversy for 10 years next prior to the institution of this suit. The special charge refused undertakes to present the law upon both of these issues, and among other things, defined "peaceable possession" and "adverse possession," and instructed the jury, in effect, that, before they would be authorized to find that the said instrument was invalid on account of false representations of material facts made by the appellant to procure it, they must believe that such representations were the sole inducement to its execution. The court charged the jury as follows: "If you believe from the preponderance of the evidence that the witness, J. F. Wright, in the presence and hearing of the

plaintiff, H. R. Stoker, made to the said W. B. Fugitt and his wife, M. A. Fugitt, any false statement or statements as to the purpose or effect of the instrument which purports to effect a settlement and fix the boundary line between the plaintiff and defendants, dated April 24, 1906, and signed by the plaintiff, H. R. Stoker, and the defendants, W. B. Fugitt and his wife, M. A. Fugitt, and that the same were false statements as to some material fact or facts, and that the said Fugitt and his wife believed said statements to be true and were induced thereby to sign said instrument, and that but for such representations they would not have signed the same, and you further believe from the preponderance of the evidence that the defendants have had and held peaceable and adverse possession of the tract of land described in plaintiff's second amended original petition for as long a period of time as 10 consecutive years next before the filing of this suit, viz., May 12, 1906, and that such possession has been open, notorious, peaceable, distinct, continued, and inconsistent with the claims of everybody else, you will find a verdict in favor of the defendants and so say." While this general charge of the court did not define "peaceable possession" and "adverse possession" separately and in the very language of the statute, and while it would have been better to have done so, yet we think the charge presented the law of the case with sufficient accuracy and clearness to meet the demands of the statute and to protect the rights of the appellant. Upon the issue of whether or not the execution of the instrument of April 24th, on the part of appellees, was procured by the alleged false representations made by appellant, the special charge was, we think, erroneous in requiring the jury to find that the appellees were solely induced by such representations to make said instrument. The general charge instructed the jury that if appellees were induced by such representations to sign said instrument, "and that but for such representations they would not have signed the same, etc., to find for them." This was a full and correct application of the law to the facts, as we understand it, and the word "induced" should not have been qualified by the word "solely," as was done in the special charge. If appellees would not have signed the instrument in question but for the false representations alleged, then they should not be held bound by it, although some other consideration operated in part as an inducement to its execution. It was not essential to their recovery that the false representations were the sole inducement.

The fourth assignment complains that the court erred in refusing to charge the jury, at his request, "that false representations are never presumed, but, like any other fact in issue, must be established by legal and competent evidence." It may be conceded that the charge announces a correct general prop-

osition, but we are of opinion that it was properly refused in this case because not called for by the evidence.

We have carefully examined the evidence, and believe that it is sufficient to support the judgment, and finding no reversible error in the record, it will be affirmed.

HANSEN v. WILLIAMS et al.

(Court of Civil Appeals of Texas. Oct. 28, 1908. On Rehearing, Nov. 18, 1908.)

1. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTIONS AS TO FACTS.

Where, in an action for a broker's commission on a sale of real estate, there was conflicting testimony as to whether the owner had imposed a specified condition on the sale, an instruction that if the broker was informed by a subagent that he, in making the trade with a purchaser had failed to state such condition, and that the earnest money was turned back to the purchaser and the trade declared off on such understanding, the verdict should be for defendant, was properly refused, as assuming a fact in dispute.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-435; Dec. Dig. § 191.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

It is not error to refuse a requested instruction covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

3. BROKERS (§ 85*)—COMMISSIONS—ACTIONS—EVIDENCE.

Where, in an action for a broker's commission, the owner testified that he had placed the property in the broker's hands for sale for a certain price, net, and the broker testified that the owner had not stated that the price was to be net, the owner could not corroborate his testimony by evidence that, at a time when he said that the price was all right he knew that the broker had been trying to sell the property in connection with other property in the vicinity, and that he thought that the broker would get compensation through the sale of the other property.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 85.*]

4. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where, in an action for a broker's commission, the court charged the jury to find for defendant if they found that a specified condition had been stated by defendant to a subagent of the broker, the exclusion of evidence that the owner relied on the fact that the subagent had made the sale on such condition was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

5. EVIDENCE (§ 589*)—WEIGHT AND SUFFICIENCY—TESTIMONY OF PARTY.

Where a broker suing for a commission testified that 5 per cent. commission was the customary compensation, and defendant did not adduce any evidence on the subject, the court did not err in taking the testimony of the broker as undisputed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2438; Dec. Dig. § 589.*]

6. EVIDENCE (§ 220*)—ADMISSIONS—FAILURE TO DENY STATEMENTS BY OTHERS.

Where, in an action for a broker's commission on the sale of real estate, the owner and a subagent of the broker testified that in an in-

terview at which the broker was not present, the owner authorized the subagent to sell on a specified condition, which the owner had not mentioned at any other time, statements subsequently made in the presence of the broker in which such condition was referred to, without contradiction by him, could not be construed as an admission that such condition had been imposed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-778; Dec. Dig. § 220.*]

On Rehearing.

7. BROKERS (§ 88*)—COMMISSIONS—ACTIONS—INSTRUCTIONS.

Where, in an action for a broker's commission on the sale of real estate, the court charged that the jury should find for defendant if a specified condition had been imposed for the sale, and a sale was made without reference thereto, an instruction that if the broker by himself or through his subagent, produced a purchaser ready and able and willing to buy on the terms agreed on between the broker and the owner, the owner was liable, was not misleading, for, if the specified condition had been imposed, the charge required proof that the sale had been effected accordingly.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 88.*]

Appeal from El Paso County Court; Albert S. Eylar, Judge.

Action by Wash Williams and another against J. C. Hansen. From a judgment for plaintiffs, defendant appeals. Affirmed.

E. B. Elfers and Millard Patterson, for appellant. Atlas Jones, for appellees.

JAMES, C. J. This is an action for a broker's commission in respect to the sale of certain lots.

The second assignment complains of the refusal of this instruction: "If you believe from the evidence that after the evening of January 24, 1907, South was informed by Young that he, Young, in making the trade with Pitman had failed to state the condition that the lots should be graded by the purchaser and that the earnest money, \$100, was turned back to Pitman and the trade declared off upon such understanding, you will find for the defendant." There being evidence that such condition had not been imposed by the owner, Hansen, prior to the closing of the trade, the instruction was properly refused. The charge assumed the fact that the grading was a condition upon which the owner had authorized the sale. It appears from Hansen's own testimony that he had authorized a sale by South of the lots at \$2,700, net cash, and that on the 24th of January he went to the office of Williams and South and announced that if they were not sold by 5 p. m. he would withdraw them. That he returned to said office a little prior to that hour and found the lots had not been sold, and told Williams he would withdraw the lots. South was not then present, and at that time Young (subagent of South) came up and asked for 20 minutes more in which to sell the lots, and Hansen stated: "That all depends

If the party does not grade them, I would not give you two minutes." That Young went off, and shortly came back to the office with Pitman, the purchaser. The witness Hansen testified that he had never said anything to South about the grading of the lots, and when the trade was concluded with Pitman on the last occasion in said office that nothing was said about grading. Some days after witness and Young got South, and they all went to Pitman, and Hansen asked Pitman if he was going to grade the lots, and Pitman said he was not, as he had not purchased on that condition. Young then said that Hansen had told him to sell the lots to a purchaser who would agree to grade them and that he had, in the hurry, neglected to tell Pitman. As Pitman refused to perform that condition he demanded his \$100 earnest money, and that South and Young then agreed to return the earnest money. Young testified that, when he had asked for 20 minutes more time, Hansen said he would give it if the lots were sold to a purchaser who would agree to grade them. But Williams, who both Hansen and Young stated was present on that occasion, testified that he heard everything said by Hansen to Young, and that Hansen said nothing about grading the lots. As neither Hansen nor Young claimed that Hansen had ever done so on any other occasion, it is apparent that there was a conflict of evidence on that subject, and that the charge would clearly have been wrong.

The third assignment is that the court should have given this instruction: "You are charged that in the transaction mentioned in this evidence the defendant Hansen, under the undisputed evidence, had the right to treat the subagent, Young, as his own agent, and, if you believe that Young failed to state to Pitman the condition (if such condition was imposed) that the purchaser should grade the property, you will find for the defendant." The charge given contained the substance of this instruction.

The fourth assignment complains of rejected testimony of Hansen which would have been to the effect that on the evening of the 24th, when the check of \$100 given by Pitman was being discussed, and Hansen said that the price was all right, he (Hansen) knew that South had been trying to sell the property of witness in block 48, Alexander's addition, in connection with other property in the same vicinity involving several thousand dollars, and that he (witness) thought at that time that South would get any compensation he might receive in effecting the sale, through the sale of the other property of witness, and that he (witness) did not at any time have the idea in his mind that any commission should be paid by him upon the \$2,700 named in the check. It appears that Hansen had testified that he had placed the property in South's hands for sale for \$2,700, net to him. South testified that he had not

stated that this price was to be net. It hardly needs discussion to decide that Hansen was not entitled to corroborate himself by such testimony as that above mentioned.

The fifth is that the court erred in excluding Hansen's testimony to the effect that when, on the evening of January 24th, he said the check for \$2,700 was all right, he thought and relied on the fact that Young had made the sale upon the condition that Pitman should grade the lots. The refusal of this did not injure defendant, for the reason that the jury were charged absolutely to find for defendant if they found that the condition had been stated to Young.

The sixth is that the court erred in charging that if they found for plaintiff, to find for the amount sued for. This was 5 per cent. commission. The proposition is that, as South was the only witness who testified as to the customary compensation, and that the same was 5 per cent., and as South was an interested party, and was testifying as an expert, the court should have left it to the jury to discredit him, and to form their own conclusion about the compensation to which plaintiff was entitled, if anything. The witness was testifying to a fact. We think the court did not err in taking it as undisputed, the testimony being as to a fact which could readily have been disproved if not true, and defendant not seeing fit to adduce any testimony on the subject.

Other assignments raise this question. It appears that, a few days after the 24th, Young and Hansen and South had the interview with Pitman, in which Young and Hansen had the discussion with Pitman concerning the grading of the lots, and which resulted in South and Young giving the check for earnest money back to Pitman. The complaint is of a special charge given at plaintiff's request which instructed the jury to "disregard any statements made by Young or Hansen as to the grading of the lots after the deal was closed with Pitman, for the reason that the evidence does not show that South ever consented or admitted that said statements were true, and for the further reason that they are irrelevant and inadmissible." The real issue after all was whether or not Hansen, on the evening of the 24th, imposed the condition of grading the lots, when he authorized Young to sell in 20 minutes. It is not attempted to be claimed that the condition was imposed at any other time, or had been mentioned by Hansen at any other time. It was established, however, that South was not present on that occasion. There is no evidence that he had been informed of any such condition. In these circumstances he was not called upon and could not be expected to contradict Young when he admitted in the interview a few days after that Hansen had told him to sell on that condition but that he had forgotten it. What was said on that subject by Young or Hansen, or what was done on that occasion with the check

under such circumstances, was not evidence against South as to the fact of imposing the condition. His conduct on that occasion could not be construed as an admission of that fact. Hansen and Young testified fully concerning the only interview at which it was ever claimed that Hansen had told Young to sell upon the condition that the lots should be graded, and the declaration afterwards in his presence could affect plaintiff only when made under circumstances in which there would be ground for saying that he had admitted their truth, and this could not be when it appeared that he had no knowledge of the subject one way or the other at the time. The charge was properly given.

The assignment No. 1 relates to a peremptory charge asked for by defendant. This was properly refused.

Affirmed.

On Rehearing.

The opinion is objected to as not passing on an assignment which complained of a charge in effect that if the jury believed that plaintiffs by themselves or through a subagent, produced to Mr. Hansen, in the person of Mr. Pitman, a purchaser ready, able and willing to buy upon the terms agreed on between the plaintiffs and defendant, then defendant would be liable to plaintiffs for the amount they have sued for. The charge was a correct statement of the law. If the condition of grading the lots had been imposed, then the above charge required proof that the sale had been effected accordingly. The jury could not have been misled by said charge, when the whole charge is considered, especially the emphatic instruction to find for defendant if said condition had been imposed and the sale to Pitman had been made without reference to it.

The motion is overruled.

HOWELL v. DENTON.

(Court of Civil Appeals of Texas. Oct. 17, 1908. Rehearing Denied Nov. 7, 1908.)

1. BROKERS (§ 80*)—ACTIONS FOR COMPENSATION—DEFENSES.

Where a contract specifically authorized the sale of a tract of land containing a certain number of acres, and it does not appear that prior to the sale the owner claimed, or that the agent knew that there was a greater number of acres in the tract, evidence that the tract did contain a greater number of acres is inadmissible to defeat an action for commissions.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 80.*]

2. BROKERS (§ 88*)—ACTIONS FOR COMPENSATION—FINDINGS—CONSTRUCTION.

Findings of fact, in an action for commissions for the sale of land, that the purchasers to whom the agent sold took 320 acres did not limit the amount of land sold to 320 acres so as to defeat the action, the authority being to sell 327

acres, where in answer to another question, if there was an excess over 320 acres, to state how many acres of such excess each of the purchasers agreed to take, the jury found that one purchaser agreed to take 3½ acres and another 3½ acres.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 88.*]

Appeal from Hill County Court; N. J. Smith, Judge.

Action by George N. Denton against J. W. Howell. Judgment for plaintiff, and defendant appeals. Affirmed.

Vaughan & Hart and Works & McKee, for appellant. Morrow & Smithdeal, for appellee.

TALBOT, J. Appellee brought this suit to recover of appellant \$490.50, alleged to be due him as commissions for selling land belonging to appellant. This is the third appeal in the case. 68 S. W. 1002, 87 S. W. 221. The terms of the contract in the main relied upon by appellee for his authority to sell the land as he did are embraced in the letters that passed between him and appellant, the most important one bearing date August 28, 1900. This letter was written by appellant to appellee in reply to a letter in which appellee stated, "I have a number of parties who like your place if they could get it cut in tracts of from 100 to 160 acres"—and so much of it as is necessary to quote is as follows: "Yours of the 27th received, and will say that cannot cut the place as desired, unless all is taken. * * * Will sell the south 163½ acre tract for \$32.50 and the end 163½ acre tract for \$27.50, or will cut 200 off south end for \$32.50, provided the north 127 is taken at \$26.00 per acre; in other words, will sell the north 127 for \$26.00 per acre and the south end 200 for \$32.50 per acre, provided all is taken. Will not cut unless all is taken." On November 26, 1900, appellee, as evidenced by a written contract, sold 100 acres of said land to G. D. Hill at \$30 per acre, to C. H. Stamphill 100 acres at \$33 per acre; to Geo. B. Helton 60 acres at \$25 per acre, and to C. L. Hardison 60 acres at \$30 per acre, aggregating 320 acres, the said Helton and Hardison agreeing to take all the land in the tract over and above said 320 acres, and by verbal contract obligating themselves to pay \$30 per acre for such overplus. The contract showing the above sales of the land, together with a letter from appellee asking if it was necessary for appellant to come down to measure the land, and stating that the parties were willing to take it at appellant's figures of 327 acres in the whole tract, was promptly sent to appellant, and he refused to recognize the trade and to make the deeds. On the last trial of the case in the lower court it was submitted on special issues and resulted in a judgment in favor of appellee for the sum of \$490.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

50, from which appellant has appealed to this court.

Among other questions submitted for the determination of the jury were the following: "How many acres of land were there in the tract of land that defendant placed with the plaintiff to sell for him as his agent? How many acres, if any, were there in said tract of land in excess of 320?" To the first of these questions the jury answered, 327, and to the second they replied, 7, acres. The defendant (appellee here) moved the court to set aside and hold for naught these findings, upon the ground that they were wholly without evidence to support them and his motion was by the court sustained. Upon other issues submitted to the jury they found that the appellee sold to Hill, Stamphill, Hardison, and Helton, respectively, the number of acres of land aggregating 320 acres, as stated in the contract sent to appellant immediately after said sales were made, and appellant testified that after the second trial of this case, and not before, he, with the assistance of his nephew and another young man, measured the said land, and that according to their measurement and figures the tract contained 358 acres.

It is contended that, having set aside the findings of the jury to the effect that the tract of land in question contained 327 acres and that the excess over 320 was 7 acres, the other findings were insufficient to authorize the judgment rendered, and that judgment should have been entered for appellant, that this was especially true in view of the jury's findings that Hill, Stamphill, Helton, and Hardison had agreed to take so many acres each aggregating 320 acres, and the testimony of appellant that according to his measurement of the land the tract contained 358 acres, all of which appellee had not contracted to sell. In this view of the case we do not concur. We think the court was clearly in error in striking out the findings of the jury referred to, but the other findings amply support the judgment rendered. The judgment is not in conflict with the jury's findings or verdict, but in accord with such findings.

But, aside from this view, it seems that the judgment rendered was the only proper one that could have been rendered. Appellant's letter, dated August 28, 1900, called for a tract of land containing 327 acres, and expressly authorized appellee to sell that number of acres. It provided into what size tracts the land might be cut up, and the prices for which such several tracts might be sold, and it does not appear that prior to the time appellee contracted to sell the same that appellant claimed, or that appellee knew, that there was a greater number of acres in the tract than 327 acres. On the contrary, the evidence is practically conclu-

sive that appellee did not know that there were more than 327 acres (if they were), and that no such claim was asserted by appellant before the sales made by appellee. This being true, and the letter of appellant of August 28th being unambiguous and specifically authorizing appellee to sell a tract of land containing 327 acres, evidence to show that the tract did in fact contain more than that amount of land was inadmissible. Because of the admission of such testimony the case was reversed by the Court of Civil Appeals at Austin on a former appeal from a judgment rendered in favor of appellant. In reversing the case the court said: "This testimony was admitted * * * in support of appellee's theory [appellant here], to the effect that, as there was more than 327 acres in the tract, he was not bound by the sale made by Denton, and therefore not liable to Denton for the commissions claimed. We are of the opinion that this evidence was not admissible. As said before, the terms of the letter of August 28th are definite and specific. It authorizes Denton to sell a tract of land of 327 acres, and the evidence fails to show that the appellee asserted any claim to a greater quantity of land prior to the time that Denton made the sale. The written contract embraced in the letters could not be controlled and affected by the evidence offered by Howell to the effect that there was more land in the tract than 327 acres." We concur in the views of the Court of Civil Appeals at Austin, as here expressed, and find no evidence in the record that would justify a change or modification of such holding. Besides, the findings of the jury, other than those stricken out by the court upon appellant's motion, show an excess in the tract of only seven acres. These findings further show, as was alleged, that Hardison and Helton each took $3\frac{1}{2}$ acres of said excess at \$30 per acre. The contention that the jury's findings in answer to questions 4, 5, 6, and 7 affirmatively limited the amount of land sold to 320 acres is not sustained, we think, by the record. In addition to these issues, question 8, propounded to the jury, is to the effect that, if there was an excess in the tract of land over and above 320 acres, then say how many acres of such excess each of the purchasers agreed to take, to which they replied, Hill, none, Stamphill, none, Helton, $3\frac{1}{2}$ acres, and Hardison, $8\frac{1}{2}$ acres. It is clear, therefore, that the jury's findings comprehended 327 acres as the whole number of acres in the tract.

The other assignments are practically disposed of adversely to appellant by what has already been said, and need not be discussed. Our conclusions lead to affirmance of the judgment of the court below, and it is so ordered.

Affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF
TEXAS v. LONG.†

(Court of Civil Appeals of Texas. Oct. 22, 1908.
Rehearing Denied Nov. 12, 1908.)

1. VENDOR AND PURCHASER (§ 218*)—RIGHTS
OF PARTIES—INJURIES BY THIRD PERSONS.

If an embankment as constructed by a railroad company created a permanent nuisance, causing constant or regularly recurring injury to adjoining land, a cause of action then arose in favor of the then owner of the land for all damages then caused or which might in the future be caused to the land by such embankment, so long as it was maintained in an unchanged condition, so that a subsequent owner would have no cause of action for damages suffered because of the embankment after he became owner, unless resulting from a change in the embankment, which change would have to be alleged by him.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 456; Dec. Dig. § 218.*]

2. VENDOR AND PURCHASER (§ 218*)—RIGHTS
OF PARTIES—INJURIES BY THIRD PERSON.

The overflows onto adjoining land of water obstructed by defendant railroad company's embankment on its land being neither constant nor regularly recurring, the right of action for any future overflow accrues at the time thereof to the then owner of the adjoining land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 456; Dec. Dig. § 218.*]

3. VENDOR AND PURCHASER (§ 218*)—BONA
FIDE PURCHASER.

The nuisance to adjoining land because of a railroad embankment not being permanent, neither the recovery against the railroad company, on the theory of a permanent nuisance, by the one owning the land at the time of the construction, nor his release to the company of any future damages, will defeat the cause of action of one buying the land without notice or knowledge of such judgment or release for subsequent overflows of the land from insufficient culverts and sluiceways to carry off the water obstructed by the embankment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 456; Dec. Dig. § 218.*]

4. APPEAL AND ERROR (§ 1140*)—REMISSION
OF DAMAGES.

Error in including in the judgment a certain item of damages, in the absence of pleading authorizing it, may be cured by remittitur.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.*]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by J. H. Long against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff. Defendant appeals. Affirmed on condition of remission of damages.

This suit was commenced by appellee against appellant by a petition filed July, 7, 1907. The appeal is prosecuted by the latter from a judgment for the sum of \$560.25 in favor of the former. The trial was before the court without a jury; and from the record it appears that the court found as facts: (1) That by purchase of one Wilson on October 6, 1904, appellee became, and thereafterwards and at the date of the trial, was, the owner and in possession of the land

described in his petition, and lying north of and contiguous to appellant's right of way, on which in 1888 it had constructed and there afterwards maintained as its roadbed a dump or embankment about 2½ feet in height. (2) That in the construction of said dump, and in the maintenance thereof thereafterwards, appellant had neglected to provide culverts and sluiceways sufficient to carry off the water obstructed in its natural flow by said embankment, and, as a result, appellee's land and crop growing thereon were injured and destroyed by water so obstructed in its natural flow. (3) That said embankment and its culverts and sluiceways remained as constructed in 1888, except that as originally constructed a ditch or barrow pit was provided along the north part of appellant's right of way, adjoining appellee's land, which, when kept well opened, furnished reasonable protection to said land from water obstructed by said embankment. (4) That after the railway had been so constructed the ditch or barrow pit gradually filled up, but was opened up about 1898, when it again began to fill up, and by the beginning of 1906 was so filled up as not to furnish protection against water obstructed in its natural flow by said embankment. (5) That, as the result of water obstructed by said embankment overflowing and washing his land and the crops growing thereon during the years 1906 and 1907, said land was "permanently damaged and depreciated in value" in the sum of at least \$100, his corn crop was damaged in the sum of \$40, and his cotton crops in the sum of \$660, less the sum of \$199.75, which would have been the cost of growing, etc., said crops. The court further found that some time prior to April 28, 1893, one Queener, who at the time the embankment was constructed owned the land, had sued appellant and recovered against it a judgment for damages to said land and crops growing thereon sustained by him prior to the institution of his suit by reason of appellant's failure to provide sufficient culverts and sluiceways to carry off the water obstructed in its natural flow by said embankment, and that in 1898 said Queener, then still being the owner of the land, had entered into a written contract with appellant whereby, for a sufficient consideration, he had released to appellant all claim for damages theretofore or which might thereafterwards be sustained by him by reason of overflows caused, or which might be caused by water overflowing his land because obstructed in its natural flow by said embankment. The court further found that appellee had neither actual nor constructive notice of the judgment recovered by Queener against appellant in 1893, nor of the release by Queener in 1898 of damages which might thereafterwards result to the land and crops growing thereupon as the result of overflows, but was a pur-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

chaser in good faith from Wilson, to whom Queener had conveyed, of the land for a valuable consideration paid by him to said Wilson. We adopt as our own the findings of the trial court, so far as specified above.

McReynolds & Hay and Head, Dillard & Head, for appellant. McGrady & McMahon, for appellee.

WILLSON, C. J. (after stating the facts as above). If it should be said from the record, in face of the finding of the trial court to the contrary necessarily included in the judgment rendered, that the embankment as constructed by appellant created a permanent nuisance, causing constant or regular recurring injury to the land in question, the contention made by appellant that at the time the embankment was constructed a cause of action arose in favor of Queener, then the owner of the land, for all damages caused or which might in the future be caused to his land by the embankment; so long as it was maintained in an unchanged condition, would be a sound one. *Rosenthal v. Taylor B. & H. Ry. Co.*, 79 Tex. 325, 15 S. W. 208; *Railroad Co. v. Barry*, 98 Tex. 248, 251, 83 S. W. 534. And it would follow that, the right to recover such damages having accrued to Queener as the owner of the land at the time the embankment was constructed, a right of action could not accrue to appellee for damages suffered by him after he became the owner of the land, unless such damages were suffered by him as the result of a change occurring in the condition of the embankment. And it would further follow, appellee's petition failing to allege such a changed condition, the judgment in his favor could not be sustained by this court, notwithstanding evidence in the record showing that a change sufficient to account for the injury to his land claimed to have been suffered by him had occurred in the provision made when it was constructed for carrying off the water obstructed by the embankment. But we think the record does not make such a case. On the contrary, as we view it, the evidence authorized the conclusion which must have been reached by the trial court that the overflows from water obstructed by the embankment were neither constant nor regularly recurring. If they were not, then the nuisance was not of a character to entitle the owner of the land at the time the embankment was constructed to sue for and recover damages which might thereafter be suffered as the result of overflows caused by it. The right of action for damages which might be caused by such future overflows would accrue as the overflows occurred in favor of the owner or owners of the land at the times they occurred. "The building of the embankment and culverts, as alleged," said the court in *Railroad Co. v. Anderson*, 79 Tex. 433, 15 S. W. 485, 23 Am. St. Rep. 350, "was not of

itself a nuisance. It was no invasion of plaintiff's rights. They were not put on his land. They became a nuisance only at intervals by diverting water from rainfalls from its natural flow upon plaintiff's land. The embankment and the culverts were permanent, but the nuisance was not. There was no constant and continuing injury." And see *Bonner et al. v. Wirth*, 5 Tex. Civ. App. 560, 24 S. W. 306; *Railway Co. v. Davis* (Tex. Civ. App.) 29 S. W. 484; *Railway Co. v. Goldman*, 8 Tex. Civ. App. 257, 28 S. W. 267; *Railway Co. v. Lensing* (Tex. Civ. App.) 75 S. W. 826; *Railway Co. v. Caldwell* (Tex. Civ. App.) 102 S. W. 461; *Railway Co. v. Kyle* (Tex. Civ. App.) 101 S. W. 272; *Gramann v. Elcholtz*, 36 Tex. Civ. App. 309, 81 S. W. 756.

Appellant, however, insists that, if the embankment did not create such a nuisance as entitled the then owner of the land to sue for and recover in one suit all damage it had caused or would cause in the future, Queener, the owner of the land at that time, nevertheless so treated it, and recovered in the suit brought in 1893 all such damages. Conceding that Queener in the suit referred to so treated the embankment, and after recovering the judgment in 1893 could not have maintained a suit for damages which may afterwards have been suffered by him, we do not think it follows that appellee could not maintain an action for damages suffered by him after he became the owner of the land. His rights in dealing with the land should be held to be controlled by the real character of the nuisance, and not by the character ascribed to it by the suit of which he had no knowledge instituted in 1893. If the nuisance created by the embankment was not a permanent one within the meaning of the law—if it was not such a nuisance as constantly injured the land—we do not think it should be held that, when appellee purchased the land of Queener, he took it burdened with a servitude in favor of appellant of which he had no notice. On the facts shown by the record we think he had a right to assume that no such servitude existed, and that the duty imposed by law on appellant to provide and maintain culverts and sluiceways sufficient to carry off the water obstructed by its roadbed (*Sayles' Ann. Civ. St.* 1897, art. 4436; *Clark v. Dyer*, 81 Tex. 343, 6 S. W. 1061; *Railway Co. v. Davis* [Tex. Civ. App.] 29 S. W. 483) still rested upon appellant (*Sellers v. Railway Co.*, 81 Tex. 458, 17 S. W. 32, 13 L. R. A. 657, 21 A. & E. Ency. Law [2d Ed.] 722).

Nor do we think there is merit in appellant's contention that the release of damages which might accrue to the land by reason of the embankment made by Queener in 1893 in favor of appellant should be held to operate to defeat appellee's cause of action. Appellee had no knowledge or notice of that transaction at the time he acquired the title to the land, and we think his rights were

not affected by it. Webb, Record Title, par. 48; Blake v. Boye, 38 Colo. 55, 88 Pac. 470, 8 L. R. A. (N. S.) 418; Treadwell v. Inslee, 120 N. Y. 458, 24 N. E. 651; Taggart v. Warner, 83 Wis. 1, 53 N. W. 33.

In the absence of pleadings authorizing it, the court found and rendered judgment in appellee's favor for the sum of \$40 as damages suffered by him by the destruction in 1906 of his corn crop growing on the land, caused by an overflow of water diverted by the embankment. The error can be cured by a remittitur filed here. The judgment of this court, therefore, will be that the judgment of the lower court be reversed and the cause remanded for a new trial, unless the appellee within 20 days from the date thereof shall remit of the amount of the judgment in his favor the sum of \$40, in which event the judgment of the lower court will be reformed and affirmed for the sum of \$520.25.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. WILBANKS.

(Court of Civil Appeals of Texas. Oct. 31, 1908.)

1. TRIAL (§ 235*) — INSTRUCTIONS — CLERICAL ERROR.

An instruction that certain circumstances constituted a "prima case of negligence" on defendant's part must have been understood to mean that they constituted a prima facie case, and was therefore not objectionable because of the clerical error.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 235.*]

2. RAILROADS (§ 465*) — FIRES — PROXIMATE CAUSE.

Where fire was communicated from defendant's locomotive to the house of O., and from thence spread to plaintiff's dwelling house and outbuildings, defendant's negligence in permitting the fire to escape was the proximate cause of the burning of plaintiff's buildings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1690; Dec. Dig. § 465.*]

3. RAILROADS (§ 478*) — FIRES — PLEADING.

A petition against a railroad company for destruction of plaintiff's buildings by fire alleged to have escaped from defendant's locomotive was not required to specify with particularity the facts which were the immediate cause of the fire's escape.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1698, 1700; Dec. Dig. § 478.*]

Appeal from District Court, Henderson County; B. N. Gardner, Judge.

Action by J. G. Wilbanks against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

On the 20th of August, 1906, appellee instituted this suit in the district court of Henderson county to recover of appellant the value of a five-room dwelling house, smokehouse, chicken house, and fencing, situated in the town of Malakoff, in Henderson county, Tex., belonging to appellee, and alleged to have been destroyed by fire through

the negligence of appellant. On the 5th day of September, 1907, the case was tried in said district court of Henderson county, and resulted in a verdict and judgment in favor of appellee in the sum of \$550. Motion for new trial was presented and overruled on the 4th day of October, 1907. The defendant perfected an appeal.

E. B. Perkins, Daniel Apthegrove, R. S. Neblett, and W. R. Bishop, for appellant. Watkins, Green & Richardson, for appellee.

BOOKHOUT, J. There is no error in the first paragraph of the charge, as complained of in the first assignment of error. It is conceded that there is a clerical error in the transcript in copying the charge. The charge actually delivered reads as follows: "You are instructed that, if, from the evidence, you believe that sparks of fire escaped from the defendant's engine or engines, and set fire to the house of one Odom, and that said fire was communicated to the five-room cottage, smokehouse and chicken house, and yard and lot fence of plaintiff, and thereby burned up said houses and fence, then such facts constitute a prima case of negligence on the part of defendant, and in the absence of rebutting evidence, sufficient to overcome such prima facie case of negligence, will render the defendant liable for the injury occasioned thereby." It is clear from a reading of the charge that by the use of the words "prima case of negligence" the court meant prima facie case of negligence, and the jury must have so understood it. The charge taken as a whole is correct, and appellant's criticism to the same is not sustained. *Railway Co. v. Johnson*, 92 Tex. 591, 50 S. W. 563.

Error is assigned to the overruling of defendant's fifth special demurrer to the petition, to the effect that plaintiff's petition is insufficient, because it appears that the negligence of which plaintiff complains is the remote, and not the proximate, cause of the destruction of the house and property described in plaintiff's petition. The same contention is presented under another assignment, which complains of the court's action in refusing a special charge embracing the proposition embraced in this exception, to the effect that the proof shows that the house of appellee was not set fire by sparks thrown or emitted from the engine of defendant, but shows that appellee's house was destroyed by a fire which was communicated to it from the house of one Odom. The court, therefore, should have instructed the jury that even if the Odom house, from which appellee's house was fired, was set on fire by the negligence of appellant, still such negligence was the remote, and not the proximate, cause, and for it appellant could not be liable, and therefore the court erred in refusing the special charge requested to that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

effect. The contention is not sustained. The petition and evidence show that the fire was set by the railroad company to the house of one Odom, and then spread from the Odom house to the dwelling house, smokehouse, chicken house, and fencing of plaintiff, all of which were burned. The principle contended for was decided against appellant by this court in the case of *Railway v. Gentry* (Tex. Civ. App.) 80 S. W. 845. We there held that where fire was set out by the negligence of the railroad company, which spread over intervening property owned by different proprietors and finally reached plaintiff's property destroying it, the company was liable, and that the negligence of the railroad company in setting the fire was the proximate cause of the plaintiff's damage. In the case now before us there was no intervening agency for the spread of the fire. The sparks escaped from the defendant's engines and set the house of Odom on fire, and the fire from the house of Odom was directly communicated to the house of plaintiff. The allegations of the petition in charging the defects in the apparatus and machinery of defendant to prevent the escape of sparks were sufficient, as were also the allegations to the effect that defendant was negligent in the use of and handling of such machinery. The engine and apparatus to prevent the escape of fire was in the exclusive control of defendant, as was also the evidence as to how the engine was handled, and plaintiff was not required to specify with particularity the facts which were the immediate cause of the escape of the fire. *Railway Co. v. Smith*, 74 Tex. 276, 11 S. W. 1104; *Railway Co. v. Easton*, 2 Tex. Civ. App. 378, 21 S. W. 575. The contention of appellant that the court erred in overruling its special exceptions to the petition as to such allegations is not sustained.

Finding no error in the record, the judgment is affirmed.

SAVAGE v. COWAN et al.

(Court of Civil Appeals of Texas. Oct. 15, 1908.
Rehearing Denied Nov. 12, 1908.)

1. HOMESTEAD (§ 103*)—EXEMPTION—DURATION.

A judgment lien does not attach to the homestead of a judgment debtor so long as the property remains a homestead.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 157, 158; Dec. Dig. § 108.*]

2. NEW TRIAL (§ 103*)—RIGHT TO—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

In trespass to try title to land deeded to defendants by a judgment debtor and sold to plaintiff under the judgment, it was not error to refuse plaintiff a new trial for newly discovered evidence showing a record of an abstract of the judgment, where it appeared that the land remained the judgment debtor's homestead until conveyed by him, since, being a homestead, no

judgment lien attached to the property, and hence the evidence could not affect the result of the suit.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 215-217; Dec. Dig. § 103.*]

3. TRESPASS TO TRY TITLE (§ 41*)—POSSESSION—EVIDENCE—SUFFICIENCY.

Evidence in trespass to try title held to support a finding that defendants were in possession of the land through their tenants under a deed when the land was levied upon under execution against their grantor.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 41.*]

Appeal from District Court, Hopkins County; R. L. Porter, Judge.

Trespass to try title by W. T. Savage against W. S. Cowan and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This was an action of trespass to try title to nine acres of land of the William H. Ravey survey, in Hopkins county, brought by the appellants, and to which the appellees filed a plea of not guilty. In a trial before the court without a jury judgment was rendered in favor of the appellees, and the appellant brings the case on appeal for review. It was admitted by all the parties to the suit that W. A. Patrick is the common source of title to the land in the suit. Appellant, who was plaintiff, read in evidence a judgment in the justice court in Dallas county, Tex., in favor of D. M. Osborne & Co., and against W. A. Patrick, for \$169.64, with interest and costs, dated November 27, 1905; an alias execution issued on said judgment on the 16th day of November, 1906, to Hopkins county, Tex., and on the 21st day of November, 1906, levied on the land in suit as the property of W. A. Patrick; sale of the land under the levy and execution on the 1st day of January, 1907, by the constable to appellant for \$50 cash, and payment of the money to the constable by appellant; a deed executed and acknowledged by the constable, making the levy and sale to appellant, conveying the land as levied on and in suit, dated January 1, 1907, and duly recorded in the clerk's office of Hopkins county January 10, 1907. The appellees read in evidence a deed executed and acknowledged by W. A. Patrick and his wife, Ella Patrick, to the appellees, conveying the land in suit, dated February 21, 1906, and duly filed for record in the clerk's office of Hopkins county on December 1, 1906, and recorded December 4, 1906. It was proven by the appellees that W. A. Patrick and his wife had continuously used and occupied the land in suit as their homestead previous to the levy and up to and at the time of their sale to appellees; that the appellees at the time of the purchase from Patrick and his wife took actual possession of the land, and continued in the actual possession of the premises through their tenants, M. M. Renfroe

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and Logan Richardson, who each lived upon and occupied the premises under rental contract, and made and gathered a crop on the premises, and that Logan Richardson was on the premises at the date of the levy of the execution in evidence, and continued to live on the place under rental contract until the 1st day of January, 1907; that it was a part of the rental contract of appellees' tenants to house their rent portion of the corn, cotton, and potatoes on the premises, which was done, and same remained there housed on the premises from the time the crops were gathered until the first of the year 1907, and until Mrs. Mann, who had rented the premises from the appellees for 1907, moved there. It was proven by appellees that at the constable's sale C. E. Brown, one of the appellees, was present and gave notice that the land offered for sale belonged to the appellees. Appellant proved by his attorney that "just before the land in controversy was levied on I made inquiry as to whether the land was in any manner occupied by any person other than W. A. Patrick, and whether or not the same was claimed by any other person. I learned that W. A. Patrick did not claim or occupy the same at the time of the levy. I did not learn of any one else occupying or claiming the same at the time of said levy or immediately before."

Frank E. Scott, for appellant. D. Thornton, for appellees.

LEVY, J. (after stating the facts as above). Appellant's first and second assignments of error complain of the action of the court in overruling a motion for a new trial on the ground of newly discovered evidence. The motion sets out that an abstract of judgment in favor of D. M. Osborne & Co. against W. A. Patrick recovered in the justice court of precinct 1, Dallas county, Tex., was properly and legally recorded in Hopkins county on December 29, 1905, and which was not discovered by appellant before the trial, and that the abstract of judgment is valid and fixed a lien on the land in controversy. It is an undisputed fact appearing in the record that before and at the date of the filing and recording of the abstract of judgment mentioned in the motion the land in controversy was the homestead of W. A. Patrick and his wife, and continued to be their homestead, without interruption or abandonment on their part, to the very day of the sale of the premises by them to the appellees. It is a settled rule of law in this state that a judgment lien does not extend or attach to the homestead of the judgment debtor as long as the property remains the homestead. The judgment lien would attach only when the property ceases to be the homestead, and remains the property of the judgment debtor. *Marks v. Bell*, 10 Tex. Civ. App. 587, 31 S. W. 699. Because of the proof that the property was the home-

stead of the judgment debtor, and never ceased to be the homestead to the date of the sale to appellees, and no contest to this evidence appearing in the motion or record, the refusal to grant a new trial to enable the introduction in evidence of the recorded abstract of judgment could not be ruled to operate as prejudicial or reversible error, because such evidence would not affect the result of the suit. The first and second assignments of error are therefore overruled.

By the remaining assignments of error it is complained of the sufficiency of the evidence to establish actual possession of the premises at the time of the levy of the execution, either by appellees themselves or through tenants. We think the evidence in the record supports the findings involved in the general finding of the trial court, that appellees, by tenants, were in actual possession and occupancy of the premises in suit at the time of the levy of the execution, and that such actual possession at the time of the levy of the execution was sufficient to give notice of appellees' ownership of the land. There is no question made as to the proof that Renfro was a tenant of the appellees in actual possession of the premises. The precise terms of the agreement made between Renfro, the tenant of the appellees, and Richardson, and "understood and recognized" by appellees in respect to the premises, are not defined in the evidence; but the course of dealing between the parties with respect to the premises and its use and occupancy tends to show that it was the intention of the parties to make a new relationship in respect to the premises. The act of Richardson and Renfro after the agreement between themselves about the premises are consistent with the conclusion that Renfro transferred and parted with all of his interest in the rented premises to Richardson for Richardson's service in finishing gathering the crop on the place, and this with the appellees' consent. Renfro left the country, and vacated the premises and surrendered the rental contract to Richardson, and Richardson exclusively occupied and used the house and premises from that time in September, prior to the levy, until January 1st following, under the terms of the original rental contract made by the appellees with Renfro, and the appellees so "understood and recognized." This evidence would support the finding that Renfro transferred and parted with all his right under the rental contract to Richardson, and that Richardson took all the interest of Renfro in the rented premises and occupied the same as the tenant of the appellees, and that the appellees agreed to the transfer or substitution of tenants. Even had the evidence established that Richardson was merely an employé or hired man of the tenant Renfro, staying on the place and taking care of the crop and the place for him, as argued, yet this relationship would not so

interrupt or be inconsistent with or show an abandonment of the tenancy relation of Renfro and appellees as could be regarded as insufficient to affect with notice of appellees' ownership of the land. As to the appellees, the legal consequence is that Renfro was still in possession and use of the premises as tenant of the appellees, notwithstanding he had hired or employed Richardson to stay on the place and take care of the same for him. In a suit by the appellees against Richardson to subject him to liability for the rent of Renfro, it might be successfully defended by Richardson on the grounds that he was occupying the premises merely as an employé of Renfro. We suggest, however, that, considered on the question of notice and the sufficiency of the circumstances to affect with notice, we are not prepared to rule that merely because Richardson's occupancy of the premises was as an employé of Renfro, the tenant of appellees, the plaintiff in execution in legal consequence was an innocent purchaser unaffected with notice of the ownership of the land. Such character of occupancy, as well as relationship, might be a sufficient circumstance and the means and reasonable information to put a person upon inquiry as to the title under which he holds the premises.

The case was ordered affirmed.

HILLMAN v. GALLIGHER et al.

(Court of Civil Appeals of Texas. Oct. 22, 1908.)

APPEAL AND ERROR (§ 387*)—PROCEEDINGS FOR TRANSFER—FILING OF APPEAL BOND—TIME.

Sayles' Ann. Civ. St. 1897, art. 1387, requires the appeal bond to be filed within 20 days after notice of appeal is given if the term of court may by law continue for more than eight weeks and appellant resides in the county, and by Acts 1907, p. 198, c. 100, a term of the district court in Bowie county may continue longer than eight weeks, if necessary. Appellant resided in Bowie county. Notice of appeal was given December 20th, but an appeal bond was not filed until February 19th, 60 days thereafter. Held, that the filing of the bond within the required time was essential to give the Court of Civil Appeals jurisdiction, and the appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2003; Dec. Dig. § 387.*]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Action between J. W. Hillman and Dan Galligher and others. From a judgment, Hillman appealed. Appeal dismissed.

J. W. Hillman, in pro. per. Hart, Mahaffey & Thomas, for appellees.

WILLSON, C. J. The case is before us on a motion by appellee to dismiss the appeal, on the ground that, because of the failure of appellant to perfect his appeal by

filing an appeal bond within the time permitted by law, this court has not acquired the power to hear and determine it. It appears that the judgment appealed from was rendered on the 17th day of December, 1907, and that the judgment overruling appellant's motion for a new trial was rendered December 20, 1907, when he gave notice of appeal. The term of the court at which the cause was tried commenced December 2, 1907, and ended January 30, 1908, having lasted by authority of law (Acts 1907, p. 198, c. 100) longer than eight weeks. It further appears that appellant at the time of the trial was a resident of Bowie county, where the cause was tried.

The motion must be sustained. Under the law the term of the court might have continued, and in fact did continue, for a period longer than eight weeks. Appellant, being a resident of the county where the cause was tried, was required to perfect his appeal by filing an appeal bond within 20 days after the date of the notice given by him of an appeal. Sayles' Ann. Civ. St. 1897, art. 1387. The bond was not filed until the 19th day of February, 1908, or on the sixtieth day after the notice of appeal was given. The filing of the bond within the time permitted by law was necessary to confer jurisdiction of the appeal on this court. Sanger v. Burke (Tex. Civ. App.) 44 S. W. 871; National Bank v. Carper (Tex. Civ. App.) 67 S. W. 192.

Necessarily, therefore, the appeal must be dismissed.

WRIGHT et al. v. COUCH.

(Court of Civil Appeals of Texas. Oct. 24, 1908. Rehearing Denied Nov. 14, 1908.)

1. HUSBAND AND WIFE (§ 23½*)—LIABILITIES OF HUSBAND.

Where a piano purchased by the wife was delivered at the home of her husband and herself, and the husband did not repudiate the contract or offer to return the piano, but refused to do so and forbade the seller to remove it, the husband ratified the contract, and was liable.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 147; Dec. Dig. § 23½.*]

2. HUSBAND AND WIFE (§ 86*)—DISABILITIES OF COVERTURE—CONTRACTS.

A wife is not personally liable for a piano not purchased for her separate estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 342; Dec. Dig. § 86.*]

Error from Collin County Court; John Church, Judge.

Action by J. T. Couch against J. E. Wright and his wife, S. E. Wright. Judgment for plaintiff, and defendants bring error. Judgment affirmed as to J. E. Wright and reversed and rendered as to S. E. Wright.

R. C. Merritt, for plaintiffs in error. J. R. Gough, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

RAINEY, C. J. The defendant in error sued plaintiffs in error to recover on a note executed by Mrs. S. E. Wright, wife of J. E. Wright, given for one piano. The petition alleged that Mrs. Wright was the agent of her husband, and represented that he would also sign the note; that he had never repudiated the contract; had accepted the piano, and thereby became bound, etc. A lien on the piano was alleged and foreclosure thereon prayed for. Defendant pleaded coverage of Mrs. Wright, general denial. J. E. Wright pleaded non est factum, in that he had not signed the note and had never authorized the signing of same. A trial before the court without a jury resulted in a judgment against both appellants as prayed for, and the case is here on appeal.

The evidence warranted the judgment against J. E. Wright and the foreclosure of the lien on the piano. The piano was delivered at the house of J. E. Wright to his wife, where it has ever since remained. Wright never repudiated the contract or offered to return the piano, but, on the other hand, refused to return it, and forbid the defendant in error from removing it from his house. The testimony shows that Wright accepted and ratified the contract. In *Walling v. Hannig*, 73 Tex. 580, 11 S. W. 547, a case involving the principles here involved, Judge Stayton says: "Marriage alone confers on the wife an agency under which she may buy necessities for herself and children if her husband fails to do so, but a further agency may be presumed from the conduct of the parties"—and then quotes from a distinguished English judge as follows: "When a husband is living in the same house with his wife, he is liable to any extent for goods which he permits her to receive there. She is considered as his agent, and the law implies a promise on his part to pay the value. If they are not cohabiting, then he is in general only liable for such necessities as from his situation in life it is his duty to supply her. But, even when they are parted, if the husband has any control over goods improvidently ordered by the wife so as to have it in his power to return them to the vendor, and he does not return them or cause them to be returned, he adopts her act and renders himself answerable." He then proceeds: "The evidence shows that the goods were used in his house for more than a year, and, after he was fully advised that they had been bought by his wife on a credit, he failed to return them or to offer to return them, unless upon condition that appellee would return the partial payments on the bill."

This settles the case against plaintiff in error J. E. Wright, and the judgment as to him is affirmed. The judgment against Mrs. S. E. Wright is a personal one, and in that respect it is error; she being a married woman. Under the facts shown she was not

personally liable, and the judgment as to her personal liability is reversed and judgment here rendered in her favor. In all other respects the judgment is affirmed.

McMAHON v. McDONALD et al.†

(Court of Civil Appeals of Texas. Oct. 14, 1908.

Rehearing Denied Nov. 18, 1908.)

1. TRESPASS TO TRY TITLE (§ 44*)—JURY QUESTIONS.

Whether land involved in trespass to try title was deeded to one under whom defendants claim *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 66; Dec. Dig. § 44.*]

2. TRESPASS TO TRY TITLE (§ 39*)—EVIDENCE—INCOMPLETE CHAIN OF TITLE.

In trespass to try title, it was proper to admit a chain of title, though no deeds connecting it with the original grantees were shown, where there were circumstances tending to complete the chain.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 57; Dec. Dig. § 39.*]

3. EVIDENCE (§ 372*)—OLD DEEDS—RECITALS.

Recitals of a deed 26 years old were admissible, along with other circumstances, to establish defendants' chain of title.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1613; Dec. Dig. § 372.*]

4. DEEDS (§ 207*)—EXECUTION—EVIDENCE.

Execution of a deed may be shown by circumstances.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 615; Dec. Dig. § 207.*]

5. TRESPASS TO TRY TITLE (§ 39*)—EVIDENCE—ADMISSIBILITY.

A schedule of property, attached to an assignment to secure creditors, including an item "640 acres of land in Liberty county patented to I. S. Fields conveyed to" assignor, was properly admitted in evidence in trespass to try title as part of defendants' case, they claiming under the assignee, since the land passed to the assignee whether sufficiently described or not.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 39.*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Trespass to try title by P. E. McMahon against Roderick McDonald and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Baldwin & Christian, for appellant. L. B. Moody, for appellees.

FLY, J. This is an action of trespass to try title to 663 acres of land, a part of the Isaiah S. Fields survey. The cause was tried by jury, and resulted in a verdict and judgment for appellees for the land.

It was proved that a league of land had been granted Isaiah Fields and his wife, Sarah Fields, and that the land in controversy is a part of that grant. They died leaving six heirs, and appellant claims the land through deeds from some of those heirs or their children, and proved title to a portion of land, unless there was evidence that the land had been sold by Isaiah and Sarah

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

Fields. This was the claim of appellees, and they relied on circumstances to prove it, being unable to produce a deed from the original grantors, or a deed from their vendee Allen, Poole & Co., through whom appellees claim. Attached to a deed of assignment, made by Allen, Poole & Co. to B. A. Shepherd to secure their creditors, was a schedule of assets, in which appeared 640 acres in Liberty county, "patented to I. S. Fields, conveyed to Allen, Poole & Co." That deed was recorded on October 2, 1874. In July, 1881, a deed was made by the assignees to William P. Ballinger, conveying 640 acres of land out of the I. S. Fields survey, describing the 640 acres by metes and bounds. In that deed it was recited that the land conveyed was the same "conveyed by I. S. Fields to Rosena Menard by deed dated May 15, 1849, and from Emma G. Menard to Allen, Poole & Co. by deed dated January 21, 1871." The records of deeds of Liberty county were destroyed by fire in the year 1874. Appellees used due diligence in searching for the deeds from Isaiah Fields to Rosena Menard and from Emma G. Menard to Allen, Poole & Co., but they could not be found. Emma G. Menard was the only child of Peter and Rosena Menard, and when they died she inherited all of their property. The evidence showed, without contradiction, that the land in controversy was assessed for taxation by P. Menard, the husband of Rosena Menard, in 1854, and that it was so assessed every year from that time by said P. Menard or those claiming under him, including appellees. No claim was shown to have been made by the heirs of Isaiah Fields to the land until January 19, 1906, when Tompkins, their attorney in fact, executed a deed to appellant to a part of the land. The suit was instituted on January 26, 1907.

The court instructed the jury as follows: "You are charged that, unless you can presume a deed from Isaiah S. Fields to Rosena Menard after considering and weighing all the relevant facts and circumstances in evidence in this case, and applying the law given you to that feature of the case, then you are charged that the plaintiff is entitled to recover all the land in controversy, except the one-fifth interest which the plaintiff admits defendant is entitled to, and the proof shows such interest was conveyed by the Stevens heirs through their attorney in fact, Silas M. Johnson to ——. But if, following the instructions hereinafter given you as applicable to the question of presumption of a grant, you presume Isaiah S. Fields, on May 15, 1849, did execute a deed to said Rosena Menard to the land in controversy, then your verdict should be for the defendant. And, in determining the question as to whether or not the jury can presume a grant from Isaiah S. Fields to Rosena Menard, you will consider and weigh all the relevant facts and circumstances in evidence; and, if you find that from the relevant facts and circumstances in

evidence it is more reasonably probable that Isaiah S. Fields did, on the 15th day of May, 1849, execute a deed to Rosena Menard to the land in controversy than that he did not execute such a deed, then the jury are at liberty to presume and find that such a deed was executed. But if you do not find that it is more reasonably probable that Isaiah S. Fields did execute such a deed than that he did not, then you are at liberty to presume such a deed, and in such case you will return a verdict for the plaintiff for all the land sued for, except the one-fifth interest of the Stevens heirs, which is admitted to be in the defendant, and as to which, should you find against the presumption of a deed from Isaiah S. Fields to Rosena Menard, you will return a verdict for the defendant."

It is claimed by appellant that the court committed fundamental error in submitting the case to the jury, because all the evidence was documentary, and it was the duty of the court to decide as to the legal effect of the evidence and instruct a verdict for one party or the other in consonance with such decision. The claim cannot be sustained. The recitations in the deed to Ballinger as to certain transfers, the lack of evidence to show any claim to the land, or any act of ownership, by those under whom appellant claims from 1849 until 1906, the assessment of the property for taxation by those under whom appellees claim continuously from 1852 to the time of trial, constituted circumstances that were sufficient to raise the issue as to whether the original grantees conveyed the land to Rosena Menard, and the issue was properly submitted to the jury. The objection to the admission in evidence of the deed of assignment made by Allen, Poole & Co., and the assignees' deed to W. P. Ballinger, and the chain of title thereunder to appellees, on the ground that, no deed being shown from the original grantees to any one under whom appellees claimed, the whole of the evidence was inadmissible, cannot be sustained. As before stated, there were circumstances tending to indicate that a deed had been made by Isaiah S. Fields to Rosena Menard, as recited in the deed by the assignees to W. P. Ballinger, and the court properly allowed all the facts to go before the jury. The deed containing the recitations in question was 26 years old, and the recitals were admissible as a circumstance which, taken with other circumstances, might show that the original grantees of the land had parted with the title. That the execution of a deed may be established by circumstances is the settled doctrine in this state. *Bounds v. Little*, 75 Tex. 316, 12 S. W. 1109; *Walker v. Caradine*, 78 Tex. 489, 15 S. W. 31; *Sydnor v. Real Est. Ass'n* (Tex. Civ. App.) 94 S. W. 451; *Hirsch v. Patton* (Tex. Civ. App.) 108 S. W. 1015. The case of *Brewer v. Cochran* (Tex. Civ. App.) 99 S. W. 1033, is very similar to this, and the court discussed the facts as follows:

"The circumstances relied upon were open and notorious assertion and claim of ownership by Roberts and those claiming under him, from the date of Roberts' deeds in 1869 down to the present time, together with payment of taxes. No actual possession was shown in any of the parties, plaintiffs or defendant or his vendors, but it was shown that the land was wild and unimproved land." There were recitals in Roberts' deeds to the effect that the land had been conveyed by parties owning to other parties, and the court, after discussing the effect of successive transfers as tending to show claim of title to the land for many years, said: "The recitals in the deed admitted in evidence go only a step further, and show a claim by Roberts that he had title from a certain source, the execution of the deeds, in and of itself, showing a claim of title. The recitals were not offered nor admitted as direct evidence of execution of the recited deeds, but only as a circumstance showing a claim by Roberts made as early as 1869, nearly 40 years ago, as explanatory of his claim of title in himself, that the Brewers had conveyed it to him." The recitals were held to be proper evidence, and the judgment was affirmed, and a writ of error refused by the Supreme Court.

The court did not err in admitting in evidence the schedule of property attached to the deed of assignment. The description of the land therein may have been vague and uncertain; but, if Allen, Poole & Co. owned any land in the Fields grant, it passed by the deed to the assignees whether it was sufficiently described or not.

The charge of the court is not open to the criticisms urged against it under the fifth and sixth assignments of error.

The second special charge given by the court was not on the weight of the evidence, and was not calculated to mislead the jury.

No error has been indicated by appellant necessitating a reversal of the judgment, and it is therefore affirmed.

LANE v. GENERAL ACCIDENT INS. CO.
(Court of Civil Appeals of Texas. Oct. 14, 1908.
Rehearing Denied Nov. 18, 1908.)

1. INSURANCE (§ 675*)—ACTIONS ON POLICY—RECOVERY—PENALTIES—ATTORNEY'S FEES—STATUTES.

The statute authorizing a recovery of 12 per cent. damages and attorney's fees where a "life or health insurance company" fails to pay the policy does not apply to accident insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1806; Dec. Dig. § 675.*]

2. COURTS (§ 121*)—JURISDICTION—AMOUNT IN CONTROVERSY.

Where, in an action in the district court on an insurance policy, the petition demanded judgment for \$500 and attorney's fees and 12 per cent. damages, and there was no plea or exception attacking the jurisdiction of the court or suggesting that a judgment could not be rendered

for the attorney's fees and the damages, the amount in controversy exceeded \$500, so that the court had jurisdiction, though attorney's fees and damages were not proper claims.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-426; Dec. Dig. § 121.*]

3. INSURANCE (§ 531*)—ACCIDENT INSURANCE—CONTRACT—CONSTRUCTION—RISKS AND CAUSES OF LOSS.

Where one insured as a sheep farmer against accident by a policy classifying as more hazardous the occupation of a hunter, and stipulating that, where an injury occurred while doing any act pertaining to any occupation classified as more hazardous, the liability of insurer should be for such part of the principal as the premium paid would purchase at the rates fixed for such more hazardous occupation, was killed while hunting for recreation, insurer was liable only to the indemnity provided for the occupation of a hunter.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1318; Dec. Dig. § 531.*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Clara Alma Lane against the General Accident Insurance Company. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

Swearingen & Tayloe, for appellant. Don A. Bliss, for appellee.

FLY, J. Appellant instituted suit in one of the district courts of Bexar county against appellee on an accident insurance policy issued by appellee to her husband, Louis V. B. Lane, who had been killed by the accidental discharge of a gun in the hands of another. The suit was for the sum of \$500 insurance, \$200 attorney's fees, and the sum of 12 per cent. as a penalty for failure to pay the amount of the policy. Appellee admitted the execution of the policy, but claimed that only \$100 was due because deceased was killed while hunting, which was an act pertaining to the occupation of a hunter, and that more than that sum could not be recovered under the terms of the policy. The court instructed a verdict for \$100.

The first question that arises is: Did the district court have jurisdiction of the amount in controversy? It is the contention of appellee that, as this suit is one on an accident policy, appellant could not, under the law, recover more than \$500 and interest, and that the mere statement of attorney's fees and appeal could not give jurisdiction to the court; the actual amount in controversy being \$500. Their contention is based on the proposition that penalties and attorney's fees can only be recovered against health and life insurance companies for failure or refusal to pay the amount of policies by reason of direct statutory provision therefor, and, there being no provision in the laws of Texas as to penalties against accident insurance companies, such penalties cannot be collected, and allegations in regard to such penalties and attorney's fees cannot be used to give juris-

diction to a court which otherwise would not have it. It is undoubtedly true that the district court had no jurisdiction of the principal amount in controversy, which did not exceed \$500, and unless appellant was authorized under the statute to recover attorney's fees or a penalty, or unless the mere allegation of a claim for such fees and penalty gave the court jurisdiction over a matter of which it otherwise had no jurisdiction, the cause should have been dismissed. The statute permitting the recovery of penalties against insurance companies is as follows: "In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss." By the terms of that statute the recovery of penalties is permitted against none but "life or health insurance" companies; and it has been held that such penalties cannot be recovered against accident insurance companies. *Insurance Co. v. Parker*, 30 Tex. Civ. App. 521, 72 S. W. 621; *Insurance Co. v. Wade* (Tex. Civ. App.) 99 S. W. 877; *Insurance Co. v. Parker*, 96 Tex. 287, 72 S. W. 168, 580, 621. It was not intimated, by plea or otherwise, that the penalty and attorney's fees were fraudulently inserted in the petition for the purpose of giving jurisdiction to the district court, but, on the other hand, it is apparent that it was a bona fide claim for the whole sum sued for and it was fully acquiesced in by the appellee, not even a general demurrer being urged to the petition. It has been held by the Supreme Court that, where jurisdiction is sought to be conferred by allegation as to matters which could not be recovered, in order to raise the question of fraud in such allegations, the defendant must allege it and prove it, unless it is apparent from the pleadings themselves that a fraud on the jurisdiction is sought to be perpetrated. *Dwyer v. Bassett*, 63 Tex. 274; *Roper v. Brady*, 80 Tex. 588, 16 S. W. 434; *Hoffman v. Building & Loan Ass'n*, 85 Tex. 409, 22 S. W. 154. Without any plea or exception attacking the jurisdiction of the court, or suggesting that a judgment could not be rendered for the penalty and attorney's fees, the court had jurisdiction, even though under the law the penalty or fees were not proper claims against appellee. It could interpose a defense to those claims or not as it might choose, and, not having invoked the action of the court thereon, it cannot now be heard to say that they are not proper claims against it and thereby destroy the jurisdiction of the court. The penalty and attorney's fees were sued for and unobjectioned to remained a part of the amount in controversy. We therefore hold that the

trial court had jurisdiction of the cause.

It was proven, without contradiction, that the deceased was hunting at the time that he was killed by the accidental discharge of a gun in the hands of a companion. He was engaged in hunting as a mere recreation, and not as an occupation. On the back of the policy, and expressly made a part thereof, is the following agreement, signed by Louis V. B. Lane: "I understand that if I contract illness or am injured, fatally or otherwise, after having changed my occupation to one classified by this company as more hazardous than that herein stated, or if I am injured while doing any act or thing pertaining to any occupation so classified, the liability of the company shall be only for such proportion of the principal sum or other indemnity as the premium paid by me will purchase at the rates fixed by this company for such more hazardous occupation." It appeared from the evidence that deceased was insured as a "sheep farmer." He so stated his occupation in his application for insurance, and that occupation was classed as "D" in the classification of occupations made by the company, while the occupation of a "hunter" was classed as "X." Deceased paid a monthly premium of \$2 which secured an indemnity of \$500 for a "sheep farmer," but which secured for a "hunter" an indemnity of only \$100. Deceased had not changed his occupation when he was killed and was still engaged in sheep farming, but he was actually engaged in hunting deer when he was shot, and was undoubtedly doing an "act or thing pertaining" to the occupation of hunting, which was classified as an occupation more hazardous than that of sheep farming. It would not matter whether deceased was acquainted with the classification or not, for he had bound himself to abide by the company's classification whatever it might be.

Almost the identical language used in the policy in this case was construed in the case of *Holiday v. Accident Association*, 103 Iowa, 178, 72 N. W. 448, 64 Am. St. Rep. 170, under quite similar facts, and it was held that "the carrying of the gun would be an act to be done in hunting, and it might pertain to hunting, but not to it as an occupation." That was said in a case where a man out hunting was accidentally shot by the discharge of his gun while he was getting through a barbed-wire fence, and the effect of the decision was to destroy the force and effect of the language, "while performing an act pertaining to an occupation classed as more hazardous than the one under which the certificate is issued," and to hold that a party must actually be engaged in a more hazardous occupation before the clause in question could have any effect. The decision is in the very teeth of language that is plain and simple, and had the effect of destroying the contract made by the parties and of substituting therefor one made by the

court. The case of *Union Mut. Acc. Ass'n v. Frohand*, 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664, was relied on by the Iowa court as sustaining its decision, but we do not think it does. In the Illinois case the man was hunting for recreation, and while so engaged was accidentally killed, and the insurance company was seeking to lessen its liability by a clause in the policy which lessened it if the insured received "an injury while engaged temporarily, or otherwise, in an occupation more hazardous than the one he was engaged in when insured." The decision turned on the question as to whether the insured was engaged in the occupation of hunting when killed. The court held that he was not so engaged, but was hunting for pleasure. To follow the Iowa case we would be compelled to hold that there is no such thing as an act pertaining to the occupation of hunting; for, if following wild deer with guns with the expressed intention of killing them is not an act pertaining to the occupation of hunting, there can be no such act. A man might carry a gun without performing an act pertaining to hunting, but, when he is on a hunting expedition and is engaged in the very act of attempting to kill a deer when he is shot by his companion, it is clear that his acts are those pertaining to the occupation of hunting. To hold otherwise would be to say that no one could perform acts pertaining to the occupation of a hunter unless he was a professional hunter. We think such a position untenable.

The judgment will be affirmed.

JARVIS v. MATSON et al.

(Court of Civil Appeals of Texas. Oct. 31, 1908.)

1. CONTRIBUTION (§ 9*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action by an obligor on a bond against his co-obligors for contribution, where the notes evidencing plaintiff's advancements were not signed by all the obligors, but the money was used to discharge the obligation of all of them, parol evidence was admissible to show that plaintiff took the notes as evidence of the transaction, and as collateral security for payment of the money by the signers of the bond, and that he did not look for payment by the signers of the notes until he failed of reimbursement by the bond signers, and to show the source of part payment on the notes, and that the loan was not made to the signers of the notes to discharge their obligations under the bond, but to discharge the joint obligations of all the obligors.

[Ed. Note.—For other cases, see Contribution, Dec. Dig. § 9.*]

2. EVIDENCE (§ 402*)—PAROL EVIDENCE—VARYING TERMS OF WRITTEN INSTRUMENT—PERSONS NOT PARTIES.

Although the terms of the notes were unambiguous, the defendants objecting to the introduction of such evidence, not being parties to the notes, the question of varying the terms of a

written contract by parol evidence was not involved.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 402.*]

3. LIMITATION OF ACTIONS (§ 49*)—COMPUTATION OF PERIOD—IMPLIED CONTRACTS—CONTRIBUTION.

In suits for contribution, the right of action is upon the implied promise to repay, and limitation begins to run from the date of each advancement.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 271; Dec. Dig. § 49.*]

4. LIMITATION OF ACTIONS (§ 49*)—COMPUTATION OF PERIOD—CONTRIBUTION.

A suit for contribution was not barred by two years' limitation, where the sum was advanced by plaintiff August 28, 1903, and the original petition was filed August 22, 1905.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 49.*]

5. LIMITATION OF ACTIONS (§ 196*)—EVIDENCE.

In an action for contribution by one obligor against his co-obligors on a bond, where it appeared that it was the custom of the obligors to secure advancements to meet their obligations, and to execute notes therefor payable in the future; and that it was contemplated that the sums would be repaid out of collections made from time to time, a note given plaintiff for his advancement, though the obligors were not liable upon it, was admissible to show whether the general rule that limitations begin to run from the date of advancement was varied by the understanding of the parties.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 196.*]

6. LIMITATION OF ACTIONS (§ 49*)—ACTIONS FOR CONTRIBUTION.

If the money advanced was not to be paid until some definite future time, no cause of action for contribution accrued until such time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 271; Dec. Dig. § 49.*]

7. PAYMENT (§ 41*)—APPLICATION—UNENFORCEABLE DEMAND.

In an action by one of several co-obligors against the others for contribution, where plaintiff had advanced two separate amounts in payment of the joint obligation, if the earlier of such advancements was barred by limitation, sums, repaid by defendants to plaintiff, of less amount should be credited thereon.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 119; Dec. Dig. § 41.*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by E. Jarvis against J. V. Matson and others. From a judgment for plaintiff against two of the defendants, and in favor of the other defendants against plaintiff, he appeals. Reversed and remanded for a new trial as to all the defendants.

E. W. Bounds and Vaughan & Hart, for appellant. Morrow & Smithdeal, for appellees.

TALBOT, J. This is the second appeal in this case. See 94 S. W. 1079. The suit was filed on the 22d day of August, 1905, by appellant against J. V. Matson, J. M. Carroll, Lee Fresby, T. C. Morgan, W. R. Bounds, Myrtle H. Davis, W. A. Putnam, J. M. Peden, J. R. Jones, Jr., M. P. Harwood,

and J. E. Clonch. It is alleged, in substance, that the plaintiff and the defendants, on the 21st day of October, 1902, executed a written contract or bond, payable to one R. H. Baker, in which said parties obligated and bound themselves to procure for the Trinity & Brazos Valley Railway Company the right of way for a certain distance in Hill county, Tex., and as rapidly as the same was required for the construction of said road; that plaintiff and defendants were constituted a right of way committee to procure said right of way, and that it was contemplated that the necessary funds with which to secure said right of way would be raised by subscriptions and donations from the citizens of said Hill county; that said committee was unable to collect sufficient money, by contributions and subscriptions, to purchase the right of way as rapidly as was required for the construction of said road, and it became necessary, in order to perform their obligations to R. H. Baker as the representative of said railway company, to secure an advancement or loan of money; that the necessary loan or advancement, which amounted to \$4,000, was obtained from plaintiff in two separate amounts, namely, \$2,500 on the 17th day of July, 1903, and \$1,500 on the 26th day of August, 1903; that it was the custom of said committee to execute notes, through such members of the committee as were accessible to sign them, for money advanced to it for the purposes stated, and that sundry such notes were so executed. Plaintiff further alleged that about August 17, 1905, all of the money that could be collected by contributions and other sources had been received; that on said date a complete statement of the account on the part of said committee, with paid funds so received and paid out by it, was made, and it was ascertained that plaintiff had been repaid of said \$4,000 the sum of \$1,375.45, leaving due him by said signers of said contract and bond referred to, the sum of \$2,629.55; that by the terms of said contract and bond the defendants became and are, jointly and severally, bound to plaintiff to make contributions to him for their several proportional parts of said sum of \$2,629.55, except defendant Putnam who, by limitation of his liability in said bond and contract, is only liable for the sum of \$100, for all of which plaintiff sues. The defendants Matson, Carroll, Morgan, and Clonch answered, pleading to the jurisdiction of the court the statute of limitations of two years, a general denial, and, in substance, that the \$4,000, claimed by the plaintiff to have been advanced by him for the use of said right of way committee, was not so advanced, but was a loan, made by him at the request of the defendant Bounds and others, and was made upon the faith of said Bounds and others to refund the same, with interest at the rate of 10 per cent. per annum. The other defendants did not answer, but made

default. A jury was impaneled, and the court, after hearing the evidence, instructed a verdict in favor of all of the defendants except Bounds and Putnam. As to these two defendants, the court instructed a verdict in favor of the plaintiff against Bounds for \$252, and Putnam for \$100. One of the parties, who signed the contract and bond made the basis of the suit, died insolvent, and his legal representatives were not sued. There was testimony tending to show that the defendants Mrs. Davis, Fresby, Peden, and Jones paid part of the amount claimed pending the suit, and we presume the verdict was directed in their favor, although they had not answered, upon the theory that plaintiff had not sued on the notes, and that they had paid their respective proportional parts of the said \$2,629.55. It does not expressly appear upon what ground the verdict was instructed in favor of the defendants Matson, Carroll, Morgan, and Clonch, but we presume the trial court was of the opinion that the \$4,000, claimed to have been advanced by the plaintiff to the committee, was money loaned to those parties who signed the notes taken at the time the money was paid over, and that said last-named defendants were not liable for the repayment of any part thereof, and, further, as to Clonch, that he was not liable, because he was neither a party to the contract and bond, nor to the notes taken for the said \$4,000.

Appellant's assignments of error, from the first to the fourth, inclusive, complain of the trial court's action in excluding certain testimony offered by him. The bills of exception presented in support of these several assignments show that, by proper questions propounded by appellant's counsel, they sought to show by appellant that (1) his purpose in taking the two notes was to hold same as evidence of the transaction, and as collateral security for the payment of the money by the signers of the bond and contract for right of way; (2) that it was not the intention or purpose of appellant in taking said notes to look to the parties who signed them for repayment of the money until he had failed to be reimbursed by the signers of the right of way bond and contract; (3) that the money received by the appellant as payment on the \$4,000 was derived from contributions made by citizens to pay for the right of way, and from money paid by some of the parties who had signed the notes, after it was found that a sufficient amount could not be collected from the contributions with which to pay the entire amount of \$4,000 that he let the committee have; (4) that the \$4,000 evidenced by the said two notes was not loaned by appellant to the parties signing said notes for the purpose of discharging their joint obligations as members of the right of way committee, but was advanced and paid to discharge the joint obligations of the whole committee.

The objections urged to the admissibility of the testimony were that it was immaterial, and that the notes speak for themselves. We are of the opinion that all of this testimony was pertinent to the issues made by the pleadings, was admissible, and that the court committed reversible error in excluding it. If the \$4,000 was advanced by appellant to discharge the joint obligation of the members of the right of way committee assumed by them in the execution of the contract to Baker, and he took notes of only a part of the committee therefor, as alleged, the money so advanced having been in fact used, as seems to appear from the undisputed evidence, to discharge such obligations, parol evidence was admissible to show the real character of the transaction resulting in the taking of said notes. In a supplemental petition the appellant alleged that it became necessary, in the progress of the undertaking to secure the right of way, to use a considerable amount of cash, more than was available from the sources open to them, and that the committee saw fit to, and did, borrow the money needed in such business and transaction from the appellant, Jarvis, from time to time as it was needed, and that it was the custom of the committee to reimburse appellant from donations, assessments, and contributions when they had sufficient money on hand. As argued by counsel, appellant being one of the parties with appellees to the right of way contract executed to Baker, and there being evidence, properly admitted, tending to show that the \$4,000 in question was advanced by him to the right of way committee for the purpose of performing the obligations resting upon them all, it was proper to show the purpose and intention of taking the notes; that is, whether it was appellant's intention and purpose to look to the parties signing the notes for repayment of the money advanced in the first instance, and whether said notes were accommodation paper for the benefit of the entire committee, or a loan made by appellant on the individual credit alone of the makers of said notes. The fact that the terms of the notes were clear and unambiguous would not alter the rule, and, the appellees objecting to the introduction of the evidence excluded not being parties to the notes, no question of varying the terms of a written contract by parol evidence was involved. If appellant furnished the \$4,000 to the right of way committee under the established custom and business policy adopted by the committee, to be used in carrying out the contract entered into with Baker, then the mere taking of the notes of some of the members of that committee would not release the appellees, who would otherwise be liable for their respective pro rata parts thereof from such liability.

But it is contended by the appellees that appellant's cause of action, if any he ever

had against them, was barred by the statute of limitations of two years. Conceding, as is the well-settled general rule, that in suits for contribution the right of action is upon the implied promise for reimbursement, and that the statute of limitations commences to run against such action from the date of each payment made by the plaintiff (*Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528), yet clearly in this case appellant's right to recover, if otherwise entitled to do so, the excess of his share of the \$1,500 was not barred. The record shows that the original petition was filed August 22, 1905, and this sum was paid and advanced by appellant on the 26th day of August, 1903. Hence two years had not elapsed from the date of such advancement up to the time of the institution of suit. We are also inclined to the opinion that his right to recover the proportional parts claimed to be due of the \$2,500, although the suit was filed a little more than two years after the payment of said sum, was not barred. The note evidencing the amount of this advancement was payable November 1, 1903, and there is evidence going to show that it was the custom of the right of way committee, of which appellees were members, to secure the loan or advancement of money, when necessary to enable them to fulfill their agreement with Baker as the representative of the railway company, and execute notes therefor, payable in the future, and that it was contemplated and expected that such sums were to be repaid to the lender out of collections, made from time to time thereafter, from subscriptions and contributions. Such being the practice, custom, and policy of the committee, we think that said note, notwithstanding appellees were not liable upon it, was legitimate evidence to be considered in determining whether or not the general rule, above stated, that limitation begins to run from the date of payment was varied by the understanding of the parties, and was, together with the other facts shown, sufficient to justify the conclusion that by mutual agreement no demand for contribution of the sum evidenced by said note should be made by the appellant until the date of the maturity thereof; and, this suit having been instituted before the expiration of two years from that date, appellant's right of action was not barred. If the money advanced by appellant was not to be repaid until some definite time in the future, then no cause of action accrued to him for contribution until such time, and suit could not sooner be brought therefor. If, however, it should be established upon another trial that no such agreement to repay the money in the future existed, then the general rule announced would obtain, and appellant would not be entitled to recover any part of said \$2,500; but in this event we think it proper to say, for the guidance of the trial court,

that the \$1,375.45, the amount shown to have been repaid appellant, should be credited on said sum of \$2,500.

These views render it unnecessary to discuss other assignments.

The judgment of the court below is reversed, and the cause remanded for a new trial as to all of the defendants to the suit, in accordance with this opinion.

Reversed and remanded.

DYCUS v. TRADERS' BANK & TRUST CO.
(Court of Civil Appeals of Texas. Oct. 31, 1908.)

1. BANKS AND BANKING (§ 105*)—CASHIERS—AUTHORITY—LEASES—MODIFICATION.

A bank cashier's agreement that the bank's lessee might use the leased premises for a purpose prohibited by the lease does not bind the bank, since under Rev. St. 1895, art. 661, providing that the business of the bank shall be managed by the directors, and the bank's charter and by-laws, defining the cashier's duties, it was a matter within the directors' control.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 252; Dec. Dig. § 105.*]

2. LANDLORD AND TENANT (§ 134*)—USE OF PREMISES—VIOLATION OF LEASE—INJUNCTION.

Under a lease restricting the use of a building to a "billiard and pool hall," injunction lies to restrain use for a moving picture show or any other unauthorized purpose, though it appears that no particular damage would result.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 486; Dec. Dig. § 134.*]

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Action by the Traders' Bank & Trust Company against N. D. Dycus. From an order granting plaintiff a temporary injunction, defendant appeals. Affirmed.

Albert W. Webb, for appellant. J. J. Eckford, for appellee.

RAINEY, C. J. This is an appeal from an order granting a temporary injunction restraining the appellant from installing a moving picture show in a building that had been leased from appellee by appellant. Plaintiff's petition alleged, in substance, that the property in controversy had been on July 11, 1908, leased to defendant for use as a billiard and pool hall, and not otherwise; that a moving picture show would be a use not permitted by the lease, and it would be a nuisance generally; that it would increase the fire hazard, contrary to the terms of the lease; and that alterations were being made in the building contrary to the terms of the lease. Defendant answered by general and special exceptions, general denial, and specially an express agreement and permission for the use of the building as a moving picture show, etc. Upon the hearing of the application for the temporary writ, after notice to defendant, the court

granted the writ, and the cause is here for review.

The written lease under which Dycus held the building provided "that the premises were to be 'occupied as a pool and billiard room and not otherwise'; that 'no improvements or alterations shall be made in or to the hereby demised premises without the consent of the lessor in writing'; 'that the lessee shall not assign this agreement or underlet the premises or any part thereof, except as may be mentioned above, or make any alterations in the building or premises, except as may be mentioned above, without the consent of the lessor in writing; or occupy, or permit, or suffer the same to be occupied for any business or purpose deemed extra hazardous on account of fire.'" The lease was signed "Traders' Bank & Trust Company, by J. Dabney Day, Cashier, and N. D. Dycus, Lessee." It was shown that Dycus was preparing to use the building to run a moving picture show, and the use of said building for such a purpose would make it extra hazardous on account of fire. The appellant claims that about noon September 30, 1908, he had a verbal agreement and understanding with Day, cashier, by which Day consented to his using said building for operating a moving picture show therein. Day practically admits this, but that about 6:30 o'clock of the same day he informed Dycus that such use of the building would not be permitted. In the meantime Dycus had been to some trouble and expense in preparing the building for use in operating the moving picture show.

Is the bank bound by this action of Day, its cashier? We think not. The appellant is a banking corporation under the laws of this state, and its charter provides that "the property or business of the corporation shall be controlled and managed by the directors," etc. This is also in effect the provision of the statutes. Article 661, Rev. St. 1895. The by-laws of the appellee in defining the powers and authority of the cashier read: "The duties of the cashier shall be to loan and invest the funds of said corporation under the supervision of the board of directors, to keep a record of all stock subscribed and transferred and minutes of all meetings of the stockholders and directors, supervise the keeping of all records and all business transacted by the corporation, to present at the annual and other meetings of the stockholders or directors all reports required by law or the board of directors, to perform the duties usually required of secretaries and cashiers of corporations and the duties required by the laws of the state of Texas, and to perform such other duties as the board of directors may impose." From this it seems the cashier had no power or authority to change or alter the provision of the lease

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contract without the consent or permission of the board of directors of the appellee. There is no proof that the board of directors ever authorized such action on the part of Day, or in any way sanctioned it. We therefore conclude that the verbal agreement changing the provisions of the written lease contract was unauthorized, and leaves the original contract in full force. *Kolp v. Specht*, 11 Tex. Civ. App. 685, 33 S. W. 715; *Temple v. Dodge*, 89 Tex. 69, 32 S. W. 515, 33 S. W. 222; *Fitzhugh v. Land Co.*, 81 Tex. 311, 16 S. W. 1078.

Then the question for consideration is whether or not the appellee is entitled to the writ of injunction to restrain Dycus from using the building for any purpose other than a "billiard and pool hall," or for a business deemed "extra hazardous on account of fire." It is contended that appellee had an adequate remedy by suit for damages, and therefore was not entitled to an injunction. Our statutes provide that an injunction may issue "where it shall appear that the party applying for such a writ is entitled to the relief demanded, and such relief, or any part thereof, requires the restraint of some act prejudicial to the applicant." In *Summer v. Crawford*, 91 Tex. 129, 41 S. W. 994, Justice Denman, speaking for the court, quotes this language: "It is not enough that there is a remedy at law. It must be plain and adequate; or, in other words, as practical and efficient to the end of justice and its prompt administration as the remedy in equity"—citing *Watson v. Sutherland*, 5 Wall. 74, 18 L. Ed. 580; *North v. Peters*, 138 U. S. 271, 11 Sup. Ct. 346, 34 L. Ed. 936. He also said: "In courts administering both law and equity, like ours, the rule denying injunctions when there is a remedy at law should not be applied as rigidly as at common law, where the issuance of the writ in equity was to a certain extent an invasion of the jurisdiction of another tribunal." The contract of lease in this case restricts the use of the building to a "billiard and pool hall," and an injunction will lie restraining the use to any other purpose, although it may appear that no particular damage would result from such other use. 22 Cyc. pp. 859-862; *Railway Co. v. Puckett* (Tex. Civ. App.) 82 S. W. 662.

The judgment is affirmed.

REDLAND FRUIT CO. v. SARGENT.

(Court of Civil Appeals of Texas. Oct. 15, 1908.
Rehearing Denied Nov. 12, 1908.)

1. PLEADING (§ 408*)—OBJECTIONS—TIME TO MAKE.

The objection that the petition in an action for breach of contract shows on its face that the contract is illegal goes to the substance of the

petition, and may be made at any stage of the proceedings.

[Ed. Note.—For other cases, see Pleading. Cent. Dig. § 1366; Dec. Dig. § 408.*]

2. MONOPOLIES (§ 17*)—CONTRACTS—VALIDITY—"TRUST."

The anti-trust act (Act 1903, p. 119, c. 94), defining a trust as a combination to create restrictions in trade or restrictions in the free pursuit of any business permitted by the law of the state, prohibits a restriction of competition in business which under the laws of the state a person may engage in, but does not prevent an owner of a plantation from giving another the exclusive privilege of selling merchandise thereon.

[Ed. Note.—For other cases, see Monopolies. Dec. Dig. § 17.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7119-7124, 7822.]

3. APPEAL AND ERROR (§ 601*)—RECORD—ORIGINAL STATEMENT OF FACTS—STATUTES.

Under Laws 1907, p. 512, c. 24, § 15, providing that no statement of facts shall be incorporated in the transcript on appeal, but the original shall be sent up therewith, the original statement of facts must be sent up with the record in all appeals from the district court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2652; Dec. Dig. § 601.*]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Action by H. R. Sargent against the Redland Fruit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John W. Scott, for appellant. W. O. Lane, for appellee.

HODGES, J. The appellee recovered a judgment in the court below against the appellant for damages on account of the alleged breach of a contract theretofore made and entered into between the parties. The allegations in the appellee's (Sargent's) petition are substantially as follows: That the appellee and one E. L. Harper, who was superintendent and manager for the appellant company, entered into the following written contract: "The State of Texas, County of Harrison. September 4th, 1905. This agreement made and entered into between E. L. Harper, Supt. of the Redlands Fruit Company, of the first part and H. R. Sargent, of the second part, witnesseth, that the said E. L. Harper, Supt., for and under instructions of said company and in and for the consideration of 5% on all sales of goods made by the said H. R. Sargent, the second party, on the premises of the said company does agree for the said H. R. Sargent to erect a storehouse on their premises and to conduct a general merchandise business and the company will endeavor to give the said H. R. Sargent their trade from the said plantation and will give no other rights on the premises to other parties for the sale of merchandise. The said H. R. Sargent shall sell no whisky or other intoxicating drink on the premises of said company. The said Sargent shall have the right to removal of said storehouse and the right to sell same. The said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

company acquires no claim or title to said storehouse building and the said Sargent no rights on premises, only so far as terms of this agreement. E. L. Harper, Supt. Redlands Fruit Company. H. R. Sargent." It is alleged that this contract was to last five years; that in pursuance thereof the appellee, plaintiff below, did erect a storehouse at an expense of \$750, and put therein a stock of goods which, it is claimed, was worth at the time of the alleged breach from \$700 to \$1,000, and that the reasonable profits which he would realize from the sale of those goods would have been \$1,000 per year; that but for the contract aforesaid he would not have erected the house nor bought the stock of goods; that the appellant company broke the contract it had thus entered into by throwing the trade of the plantation to others, and allowing others to erect a storehouse on its premises; that, on account of the breach of the said contract by the appellant company, the appellee's trade and the profits therefrom, which he says would have amounted to \$5,000, left him. Appellee also alleges that his house was rendered valueless to him except to the extent of what it would be worth in lumber, which was estimated at \$50; that his goods deteriorated to the extent of \$750 on account of being left on his hands. He sues to recover the aggregate sum of \$6,450. The defendant answered by a general demurrer, general denial, and specially that appellee breached the contract by selling intoxicating liquors on the premises, and in not paying over the 5 per cent. commissions provided for in the contract. The case was submitted to the court without a jury, and a judgment rendered in favor of the appellee for the sum of \$240. From that judgment, this appeal is prosecuted.

There are five assignments of error in the record, two of which assail the refusal of the court to sustain the appellant's general demurrer. The remaining three attack the grounds upon which the court predicated its judgment in matters of facts.

The first question that presents itself for our consideration is whether or not the contract as pleaded by the appellee is void by reason of being in conflict with the provisions of what is known as the "Anti-Trust Law" of this state. The first error assigned complains of the refusal of the court to sustain the general demurrer interposed by the appellant in the trial below. It appears that a general demurrer was filed, but not called to the attention of the trial court, and was not passed on. The reason urged in the appellant's brief as grounds upon which the court should have sustained its general demurrer is that the contract sued upon, and set out in the appellee's original petition, shows upon its face that it is in violation of the law of this state prohibiting the formation of trusts and monopolies. If the appellee's cause of action as stated shows that

he is undertaking to recover damages for the breach of an illegal contract, then the objection may be made at any stage of the proceedings. The objection goes to the substance of the petition, and the error, if it exists, is fundamental. *Grant v. Whittlesey*, 42 Tex. 320; *Norris v. Logan* (Tex. Civ. App.) 94 S. W. 123; *Schuster v. Frendenthal*, 74 Tex. 55, 11 S. W. 1051; *Alamo Ins. Co. v. Davis* (Tex. Civ. App.) 45 S. W. 605; 6 Amer. & Eng. Ency. Plead. & Prac. 380.

The question then is: Do the terms of the contract sued on violate the anti-trust statute? The provisions of the contract pointed out as being obnoxious to that statute are those by which Sargent is given the exclusive right to sell goods on the appellant's premises, and by which appellant bound itself to endeavor to induce its employees to trade with Sargent. In Acts 1903, p. 119, c. 94, a trust is defined as "a combination of capital, skill or acts by two or more persons * * * for either, any or all of the following purposes: (1) To create or which may tend to create, or carry out restrictions in trade or commerce, or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the law of this state." An undertaking on the part of the appellant to endeavor to induce its employees to trade with the appellee could not be regarded as any violation of law, and the vice, if any, in the contract, must be that portion which gives to the appellee the exclusive right to sell goods on the appellant's premises. If this is in violation of the anti-trust statute, then the assignment should be sustained; otherwise it should be overruled. We do not think it was the purpose of the statute to prevent the making of exclusive contracts of every kind. Such an inhibition would be productive of a greater evil than that which the law attempts to remedy. The business competition which cannot be restricted is that which under the "laws of the state a person is permitted or authorized" to engage in. The privilege of selling goods upon the premises of another is not derived from the laws of the state, but from the consent of the owner. *Ft. Worth & D. C. Ry. Co. et al. v. State*, 99 Tex. 34, 87 S. W. 336, 70 L. R. A. 950; *Lewis v. Railway Co.*, 36 Tex. Civ. App. 48, 81 S. W. 111, 10 Tex. Ct. Rep. 423. In the first case cited above a contract had been entered into between the railway company and the Pullman Company, by the terms of which the latter was given the exclusive right of furnishing the railway company sleeping cars on all of its lines for the term of 15 years. In an opinion holding that this contract did not violate the anti-trust statute, the court said: "Waiving the fact that at the time the law of 1903 was enacted there was no other person or company engaged in the like busi-

ness in Texas, we come to the question: Did the railroad company have the lawful right to make a contract with the Pullman Company, whereby it excluded all other companies for 15 years from furnishing to the railroad company sleeping cars for the use on all of its lines? That question suggests this: Did all sleeping car companies have a right to demand of the railroad company to haul their coaches on its railroad? If yea, the contract restricted the free pursuit of a lawful business, and constitutes a trust under the Act of 1903; otherwise the law has not been violated by the agreement. * * * This contract in no way interfered with the rights of any other sleeping car company, if any existed, to build or furnish its cars to other railroads. Neither the Pullman nor any other corporation or person had a right to have sleeping cars attached to the passenger trains of the Ft. Worth & Denver City Railroad Company. Therefore to exclude them did not restrict 'the free pursuit of any business authorized or permitted by law,' because such business was not authorized to be pursued on a railroad without the consent of the owner; and, since no such business right existed, it could not be restricted." In that opinion the case of *Lewis v. Railway Co.* is cited with approval. In the latter case an attack was made on the contract entered into between the railway company and one Green, by which the latter was given the exclusive right to go upon the train of the railway company and solicit the transfer of baggage from passengers riding thereon. Lewis and his employes would purchase tickets, board the passenger train of the railway company, and also solicit such patronage from the railway passengers. The railway company sought to enjoin this conduct on the part of Lewis, and set up the fact that it had contracted with Green that he should have this exclusive privilege. This feature of the contract was assailed as being in violation of the anti-trust statute. The court held otherwise; and, in disposing of the question, uses this language: "It is, we think, a sufficient answer to this contention that the rule or regulation of appellees by which Green was permitted to solicit the patronage of its passengers to the exclusion of appellant did not 'create or carry out restrictions in the free pursuit of any business authorized or permitted by the law of this state,' because the only restriction imposed is with respect to the transaction of appellant's business on appellee's passenger trains, which he is nowhere authorized or permitted by the law of this state to engage in. It is therefore not a restriction upon the free pursuit of this lawful business. In the sense that the regulation prevents appellant from securing the patronage of appellee's passengers, it may be said to be a restriction upon his business. But the least reflection will show that, if this construction of the law were to be adopted, a very large

per cent. of the everyday contracts in the business world, such as those of leasing, of agency, of service, and the like would be reprobated—a result never dreamed of by the legislators who enacted the statute. If appellee is to be denied the relief prayed for, it must be upon other grounds than that asserted in this assignment." Applying the principles approved in the decisions quoted above, we may ask: Were any restrictions created or carried out in the contract under consideration against the free pursuit of any business which the law gave others the right to engage in? Did others have the right under the law to demand of the appellant that they be permitted to sell goods upon its premises? The right to sell upon the premises of another is not given by law, but by consent of the owner. The latter has the right to say who shall or who shall not use his premises for any such purpose. The right to give an exclusive contract for the purpose of any business is involved in every lease.

Our attention has been called to the case of the *T. & P. Coal Company v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919. The appellant urges with much earnestness that the language used in that case is decisive of this. We do not agree with that contention. While there is some language used in the opinion rendered by Justice Denman in the case referred to which tends to support the appellant's construction, yet the facts are different, and that language is not in harmony with the latter decision of our Supreme Court which we have cited. If we have departed from the ruling of the court in the *Lawson* Case we think our action is justified, not only by the latter expressions of the Supreme Court, but by sound reason as well. In the *Lawson* Case the contract which was held to be in violation of the anti-trust statute was more far-reaching than the one here under consideration. Among other things, the coal company, the owner of the premises, bound itself not to engage in a business in competition with that carried on by *Lawson*. It thus by agreement deprived itself of a right given by law, and in so doing restricted competition to that extent. In this case the contract is susceptible of no such construction. The second assignment of error is overruled because we do not think the pleadings were subject to the objections urged. They were sufficient to constitute a cause of action, however defectively this may have been stated.

The remaining assignments of error involve issues of fact which cannot be considered because of the absence of a statement of facts such as is now required by law. The transcript contains what purports to be a copy of the statement of facts. Under the law as it now exists, in all appeals from the district court, the original statement of facts must be sent up with the record. Laws 1907,

p. 512, c. 24, § 15; *Garrison v. Richards* (Tex. Civ. App.) 107 S. W. 861.

The judgment of the district court is affirmed.

TEMPLEMAN et al. v. McFERRIN et al.
(Court of Civil Appeals of Texas. Oct. 20, 1908. Rehearing Denied Nov. 18, 1908.)

1. WORDS AND PHRASES—"HEIR."

No one can be an heir during the lifetime of his ancestor.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3241.]

2. HUSBAND AND WIFE (§ 124*)—WIFE'S SEPARATE PROPERTY—CONVEYANCE—NOTES FOR PURCHASE PRICE—OWNERSHIP.

A wife executed a deed in which her husband joined, conveying her separate real estate for a recited consideration, a part of which was to be paid to her heirs after her death. The purchaser executed a note, promising to pay to her heirs such part of the consideration. *Held*, that the note was, when executed, the property of the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 450; Dec. Dig. § 124.*]

3. HUSBAND AND WIFE (§ 202*)—WIFE'S SEPARATE PROPERTY—CONVEYANCE—NOTES FOR PURCHASE PRICE—LIABILITY.

Separate real estate of a wife was conveyed by deed, in which her husband joined. The purchaser executed a nonnegotiable note for a part of the price to be paid the wife's heirs at her death. After the death of her husband, the wife conveyed the same land to the same purchaser. The deed recited that the first conveyance should be held for naught, and that the note given for the price should be canceled. The purchaser conveyed to a third person for value and in good faith. *Held*, that the purchasers might rely on the recitals in the second deed, and were not liable on the note.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 202.*]

Appeal from District Court, Brazos County; J. C. Scott, Judge.

Action by Johnnie McFerrin and others against Ward Templeman and others. From a judgment for plaintiffs, defendants appeal. Reversed and rendered.

Geo. D. Neal and Doremus & Butler, for appellants. Haynes Shannon and A. G. Board, for appellees.

NEILL, J. On June 22, 1894, Zilpha McFerrin and her husband, L. McFerrin, made a deed to M. W. Peterson, conveying a certain tract of land containing 194 acres of the William Millican league, situated in Brazos county, Tex. After reciting the payment of \$50 cash, the consideration is thus expressed in the deed: "And for the further consideration of two thousand four hundred dollars to be hereafter paid to the heirs of the said Zilpha McFerrin, to be due and payable to said heirs after the death of the said Zilpha McFerrin, and the further consideration of fifty dollars to be paid to the said Zilpha McFerrin by said M. W. Peterson every three months from this date so long as she lives,

which sum of two thousand four hundred dollars are evidenced by the promissory note of said M. W. Peterson of this date to secure the payment of the same at the maturity thereof, the vendor's lien is retained on the land hereinafter described." Contemporaneous with its execution, the vendor, M. W. Peterson, executed and delivered to the grantors the following instrument: "On the death of Mrs. Zilpha McFerrin, for value received I promise to pay unto the heirs of the said Zilpha McFerrin the sum of two thousand four hundred dollars for a tract of land in Brazos county, Texas, described fully in the deed of the said Zilpha McFerrin and her husband, Levi McFerrin, of this date, in which the vendor's lien is retained to secure the payment of this note at its maturity which is to be at the death of said Zilpha McFerrin and fifty dollars every three months from this date which is provided for in said deed so long as she lives in lieu of interest on this note during her lifetime but this note to bear 10 per cent. from the date of her death until paid. M. W. Peterson"—which is the one referred to in the deed as the "note" given for a part of the consideration. The land was of the separate estate of Mrs. McFerrin.

Levi McFerrin died during the year 1898. The obligation or note of Peterson, above recited, for \$2,400 was delivered by Zilpha McFerrin to Jesse McFerrin (but the date of such delivery is not shown by the record) to be held by him; and, when delivered, she stated to him that she "wanted him to keep the same, and stated that this is for my children and my will." Peterson paid Zilpha McFerrin the \$50 per quarter, provided for in his said note or obligation, several times while it was held by Jesse McFerrin. On January 25, 1899, Zilpha McFerrin, then a feme sole, made a deed conveying the same 194 acres described in the deed above mentioned to M. W. Peterson. The consideration expressed in the deed is "for and in consideration of the sum of fifteen hundred dollars to me secured to be paid by M. W. Peterson of Brazos county, Texas, as follows: Three promissory notes signed and executed by M. W. Peterson each payable to Zilpha McFerrin or order at Navasota, Texas, of even date herewith each for the sum of five hundred dollars with ten per cent. interest per annum from date until paid the interest payable annually all past due interest to bear interest at the rate of ten per cent. per annum and each note providing for the payment of ten per cent. on principal and interest as attorney's fees if placed in the hands of an attorney for collection or if suit is brought on same or if collected through the probate court and each reciting that it is given in part payment of the land herein conveyed, and that a vendor's lien is retained upon said property and said notes being due on one, two

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and three years after date respectively." It also contains the following recitations, to wit: "Whereas on June 22, 1894, said Zilpha McFerrin joined by her husband Levi McFerrin by deed of that date which is of record in Vol. 13 page 449 to 451 of the deed records of said Brazos county, conveyed said tract of land to said M. W. Peterson for the consideration of \$50.00 cash then paid and the further consideration of \$2,400.00 as evidenced by the promissory note of said Peterson to be paid to the heirs of said Zilpha McFerrin upon the death of said Zilpha McFerrin and the further consideration of \$50.00 to be paid every three months by said M. W. Peterson to said Zilpha McFerrin so long as she lived and whereas it is intended by said M. W. Peterson and Zilpha McFerrin that this deed shall in all things take the place of said first deed. It is therefore expressly understood and agreed that said first deed shall be held for naught from henceforth and shall be of no further force or effect. And this conveyance shall in all things supersede and take place of said first deed it being intended to make a present conveyance of a present right and title and to convey in all things the present right of use, enjoyment and possession and the said Zilpha McFerrin herein acknowledges that there are no charges for or on account of said land that said purchase price of fifteen hundred dollars first above described and that said note mentioned in first said deed has been surrendered and canceled, and the lien upon said land for and on of the purchase money mentioned in said first deed is hereby canceled and released and said Peterson is discharged from all moneyed obligations under said first deed."

On October 24, 1900, M. W. Peterson, joined by his wife, Jessie L., made a deed to W. J. Foster and Ward Templeman, conveying to them, among other lands, the 194 acres described in the other two deeds. A part of the consideration for such conveyance was the assumption of and promise to pay the three promissory notes of Peterson to McFerrin, recited in the second deed above mentioned, which notes were by them subsequently paid off and satisfied. When the purchase was made by Foster and Templeman, each of the deeds first above mentioned was of record in Brazos county, and prior to and at the time of their purchase they had the title of the 194 acres examined by attorneys, and were advised by them that the title to the same was good. Foster and Templeman had no notice nor knowledge of the transactions between M. W. Peterson and Zilpha McFerrin and her husband other than as is disclosed by the record of the two first-mentioned deeds; nor did they know that Jesse McFerrin held the note or obligation of Peterson described in the deed first mentioned, and herein above copied, in his possession when they purchased the land from him. Zilpha McFerrin died during the

latter part of 1901, leaving Johnnie McFerrin, her only surviving child, and Lillie Price, Gus Price, and Henry Price, children of her daughter, — Price, her only surviving grandchildren, who were her only heirs. Johnnie McFerrin died after this action was brought, leaving as his heirs the aforementioned grandchildren of his mother. He also left uncles, who are his father's full brothers. The facts just stated were, in substance, found by the trial court; and, there being no statement of facts with the record, are adopted by us.

This suit was brought August 24, 1905, by the minors, Johnnie McFerrin, and the above-named grandchildren of Zilpha McFerrin against M. W. Peterson, Ward Templeman, and W. J. Foster, to recover upon the obligation or note for \$2,400 of M. W. Peterson, set out in the foregoing conclusions of fact, and to foreclose a vendor's lien on the land for which such instrument was given. The defendants, Ward Templeman and W. J. Foster, after interposing general and special exceptions and a general denial to plaintiffs' petition, specially pleaded the matters recited in the deed of January 25, 1899, from Zilpha McFerrin to M. W. Peterson, and the facts relating thereto, set forth in our conclusions of fact, in discharge of the alleged obligation or note sued upon. They further pleaded that they were purchasers in good faith for value, without notice, etc. M. W. Peterson having died during the pendency of the suit, his wife, Jessie, voluntarily made herself a party defendant, and after pleading the insolvency of her husband's estate at the time of his death, and that there had been no administration thereon, nor necessity therefor, disclaimed all interest in the land upon which the alleged lien is sought to be foreclosed, and adopted the answer of her codefendants. The case was tried before the court without a jury, who rendered judgment against Mrs. Jessie Peterson for the amount sued for, together with a foreclosure of the alleged vendor's lien on the land, as against her codefendants.

It cannot be successfully contended that the instrument sued upon was not the property of Mrs. Zilpha McFerrin when it was executed by Peterson for a part of the purchase money of the land he bought from her. It is axiomatic that no one can be an heir during the lifetime of his ancestor. Therefore, as Mrs. McFerrin had no heirs when the instrument was executed, and it could not then be known who would be her heirs when the money would become due, the writing sued upon must have necessarily remained her property, unless she parted with the title, until the occurrence of the event which would disclose her heirs to whom, by its terms, it would then be due and payable. It being her property, she could dispose of it, or make such contract with the obligor affecting it as she might see fit. Indeed the contention of appellees

that she gave it to her children subsequent to its execution is a concession on their part that it was her property up to that time. For if she did not own it, she could not give it to any one. Therefore plaintiffs' ownership of the instrument sued on necessarily depends upon whether or not Mrs. McFerrin gave it to her children when she delivered it to Jesse McFerrin, telling him she wanted him to keep it, and that it was for her children. From the view we take of the case, it is deemed unnecessary to determine the question whether the transaction just referred to constituted a gift from her to her children or not. Let it be assumed that the transaction contained all the essential elements of a gift inter vivos, and that such gift was absolute and irrevocable, still, as the appellants had no notice of it, they were not affected by the gift; for the findings of the trial court show indisputably every fact necessary to constitute Templeman and Foster purchasers in good faith for value; and completely negative any personal liability of Mrs. Peterson upon the instrument sued upon. In fact, the allegations in plaintiffs' petition disclose no liability on her part.

The paper upon which this action is predicated is not a negotiable instrument; and, being, when executed, the separate property of Zilpha McFerrin, Templeman and Foster when they purchased had the right to rely upon the recitals in the deed of Mrs. McFerrin to their vendor that such instrument had been satisfied and canceled by mutual agreement of the parties; nor were they put upon further inquiry regarding the matter. *Moran v. Wheeler*, 87 Tex. 179, 27 S. W. 54; *Southern B. & L. Ass'n v. Brackett*, 91 Tex. 44, 40 S. W. 719; *Rogers v. Houston*, 94 Tex. 403, 60 S. W. 869; *Drumm Commis. Co. v. Core* (Tex. Civ. App.) 105 S. W. 843.

The court below erred in rendering judgment upon the facts found in favor of appellees, and in not rendering it for the appellants. Wherefore the judgment of the district court is reversed, and judgment is here rendered for appellants.

CLARK et al. v. SOUTHWESTERN LIFE INS. CO. et al.†

(Court of Civil Appeals of Texas. Oct. 21, 1908. Rehearing Denied Nov. 18, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 182*)—RIGHTS OF WIDOW AND CHILDREN—LIFE POLICY.

A widow's right to a yearly allowance for herself and children, and in lieu of a homestead, is inferior to the claim of a bank on a life policy, delivered to it by decedent to secure a debt.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 686; Dec. Dig. § 182.*]

2. INSURANCE (§ 347*)—LIFE POLICY—ASSIGNMENT—WHO CAN OBJECT.

Insurer having waived the requirements of a life policy as to the form of an assignment of the policy by insured to secure a debt, no one else could attack the form.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 347.*]

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

Consolidated actions by Cora Clark and by the Woods National Bank against the Southwestern Life Insurance Company, Whitney Patrick and others intervening. From the judgment plaintiff Clark brings error. Affirmed.

A. C. Bullitt and V. M. Clark, for appellant. W. P. Lobban and Cobbs & Cobbs, for appellees.

FLY, J. Cora Patrick, as the duly qualified survivor of the community estate of herself and her deceased husband, Lee Patrick, instituted this suit against the Southwestern Life Insurance Company to recover \$5,000 insurance on the life of said Lee Patrick. The Woods National Bank had in a separate suit sought to recover the same insurance from the insurance company, alleging that the same had been transferred to it by Lee Patrick, and at the instance of the insurance company the two causes were consolidated, and it prayed that the question of ownership of the money be established by the court, so that it would be protected in the payment of the same. Through their next friend and attorney, A. C. Bullitt, Whitney Patrick, Cora Patrick, and Dulcie Patrick, minor children of Cora Patrick and Lee Patrick, intervened in the suit claiming an interest in the insurance money, which had been paid by the Southwestern Insurance Company into the registry of the court. For further statement we refer to the opinion in case of *Insurance Co. v. Woods National Bank* (Tex. Civ. App.) 107 S. W. 114, which was an appeal from the same judgment from which this writ of error is prosecuted. The case was submitted on special issues, and the judgment rendered is thus described in that opinion: "Upon those answers the court rendered judgment that neither appellant Mrs. Patrick nor the minors should recover anything, that appellant recover all costs incurred by reason of the suit of Mrs. Patrick, and the intervention of the minors, and that the Woods National Bank recover of appellant the sum of \$5,000, the principal amount of the policy, the sum of \$245, interest at 6 per cent. per annum from January 5, 1906, until October 29, 1906, \$600, the statutory penalty for refusal to pay the loss, and \$500 attorney's fees, the whole being \$6,345. It was also provided in the judgment that the clerk should pay the \$5,000, paid into the registry of the court by appellant, to Woods National

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

Bank, upon the execution of a bond by said bank in the sum of \$8,000, payable to the district judge, or his successors, conditioned that the bank would repay the money, with interest, to the successful party in the suit." This writ of error is prosecuted by Cora Patrick, who became Cora Clark by intermarriage with V. M. Clark after the judgment was rendered. The minors did not join in the petition for writ of error, and they are in this court, together with Woods National Bank and the insurance company, as defendants in error. The evidence justifies the conclusions that Lee Patrick, whose life was insured for \$5,000 by the Southwestern Life Insurance Company placed his policy of insurance in the hands of the Woods National Bank as collateral security for a debt greatly in excess thereof that he owed to the bank, and the policy was in the hands of the bank at the time that Lee Patrick died, and he was at that time indebted to the bank in the sum of \$13,000. The form prescribed in the policy for its assignment was not complied with, but the facts showed, and the jury found, that the insurance company had recognized the assignment, and had waived the formal mode of assignment.

There is practically but one point to be decided in this case, and that is: Is the claim of plaintiff in error for a yearly allowance for herself and children, and in lieu of a homestead, superior to the claim of the bank on the policy, which had been placed in its possession by Lee Patrick to secure the payment of a debt due by him to the bank? In connection with that issue it may be stated that it was shown beyond controversy that the policy was delivered by Lee Patrick to the bank, to be held as security for a debt, and was in its possession at the time of Patrick's death. Mrs. Patrick admitted these facts, while acting as survivor, both orally and in writing. The issue presented has been time and again decided adversely to the claim of plaintiffs in error, by the appellate courts of Texas, which a brief review of the decisions will clearly demonstrate.

In the case of Huyler v. Dahoney, 48 Tex. 234, the administrator sued to recover certain promissory notes, left with the defendant as collateral security by the decedent for a debt owed by him to the defendant. The Supreme Court said: "When such negotiable instruments are deposited as collateral security for a debt, the creditor is not a mere mortgagee or lienholder, who, in case of the death of his debtor, must prove up his claim against the estate, and ask the aid of the probate court to enforce his lien. He has in his own hands the means of paying himself, and may, at any time after his debt is due, collect the collaterals, and appropriate the proceeds to such payment." That decision was reiterated in the case of Williams v. Lumkin, 74 Tex. 601, 12 S. W. 488.

In the case of Andrews v. Life Insurance Company, 92 Tex. 584, 50 S. W. 572, it ap-

peared that the Union Central Life Insurance Company had issued a policy on the life of W. L. Andrews for the sum of \$5,000. He died, and the insurance company paid the amount due on this policy to one A. P. Dyke. The court said: "The plaintiff claims that if Dyke was in fact a creditor of the deceased to the extent of the amount named in the policy, then she is entitled to recover, because the estate was insolvent, and there was no homestead or other exempted property which the court could set apart to the widow and minor children, and no property or funds out of which they could be furnished a year's support, and that the order of the probate court, setting apart the fund to be derived from the collection of this policy to the widow and children, gives a prior claim to that of the creditor. The petition alleges that Dyke, if a creditor at all, held the policy as collateral security for his debt. If it be agreed that the policy was in Dyke's hands as collateral to secure the indebtedness to him, then he had the right to collect it and apply the proceeds to the payment of his debt, and his claim was superior to that of the plaintiff and her children." The Supreme Court reversed the judgment, and on another appeal to the Court of Civil Appeals, in affirming the judgment of the lower court, it was said: "Dyke is shown to be the absolute owner of the policy, and it was not necessary to his recovery to show any assignment of it to him." *Andrews v. Union Cent. Life Ins. Co.*, 24 Tex. Civ. App. 425, 58 S. W. 1039.

In the case of Fulton v. National Bank, 26 Tex. Civ. App. 115, 62 S. W. 84, decided by this court, the deceased had placed with the bank certain corporate shares to secure an indebtedness due by him. Some of the shares had been paid for by the bank, for the benefit of deceased, but there were others for which it did not appear that the bank had advanced the purchase price. Mrs. Fulton, the widow of deceased, sought to have the stock set apart as an allowance for her and her children. This court held that, as to all the shares except eight, the bank had a vendor's lien, which would be superior to a claim for an allowance, and as to the other shares, not paid for by the bank, this court said: "The statute does not authorize an administrator to assume or recover possession of property which the decedent had disposed of and was himself not entitled to. Fulton had neither possession of any of this property, nor was entitled to its possession at his death. He had a right to acquire or regain possession of it by satisfying the creditor who held it, and his administrator has no better right." The same rule fits the facts of this case to a nicety. The court, however, went farther in that case, and held: "But independently of the reasons stated in the above paragraph, the expressed views of the Supreme Court are not in accord with plaintiff's contention that these pledged stocks were subject primarily to the payment of al-

lowances to widow and children." After a quotation from *Andrews v. Insurance Company*, herein cited, the court proceeded: "We are of the opinion that a pledgee of certificates of stock is entitled to hold them as against an administrator of the pledgor, and is entitled to receive and enforce dividends or other benefits attaching thereto so long as his claim is unsatisfied."

The policy was pledged to Woods National Bank to secure a debt he owed the bank, and he could not have recovered possession of the policy, without payment of the debt for which it was pledged, and neither can his wife and children. The insurance company having waived the requirements in the policy as to its assignment, no one else had the right to attack the form of the transfer. *Coleman v. Anderson*, 98 Tex. 570, 86 S. W. 730; *Embry v. Harris*, 107 Ky. 61, 52 S. W. 958; *Lockett v. Lockett*, 80 S. W. 1152, 26 Ky. Law Rep. 300; *Cplitz v. Karel*, 118 Wis. 527, 95 N. W. 948, 62 L. R. A. 982, 99 Am. St. Rep. 1004; *McCauley v. Nat. Bank*, 27 S. C. 215, 3 S. E. 193. It has also been held that where a debtor made an assignment of a policy upon his life as collateral security for his debt, the assignee does not waive his rights in the policy, by reason of having procured an allowance of his claim against the estate. *Hight v. Taylor*, 97 Ind. 392.

The judgment, as reformed in our opinion on the other branch of this case, will be affirmed.

STEGER & SONS PIANO MFG. CO. et al. v. MacMASTER.†

(Court of Civil Appeals of Texas. June 27, 1908. Rehearing Denied Oct. 17, 1908.)

1. APPEAL AND ERROR (§ 837*)—PRESENTATION BELOW—OBJECTIONS TO PETITION—FAILURE TO STATE CAUSE OF ACTION.

In a suit to enjoin the prosecution of suits brought in a justice's court, assignments of error to a refusal to dismiss the injunction because the petition did not show any equity on its face, nor that plaintiff was entitled to the injunction, and because it failed to allege his defenses to the suits, were objections in the nature of demurrers and exceptions to the petition, and the proper practice was to first demur to the petition, and assign an adverse ruling thereon as error, and hence only require the appellate court to determine whether the petition would have been good on demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 837.*]

2. APPEAL AND ERROR (§ 719*)—ASSIGNMENTS OF ERROR—NECESSITY—FAILURE TO STATE CAUSE OF ACTION.

It would be the duty of the Court of Civil Appeals to determine the sufficiency of the petition as against a general demurrer, even though there were no assignments of error as to its sufficiency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2973; Dec. Dig. § 719.*]

3. INJUNCTION (§ 19*)—GROUNDS—MULTIPLICITY OF SUITS.

Rev. St. 1895, art. 2989, cl. 3, authorizes the district court to issue injunctions where the applicant is entitled thereto under the principles of equity. The petition alleged that plaintiff sold on commission pianos consigned to him by defendants under written contracts providing that, on all time sales, plaintiff was allowed the first payment by the purchaser to a certain amount, and was to remit the remainder to defendants, together with sufficient notes, etc., to make the total remittance at least 50 per cent. over the price at which the instruments were consigned to plaintiff, the excess to be placed to his credit until defendants' interest therein was satisfied when it should belong to plaintiff; that plaintiff should guarantee the notes and pay for any pianos not paid for by the purchaser; that, after plaintiff had terminated his employment, defendants brought suits in justice's court for a certain sum and to recover four pianos, or their value, which defendants claimed that plaintiff had not paid for, but that defendants were in fact, largely indebted to plaintiff above the amount sued for because of their failure to remit for collateral notes held by them, and plaintiff charged that the justice's suits were brought to vex and needlessly embarrass him, and prayed that their prosecution be enjoined, and that all matters arising out of the contract be settled in this suit. *Held*, that the petition was sufficient on general demurrer to authorize the district court to grant the relief prayed on the ground of multiplicity of suits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 18; Dec. Dig. § 19.*]

4. INJUNCTION (§ 25*)—ACTIONS AT LAW—GROUNDS FOR RELIEF—ERRORS.

As a general rule, when a court of law has jurisdiction of the parties, the subject-matter, and the amount in controversy, and is proceeding in a lawful manner, equity will not interfere to control the proceedings for mere errors of law or judgment, where the trial court can properly determine the dispute.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 24; Dec. Dig. § 25.*]

5. EQUITY (§ 51*)—JURISDICTION—MULTIPLICITY OF SUITS.

In order to prevent a multiplicity of suits, equity will take cognizance of a controversy, determine the rights of the parties, and grant the relief required to meet the ends of justice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 167-171; Dec. Dig. § 51.*]

6. APPEAL AND ERROR (§ 216*)—OBJECTIONS NOT MADE BELOW—INSTRUCTIONS—REQUESTS.

Where the objection to instructions is merely that matters were omitted therefrom which were not specially requested to be supplied, there is no error available.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. § 628.]

7. TRIAL (§ 253*)—INSTRUCTIONS—IGNORING ISSUES.

In an action to enjoin certain suits and settle the rights of the parties under a contract by which plaintiff was to sell pianos consigned to him by defendants, and remit part of the first payments, and notes for the remainder due, so as to make the total amount remitted at least 50 per cent. over the price at which they were consigned to plaintiff, and, after defendants' interests in the notes were satisfied, the residue collected on them was to belong to plaintiff, defendants having negligently failed to collect such notes and make returns as provided for, a requested instruction submitting defendants' right

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to recover the sum allowed as a discount to plaintiff on his personal notes on account of plaintiff's failure to carry out the terms of the settlement after having received that discount was properly refused as ignoring plaintiff's right to recover for the collateral held by defendants under their contract.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 253.*]

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Suit by James MacMaster against the Steger & Sons Piano Manufacturing Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Defendants' twentieth assignment of error was that the court erred in failing to submit the question whether the pianos in controversy were sold to plaintiff under the parol contract alleged in plaintiff's petition, or whether they were consigned to him under the terms of the written contract attached to the petition.

The twenty-second assignment of error was that the court erred in failing to submit the issue whether the settlement alleged in the petition and answer was in fact consummated.

The twenty-third assignment of error was that the court erred in failing to submit the question whether defendants were entitled to recover of plaintiff a certain sum, the balance due on plaintiff's personal notes, as set out in defendants' answer.

Special charge No. 3 requested by defendants submitted the question of defendants' right to recover the discount allowed plaintiff on his personal notes, because of plaintiff's failure to carry out the terms of the settlement after having received the discount.

Defendants' twenty-seventh assignment was as to error in overruling defendants' special exception to the allegations of the supplemental petition because plaintiff sought thereby to contradict and vary by parol the terms of the written contracts attached to his original petition, and the averments of the petition excepted to were that, after the written contracts had been entered into, plaintiff and defendants entered into a custom and oral contract whereby defendants undertook the collection of collateral sent them by plaintiff, and that plaintiff had frequently demanded certain collateral which he had means of collecting, and informed defendants thereof, but defendants ignored his request, whereby the collateral became uncollectible.

Flournoy, Smith & Stover and McLean & Scott, for appellants. Israel Dreeben and McCart, Bowlin & McCart, for appellee.

CONNER, C. J. This is an injunction suit filed by appellee to restrain appellants and John L. Terrell and Charles T. Rowland, two justices of the peace of precinct No. 1,

Tarrant county, from prosecuting five several suits filed in said justice courts by appellants against appellee, and to recover damages as set out in the petition. The trial resulted in the perpetuation of the preliminary injunction that had been issued and in a judgment for appellee in the sum of \$555.60, from which this appeal has been prosecuted.

In the first seven assignments it is urged that "the court erred in refusing to dismiss the injunction suit herein against defendants" because of various omissions in and objections to appellee's petition for injunction. For instance, in the third assignment, it is urged that "the court erred in refusing to dismiss plaintiff's injunction filed herein because the allegation of plaintiff's petition for injunction does not show any equity on its face, or that plaintiff was entitled to said injunction in this," etc.; contradiction in certain clauses being alleged. The fourth assignment is that "the court erred in refusing to dismiss the injunction suit herein against defendants because the plaintiff failed to allege what defense he had to the suits pending in the justice court enjoined herein," etc. We think it manifest from these assignments that they are wholly in the nature of demurrers and exceptions to the petition, and that the proper practice would have been to first challenge the sufficiency of the petition by demurrers, and, in event of adverse rulings, to assign error to the action of the court. We think the assignments of error thus noticed can be considered by us in no event further than to scrutinize appellee's petition for the purpose of determining whether it is good as against a general demurrer, which doubtless it would be our duty to do at all events. So far as we deem it necessary to here state, appellee alleged that prior to all dates involved he had been engaged in selling on commission pianos consigned to him by the appellant piano companies under written contracts providing for private prices to be paid by appellee, when sold for cash, by remitting to appellants the invoice price to him; that on all time or part cash sales appellee was to be allowed "the first cash payment made by the purchaser to the amount of \$50, the remainder of such cash payment I am to remit to you (the appellant piano companies), together with a sufficient amount of the interest-bearing notes, contracts, or leases first becoming due to make the total amount so remitted equal to a sum not less than 50 per cent. in excess of the price at which the instrument is consigned to me, which excess shall be placed to my collateral credit until your equity in said notes, contracts, or leases is satisfied, then this excess shall revert to me, and I hereby guarantee the payments of all notes, contracts, and leases so taken, waiving protest and notice of protest and default. And if default is made

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the payments of any notes, contracts, or leases so guaranteed, I agree upon your demand, to repossess, or cause to be repossessed at my expense, any instrument for which said default note or notes, contracts, or leases were given in payment. Should I be unable to regain possession of such instrument, I agree to pay the entire amount due you on same in cash, or you may at your option apply any part of my collaterals which you may hold in full or part settlement of the same." The contract further provided that "I [appellee] hereby agree to assist you [the piano companies] in making collection of notes, contracts, and leases indorsed by me when called upon to do so, and without charge for services rendered." Appellee alleged that, prior to the institution of the suits in the justice court, he had terminated his connection with the appellant companies; that said suits had been instituted for the cash sum of \$50 alleged to be due, and for the recovery of four certain pianos, or their value, which had been consigned to him, and for which appellants alleged he had not paid; that in truth appellants were largely indebted to him in excess of the amount so sued for on account of the value of collateral notes that had been delivered to appellants under the terms of their said written contracts, and which they had negligently failed to collect and apply and remit, as had been provided, and it was charged that said suits had been instituted in said justice courts with the purpose of vexing, harassing, and needlessly embarrassing appellee, and he prayed that appellants be enjoined from further prosecuting them, and that all matters arising out of said contracts be settled in this suit, and that he have judgment as prayed for. The petition contained many other allegations not deemed necessary to an understanding of this opinion; but as perhaps sufficient therefor the above outline has been given.

The main contention seems to be that the district court is without power to enjoin the justice courts from proceeding with the causes of action properly filed therein, "when said justice court has jurisdiction of the parties, the subject-matter of the suits, the amount in controversy, and is proceeding in a lawful manner with the trial and the disposition of the same," and the case of *Railway v. Dowe*, 70 Tex. 1, 6 S. W. 790, is cited in support of this contention. The general rule under the present Constitution of this state is undoubtedly as stated in the contention made. Courts of equity will not interfere to control the proceedings of other courts where there have been mere errors of law or of judgment, or where the lower court can hear and determine the dispute. But our statute expressly authorizes the district court to issue injunctions in all cases where "the applicant for such writ may show himself entitled thereto under the principles of equity." See Rev. St. 1895, art. 2989, cl. 3.

Says Mr. Pomeroy in the fourth volume of his work on *Equity Jurisprudence* (3d Ed., § 1360): "The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction." And it is a well-established doctrine that a court of equity may take cognizance of a controversy, determine the rights of all the parties, and grant the relief required to meet the ends of justice in order to prevent a multiplicity of suits. 1 Pomeroy's *Equity Jurisprudence*, § 243 et seq. In section 271 of the volume just cited the author says that the judgment of a court of equity to prevent multiplicity of suits "has also been admitted, under special circumstances, to settle the entire controversy between two parties growing out of some complicated contract involving numerous questions and many actions at law." So that, on the whole, we think it can be scarcely doubted that appellee's petition is sufficient on general demurrer to authorize the relief he sought. Certainly as against appellants, at least, he would be entitled to the restraining process invoked.

Under the twelfth, thirteenth, fourteenth, and sixteenth assignments it is insisted, in substance, that the evidence is insufficient to support the verdict in appellee's favor on the issue of negligence on appellants' part in the collection of certain collateral notes, for the value of which appellee alleged he was entitled under the terms of the contract. A statement of all the evidence on this issue would confuse rather than otherwise, and we hence deem it sufficient to omit details and to say that, after careful examination, we must disagree with appellants' contention in this particular.

The first paragraph of the court's charge objected to in the fifteenth assignment was correct as far as it went, and the errors complained of in the twentieth, twenty-second, and twenty-third assignments at most constituted omissions merely calling for requested special instructions. Appellants' special charge No. 3 was properly rejected as ignoring appellee's right to recover upon his collateral that appellants were shown to have and to have negligently failed to collect and return as provided for by the written contracts. Nor do we find error in the action of the court in overruling appellants' special exception as complained of in the twenty-seventh assignment. The averments of appellee's petition excepted to seem to us to be consistent with the contracts declared upon, and as in nowise varying or contradicting their terms, as is insisted under this assignment.

We conclude that no reversible error has been shown, and that the judgment should be affirmed.

**WISCONSIN & ARKANSAS LUMBER CO.
v. THOMPSON et al.**

(Supreme Court of Arkansas. Oct. 26, 1908.)

MASTER AND SERVANT (§ 83*)—EMPLOYEES' DISCHARGE—WAGES—REFUSAL TO PAY—CHARACTER.

A paymaster's statement to discharged employes, who demanded payment of their wages: "You would not go to the car; if this had been reasonable, I would pay you"—was not an absolute refusal to pay, within Acts 1905, p. 538, prescribing a penalty where a corporation fails to pay the wages of discharged employes within seven days from their discharge; the paymaster merely meaning that the employes were not reasonable because they did not go to the car, which was the customary place for payment, and that he could not pay them before definitely ascertaining how much the company owed them.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 83.*]

Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

Action by C. F. Thompson and another against the Wisconsin & Arkansas Lumber Company. From a judgment for plaintiffs, defendant appeals. Reversed, and remanded for new trial.

N. P. Richmond and H. Berger, for appellant. H. B. Means, for appellees.

HART, J. This is a suit by C. F. Thompson and J. M. Fielding against the Wisconsin & Arkansas Lumber Company to recover the penalty imposed by statute upon corporations for failing to pay the wages of discharged employes within seven days from their discharge. Acts 1905, p. 538. Separate suits were brought, but the cases were consolidated by order of the court and tried at the same time. There was a jury trial, and verdict for the plaintiffs, and defendant has appealed.

The essential facts in this case are the same as those in the case of Wisconsin & Arkansas Lumber Company v. Reaves, 82 Ark. 377, 102 S. W. 206, and the principles there announced control here. The only difference between the facts in this case and the Reaves Case is as follows: When the laborers went to the paymaster's office, and presented their identification checks, the paymaster said: "You would not go to the car; if this had been reasonable, I would pay you." The paymaster explained that the identification checks did not show whether the parties were discharged, or had merely quit, and did not show the amount due them; that the laborers were in the habit of trading at the company's store in the woods; and that he did not know how much they owed until the report from the woods where they worked was received.

If the language above quoted could be construed as an absolute refusal to pay on the part of the company, then the present case could be distinguished from the Reaves Case; for it would be no use for the labor-

ers to leave their addresses, if the company refused absolutely to pay them. This is in accord with the reasoning of the case of St. L. S. W. Ry. Co. v. Brown, 75 Ark. 137, 86 S. W. 994. We do not think, however, the language is susceptible of that interpretation. The paymaster merely meant to tell them they were not reasonable because they did not go to the car, which was the usual and customary place for the men to be paid off, and that he could not pay them until he had definitely ascertained how much the company owed them.

Counsel for the plaintiffs urge that the Reaves Case be overruled; but no new arguments are presented therefor. No reason is given, and none is perceived by the court, to warrant a departure from the rule adopted in that case. Therefore, under the undisputed facts as disclosed by the record, the court below should have directed a verdict for the defendant, as requested by it.

The judgment is reversed, and the cause remanded for a new trial.

LITTLE v. WILLIAMS et al.

(Supreme Court of Arkansas. June 22, 1908.
On Rehearing, Nov. 9, 1908.)

1. BOUNDARIES (§ 12*)—NONNAVIGABLE LAKE—OWNERSHIP—RIPARIAN RIGHTS.

The title of adjoining landowners extends to the center of a nonnavigable lake by virtue of their riparian rights.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 114; Dec. Dig. § 12.*]

2. QUIETING TITLE (§ 10*)—BURDEN OF PROOF.

In a suit to quiet title, plaintiff must succeed, if at all, on the strength of her own title, the burden being on her to show that the land in controversy was of such a character that it passed to her under her chain of title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 36; Dec. Dig. § 10.*]

3. PUBLIC LANDS (§ 25*)—GOVERNMENT SURVEY—EVIDENCE.

Where the plats of a government survey of land in controversy and the field notes accompanying them showed that the lands when surveyed constituted the bed of a lake and were within the meandered lines thereof, they constituted prima facie evidence that the lands were a part of the lake bed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 33; Dec. Dig. § 25.*]

4. PUBLIC LANDS (§ 25*)—SURVEY—CORRECTNESS—IMPEACHMENT.

Where a government survey erroneously included within the meandered lines of a nonnavigable lake a quantity of swamp lands as a part of the lake bed, but neither the United States land department nor the state of Arkansas had ever questioned the correctness of the survey but had always treated it as correct, it could not be impeached by an individual claimant in a collateral proceeding.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 33; Dec. Dig. § 25.*]

5. PUBLIC LANDS (§ 108*)—SWAMP LANDS—SECRETARY OF INTERIOR'S DECISION—IMPEACHMENT.

A decision of the Secretary of the Interior as to whether certain lands are within the terms

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of the swamp land grant is conclusive in the absence of fraud, and cannot be collaterally attacked.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 804; Dec. Dig. § 108.*]

6. BOUNDARIES (§ 12*) — CONVEYANCE BY STATE—PATENTS—EFFECT.

The legal effect of state patents of fractional sections and parts of sections of public lands surrounding the meandered lines of a nonnavigable lake according to the official plats of the public survey was to convey all riparian rights, and by virtue thereof to vest *prima facie* title to the bed of the lake as shown by the plats from the meandered shore line to the center.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 114; Dec. Dig. § 12.*]

7. PUBLIC LANDS (§ 58*)—SWAMP LAND ACT—EFFECT.

The swamp land act (Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519), while a grant in *present*, did not pass the legal title of the lands transferred thereby to the states until the lands had been selected as such and the patents were delivered.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 181; Dec. Dig. § 58.*]

8. PUBLIC LANDS (§ 25*) — SURVEY—CONCLUSIVENESS—MISTAKES.

Until the government elects to correct mistakes in an original survey of public land and asserts a claim to the lands by virtue of such mistakes, no one can complain or dispute the title of the holders of a *prima facie* title.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 33; Dec. Dig. § 25.*]

On Rehearing.

9. EVIDENCE (§ 23*)—JUDICIAL NOTICE—GOVERNMENT SURVEYS.

Courts take judicial notice of the general system of government surveys, and know that lands are surveyed and platted into sections, parts of sections, and fractionals where they abut on streams or other bodies of water.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 29, 30; Dec. Dig. § 23.*]

10. BOUNDARIES (§ 10*) — DESCRIPTION OF LAND.

Description of land according to terminology employed in the system of governmental surveys and plats is necessarily a reference to the plats of those surveys, there being nothing known of townships, sections, and parts of sections, except such as are described in the plats of the government surveys.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 90, 91; Dec. Dig. § 10.*]

11. BOUNDARIES (§ 10*) — DESCRIPTION—REFERENCE TO PLAT.

A conveyance of a township "according to plats of the surveys" does not include lands which do not appear on the plat of the surveys.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 90, 91; Dec. Dig. § 10.*]

12. STIPULATIONS (§ 14*) — CONSTRUCTION — "TOWNSHIPS."

In a suit to quiet title, a stipulation provided that all the surveyed lands in the vicinity were in September, 1850, swamps and overflowed lands, and passed to the state, and that the "townships," including Walker's Lake as meandered on the map, were included by the Secretary of the Interior in the list of lands granted to the state under the swamp land act (Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519). *Held*, that the word "townships" as used in such stipulation was limited to the townships as surveyed and platted by the government surveyors, and meant the townships according to the surveys and plats, and did not include unsurveyed lands

erroneously included within the meandered line of the lake.

[Ed. Note.—For other cases, see Stipulations, Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7032-7035.]

13. JUDGMENT (§ 632*) — CONCLUSIVENESS — PARTIES.

Where the board of directors of a levee district was not a party to a suit involving the character of certain lands conveyed by it to plaintiff under a grant from the state, the rights of the board could not be affected by the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1148; Dec. Dig. § 632.*]

Appeal from Mississippi Chancery Court; Edward D. Robertson, Chancellor.

Suit by Johanna Little against J. J. Williams and others. Judgment for defendants, and plaintiff appeals. *Affirmed*.

This case involves a controversy concerning the title to a large body of unsurveyed and unoccupied land containing 1,000 or 1,200 acres of land within the meandered lines of what is known as "Walker's Lake" according to the survey made in 1847 by the United States government. The plaintiff, Johanna Little, claiming to be in actual possession of the lands in controversy, instituted this suit in chancery against the defendant J. J. Williams and others, to quiet her alleged title.

The plaintiff claims title to the land through the following chain: First. United States to state of Arkansas, act of Congress dated September 28, 1850 (chapter 84, 9 Stat. 519), donating swamp and overflowed land. Second. State of Arkansas to Board of Directors of St. Francis Levee District, act of General Assembly dated March 29, 1893 (Laws 1893, p. 172), donating all lands in the district owned by the state. Third. Board of Directors of St. Francis Levee District to plaintiff, deed dated March 11, 1903.

The defendants are the owners by *mesne* conveyances running back to the state of Arkansas and the United States of the fractional sections, according to government survey, of land bordering on the meandered line of Walker's Lake, and claim title to the lands in controversy by virtue of their alleged riparian rights as such owners. Walker's Lake is, and at the time of the government survey was, a shallow nonnavigable lake. The testimony is conflicting as to the true boundaries of the lake and the character of the territory now in controversy—whether it was water or swamp land—at the time of the government survey. Testimony introduced by the plaintiff tends to establish the fact that the territory was swamp land at that time; and the testimony of defendants' witnesses tends to show that at that time the waters of the lake extended up to the meandered lines of the survey, but have since then receded so as to leave the land dry.

The parties, in addition to introducing the plats and field notes of the government survey and depositions of witnesses, entered

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

into the following written agreement as to facts, which writing was a part of the record: "In order to avoid labor and expense in taking testimony, it is agreed by counsel representing defendants that all of the surveyed lands in the vicinity and locality of what would be south $\frac{1}{2}$ of section 25, the whole of section 36, township 16, range 12 east, and northwest $\frac{1}{4}$ and south $\frac{1}{2}$ of section 31, township 16, range 13 east, Mississippi county, Arkansas, if same were surveyed, were in September, 1850, swamp and overflowed lands, and passed to the state of Arkansas, under the grant of the United States, of date September 28, 1850, and that the townships including Walker's Lake, as meandered on the map, were included by the Secretary of the Interior of the United States government in the list of lands prepared by him and forwarded by him to the Governor of Arkansas, showing the lands which passed to the state under the grant of 1850, and that said lands embraced in said list were subsequently covered by patents from the government of the United States. And it is further agreed that the state of Arkansas never undertook to convey the said lands embraced within the meandered lines of Walker's Lake, except as same might have passed by operation of law to the defendants as riparian owners, prior to the land grant made by the state to the St. Francis Levee Board in 1893."

The chancellor, after hearing the evidence, dismissed the complaint for want of equity, and plaintiff appealed.

Henry Craft, for appellant. S. S. Semmes, Will J. Driver, and Allen Hughes, for appellees. N. W. Norton, *amicus curiæ*.

McCULLOCH, J. (after stating the facts as above). The first question presented is one of fact, whether, at the time of the government survey in 1847, the land in controversy was a portion of the bed of Walker's Lake, or whether it was swamp land; for if the former state of fact is found to have existed, then the title of the owners of adjoining lands extended to the center of the lake by virtue of their riparian rights as such owners, and, since the recession or drying up of the waters has left the land exposed, it belongs to them. See *Rhodes v. Cissel*, 82 Ark. 367, 101 S. W. 758, and cases therein cited.

Appellant was the plaintiff below, seeking to quiet her alleged title, and must succeed, if at all, upon the strength of her own title, and not upon the weakness of that of her adversaries. *Chapman & Dewey Land Co. v. Bigelow*, 77 Ark. 338, 92 S. W. 534. In other words, the burden of proof is upon her to show that the land in controversy was land and not lake bed at the time of the government survey. In addition to that, the plats of the government survey and the field notes which accompany them show that these lands then constituted the bed of the lake, and were within the meandered lines

of the lake. This establishes, *prima facie*, that the lands were a part of the lake bed, and the burden is upon the appellant to overcome it by proof to the contrary.

But, thus conceding the burden to be upon the appellant, the testimony which she has adduced convinces us that she is correct in her contention as to this question of fact, and that the land in controversy was swamp land at the time of the government survey, and was not in the bed of the lake. The surveyors made mistakes in delimiting the boundary lines of the lake, and included a large amount of low swampy land, which the waters of the lake did not cover. These mistakes were not unreasonable ones, and do not demonstrate either fraud or gross carelessness on the part of the surveyors, for the evidence shows that there may have been grounds at that time to believe that the meander line followed the bank of the lake. The intervening territory between the meander line and the bank of the lake was undoubtedly of that indeterminate character, low lands partly covered by water, about which the surveyors could reasonably have been mistaken, and which they may have concluded was the bed of a shallow part of the lake. There was a slash or low place along the meander line, and, as this may have been temporarily covered by water at the time, the surveyors followed its outer line, believing it to be the shore line of the lake.

We are satisfied, however, that a mistake was made in establishing this line as the shore line of the lake. Out of the testimony of all the witnesses, who testify from recollection as to the condition of the land and the boundaries of the lake many years ago, the preponderance lies, we think, with those who say that the land in controversy was swamp land, and not lake bed. In addition to this, the condition in which the undisputed evidence shows the land to be at this day, and the character of the timber growing thereon, is convincing that it was not a portion of the lake in 1847. The present banks of the lake are well marked, and have not materially changed during the memory of those persons whose testimony on the subject preponderates. We will, therefore, treat it as established that mistakes were made in survey, and that this land was in fact swamp land, and not lake bed. The real location of Walker's Lake was and is far inside the meander lines run by the surveyors. At some points the bank of the lake is over a mile from the surveyed meander line.

But conceding this to be true, the fact remains that a meander line was surveyed, which the field notes show was intended to indicate the shore line of the lake. A body of water constituting a nonnavigable lake existed then and still exists within the meander line, though a considerable distance inward from it. The plats of this survey were filed in the General Land Office of the United States, and were accepted and approved

ed by that department of the government as correct. In running the meander lines, the surrounding sections and parts of sections were necessarily made fractional, and, under the swamp land act of 1850 (act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519), surveyed land in the townships surrounding the lake were selected by the state. The selections were approved by the Secretary of the Interior, and patents were issued to the state conveying the land by description "according to the official plats of the survey returned to the General Land Office of the Surveyor General." The state of Arkansas has, from time to time, sold to individuals the surveyed lands and conveyed them by descriptions according to the plats.

Neither the land department of the United States nor of the state of Arkansas has ever questioned the correctness of the survey, but, on the contrary, have up to the present time and do now treat them as correct, if we may view in that light a failure to take any steps looking to a correction. Can an individual question the correctness of the surveys when neither the general government nor the state government has ever done so? Can an individual acquire and assert rights in these unsurveyed lands which the government has never asserted against the riparian rights of the adjoining owners?

The Supreme Court of the United States, as early as the case of *Spencer v. Lapsley*, 20 How. 264, 15 L. Ed. 902, decided that "the issue of the grant or patent conveys the title, and questions of fraud or irregularity, or excess in the survey, cannot be raised by other parties than the government."

Mr. Justice Lamar, in delivering the opinion of the court in *Cragin v. Powell*, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566, said: "That the power to make and correct surveys of the public land belongs to the political department of the government, and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not elementary principles of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient. The reason of the rule, as stated by Mr. Justice Catron in the case of *Haydel v. Dufresne*, 17 How. 23, 15 L. Ed. 115, is that great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other grounds than an opinion that they could have the work in the field done and divisions made more equitably than the department of public lands could do."

In *Russell v. Maxwell*, 158 U. S. 253, 15 Sup. Ct. 827, 39 L. Ed. 971, Mr. Justice Brew-

er, speaking for the court, said: "In the nature of things, a survey made by the government must be held conclusive against collateral attack in controversies between individuals. There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys, and no other tribunal is so competent to deal with the matter as the land department. None other is named in the statutes. If in every controversy between neighbors the accuracy of a survey made by the government were open to question, interminable confusion would ensue."

The same learned judge, in delivering the opinion of the court in *Whitaker v. McBride*, 197 U. S. 510, 25 Sup. Ct. 530, 49 L. Ed. 857, said: "The official surveys made by the government are not open to collateral attack in an action at law between private parties."

Mr. Farnham, in his work on *Water and Water Rights* (volume 2, § 422), states the same doctrine, as follows: "Where a patent issues for a fractional lot appearing by the plat of the United States survey to be bounded on one side by a meandered lake, the patent is not void so far as it purports to convey the land under the water, though it was an error in the surveyor to treat the tract covered by water as a lake to be meandered, instead of land to be surveyed. Conceding the patent to that extent to be void, it can be avoided only by the United States in a suit to which the patentee is a party. The land passed, and a private individual cannot complain."

The following decisions of the Supreme Court of the United States announce in effect the same principle: *Michigan Land & Timber Co. v. Rust*, 168 U. S. 599, 18 Sup. Ct. 208, 42 L. Ed. 591; *Humbird v. Avery*, 195 U. S. 480, 25 Sup. Ct. 123, 49 L. Ed. 286; *Oregon v. Hitchcock*, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. Ed. 935.

The decisions of this court in *Smith v. Hollis*, 46 Ark. 17, and *Williamson v. Baugh*, 71 Ark. 491, 76 S. W. 423, are based upon the same principle. The court in these cases held that the decision of the Secretary of the Interior, in determining whether or not certain lands came within the terms of the swamp land grant, was, in the absence of fraud, conclusive, and could not be overturned in a collateral proceeding.

The legal effect of the patents to the state of the fractional sections and parts of sections surrounding the meandered lines of the lake, according to the official plats of the public survey, was to convey all riparian rights, and by virtue thereof to vest *prima facie* title to the bed of the lake, as shown on the plats, from meandered shore lines to center. The conveyances executed by the state in turn to its grantees had the same effect. *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 428; *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 35 L. Ed. 442.

If title to the lands in controversy has not

passed out of the United States to the state and its grantees in that way, it has never passed at all. Though the swamp land act has been held to be a grant in present, the legal title did not pass until the lands were duly selected as such, and the patents were delivered. *Rogers Locomotive Works v. American Emigrant Co.*, 164 U. S. 559, 17 Sup. Ct. 188, 41 L. Ed. 552; *Michigan Land Co. v. Rust*, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591; *Brown v. Hitchcock*, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772; *Ogden v. Buckley*, 116 Iowa, 852, 89 N. W. 1115; *Funston v. Metcalf*, 40 Miss. 504.

These lands have never been selected or patented at all, unless the patents to the adjoining fractional sections embraced them. The state of Arkansas, by the compromise settlement contract entered into with the United States, which was approved by act of the General Assembly of Arkansas, March 10, 1897 (Laws 1897, p. 88), and by act of Congress, April 29, 1898, c. 229, § 4, 30 Stat. 368 (U. S. Comp. St. 1901, p. 1592), expressly relinquished her claim to any unpatented swamp land. So the title to these lands is either in the owners of the adjoining lands by virtue of their riparian rights, according to the legal purport of the patents and subsequent conveyances, or it remains in the United States government. Until the government elects to correct the mistakes in the original survey and assert claim to the lands, no one can complain or dispute the title of the holders of the *prima facie* title. *Schlusser v. Cruickshank*, 96 Iowa, 414, 65 N. W. 344; *Ogden v. Buckley*, 116 Iowa, 352, 89 N. W. 1115; *Minnesota Land Co. v. Davis*, 40 Minn. 455, 42 N. W. 299; *Lamprey v. Mead*, 54 Minn. 290, 55 N. W. 1132, 40 Am. St. Rep. 328; *Whitaker v. McBride*, 197 U. S. 510, 25 Sup. Ct. 530, 49 L. Ed. 857. Appellant, in no event, has any shadow of title, for if the state took title as riparian owner under the patent to the adjoining land, she in like manner conveyed it to her grantees, and had no title to donate to the levee board. *Towell v. Etter*, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53; *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872.

Whether or not the state can now correct any mistake as to the quantity of land conveyed by her patent to individuals, is not presented in this case, and we therefore refrain from any discussion on that point.

The case of *Chapman & Dewey Land Co. v. Bigelow*, 77 Ark. 338, 92 S. W. 534, has no application to the facts of the present case, and is not controlling. In that case the meander line was run by the government surveyors along the bank of a stream, and title was claimed under a patent of lands bordering on this meandered line by virtue of riparian rights to lands lying beyond the body of water meandered. This court refused to sustain the claim, holding that no title passed under the patent to lands lying beyond the meandered stream.

Neither do *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68, *Niles v. Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171, nor *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800, have any bearing on the present case. They are cited in the *Bigelow* Case, and the facts of each bring them all within the same class of cases, but they have no controlling force here, because of the difference in the facts.

We conclude that the decree of the chancellor is correct, and the same is in all things affirmed.

On Rehearing.

The decision is vigorously assailed on the ground that we were mistaken in holding that the unsurveyed land between the meandered line and true shore line of this lake was not patented by the United States to the state of Arkansas. Courts take cognizance, judicially of the general system of government surveys, and, accordingly, we know that lands are surveyed and platted into sections and parts of sections and into fractionals where they abut on streams or other bodies of water. The record in this case contains a plat and the field notes of the governmental surveys of the land surrounding Walker's Lake, and they confirm the facts of which we are already judicially cognizant. *Bittle v. Stuart*, 34 Ark. 224; 7 Enc. Ev. pp. 987, 988; *Knabe v. Burden*, 88 Ala. 436, 7 South. 92; *Ledbetter v. Borland*, 128 Ala. 418, 29 South. 579; *Peck v. Sims*, 120 Ind. 345, 22 N. E. 313; *Muse v. Richards*, 70 Miss. 581, 12 South. 821; *Stanford v. Bailey*, 122 Ga. 404, 50 S. E. 161.

Description of lands, according to terminology employed in the system of governmental surveys and plats of lands, is necessarily a reference to the plats of those surveys; for those terms are meaningless unless so considered with reference to the surveys and plats. There is nothing known of townships, sections, and parts of sections of lands except such as are described in the plats of the government surveys. Therefore, giving the word "township," used in the stipulation of facts, the meaning which we must attribute to the parties who employed the term, it has reference to the townships surveyed and platted by the government surveyors, and means the townships according to the surveys and plats. A conveyance of the township "according to plat of the surveys" does not include lands which do not appear on the plat of the surveys. We do not mean to hold that the unsurveyed land could not have been selected as swamp lands and patented to the state by the use of proper descriptive terms in the patent, but this was not accomplished by reference to townships, sections, or parts thereof according to the plat of the surveys when the unsurveyed land did not appear on the plats at all. The plats showed it to be water, and not land.

We are convinced, also, that, even if we discard the technical meaning of the word "township," the language of the stipulation is susceptible of no other reasonable construction than that only the surveyed land appearing on the plat of the public survey was meant to be covered by the agreement. It is evident that the parties meant only the surveyed lands appearing on the plat, leaving all questions as to the character of the unsurveyed territory and title thereto open to further proof and adjudication. We find nothing to indicate that appellees' counsel meant to concede that, if the locus in quo should be found to have been land and not lake bed at the time of the survey in 1847, it was included in the patents from the United States to the state of Arkansas and belonged to appellant. In this respect, the stipulation deals only with the surveyed land. It reads that "all of the surveyed lands in the vicinity and locality * * * were, in September, 1850, swamps and overflowed lands and passed to the state of Arkansas under the grant of the United State of date Sept. 28, 1850, and that the townships including Walker's Lake, as meandered on the map, were included by the Secretary of the Interior of the United States government in the list of lands prepared by him and forwarded by him to the Governor of Arkansas, showing the lands which passed to the state under the grant of 1850, and that said lands embraced in said list were subsequently covered by patents from the government of the United States."

Now, as it was only stipulated that the surveyed lands passed to the state as swamp and overflowed lands under the act of Congress, it would be unreasonable, in the absence of a clear expression, to construe the meaning of the stipulation to be that the unsurveyed lands were patented by the United States to the state.

We therefore think that we were correct in saying that "the legal effect of the patents to the state of the fractional sections and parts of sections surrounding the meandered lines of the lake, according to the official plats of the public survey, was to convey all riparian rights and by virtue thereof to vest prima facie title to the bed of the lake, as shown on the plats, from meandered shore line to center," and that, "if title to the lands in controversy has not passed out of the United States to the state and its grantees in that way, it has never passed at all."

We have not been unmindful of the earnest reliance of counsel upon the case of *Kean v. Calumet Canal Co.*, 190 U. S. 452, 23 Sup. Ct. 651, 47 L. Ed. 1134, but we do not think that the case supports their contention. On the contrary, we think that the views already expressed are in conformity with the conclusion reached in that case. The facts there were that the land in controversy at the time of the survey made by the government, as well as at the time of the issuance of the patent to

the state, was the bed of a nonnavigable lake duly meandered by the survey and situated within the bounds of the section of land patented. The court held that the title to the bed of the lake passed to the state under the patent, and in turn to the state's grantee under its patent, basing that conclusion upon the decisions in *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 35 L. Ed. 428, and *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 35 L. Ed. 442. It is apparent, therefore, that the court based its conclusion as to the passage of title under the patent upon the fact that the title passed as a riparian right or as an appurtenant to the surveyed land which was conveyed. This is apparent when we consider the language used by the court in the two former cases.

In *Hardin v. Jordan*, supra, Mr. Justice Bradley, speaking for the court, said: "It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters."

In *Mitchell v. Smale*, supra, the same learned justice, speaking for the court, said: "Our general views with regard to the effect of patents granted for lands around the margin of a nonnavigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the preceding case of *Hardin v. Jordan*, and need not be repeated here. We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable, part of his grant."

It therefore appears from the above quotations that the court held that the title to the bed of the lake passed because of the riparian or appurtenant rights, for it was not surveyed out as land, and was not described on the plat as land. In other words, it was conveyed as lake bed and not as land. And so it is in the present case: If the title to the unsurveyed land in controversy passed at all from the general government to the state under the patents, it passed by virtue of riparian rights, for it was designated on the plats as water, not land; and, if the title did not pass in that way, the state's title in like manner passed to its vendees.

Counsel for the Board of Directors of St. Francis Levee District has filed a brief, as amicus curiæ, calling attention to the fact that the rights of the district in unsurveyed lands claimed to have been donated by the act of 1893 should not be prejudiced by a decision that the compromise between the

state and United States affected its right to lands donated prior to the compromise. The district not being a party in the case, its rights cannot be adjudicated herein. The compromise is referred to in the opinion merely to call attention to the fact that the state has thereby released her claim to all unpatented swamp lands, and cannot now make selections of swamp land and call for patents for the purpose of correcting mistakes in surveys. If the state did not obtain title under the patents, it is now too late for her to procure title.

Appellant claims title as vendee of the levee district, but conceding (though not deciding) that the donation act of 1893 could be operative as a grant of the state's equitable claim or title to unpatented swamp lands, and that the state could not thereafter release the claim to the general government, yet the right is not conferred upon appellee to question the accuracy of the original survey, and disturb the prima facie title of prior patentee of the adjoining land.

It may be that the donation act of 1893 conveyed to the levee district the state's equitable title under the swamp land grant of 1850 to unsurveyed lands situated, for instance, like those in the case of Chapman & Dewey Land Co. v. Bigelow, supra, the prima facie title to which had not been created by patent, and that the state could not, subsequent to the donation to the levee district, release the claim to the general government. But we are not required, by the facts of this case, to decide that question.

After a very careful re-examination of the case, bearing in mind the importance and magnitude of the questions and interests involved, we are of the opinion that we reached the correct conclusion on the former hearing. The petition for reconsideration is therefore denied.

SKAGGS v. STATE.

(Supreme Court of Arkansas. Oct. 19, 1908.)

1. CRIMINAL LAW (§ 634*)—TRIAL—ABSENCE OF JUDGE.

Where the judge, during the argument of counsel for accused, left the bench and stepped across the hall from the courtroom to a closet, and was absent for two minutes, during which a practicing attorney of the bar sat in the judge's chair, at his request, but whether the doors were open so that the judge while out of the room could hear the proceedings was not shown, error did not appear.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1461; Dec. Dig. § 634.*]

2. CRIMINAL LAW (§ 634*) — ABSENCE OF JUDGE.

The integrity of a criminal trial is destroyed by the temporary absence of the judge only when such absence is such that he must for some period have lost control of the proceedings.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1461; Dec. Dig. § 634.*]

3. CRIMINAL LAW (§ 703*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction that, if defendant confessed he had committed rape on prosecutrix, that alone would not authorize a conviction, but it must be shown that the offense was actually committed, and if the jury should find from the evidence beyond reasonable doubt that defendant confessed, and that the crime was committed, they should then convict, was not objectionable as on the weight of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1762; Dec. Dig. § 763.*]

4. CRIMINAL LAW (§ 535*)—"JUDICIAL CONFESSIONS"—EFFECT.

A confession, made by accused on preliminary examination before a magistrate, is a judicial confession, and is sufficient to justify a conviction, under Kirby's Dig. § 2385, providing that a confession, unless made in open court, will not warrant a conviction unless corroborated by proof of the commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 535.*]

For other definitions, see Words and Phrases, vol. 4, p. 3854.]

5. CRIMINAL LAW (§ 1171*)—APPEAL—CONFESSION OF ERROR.

Where accused confessed to rape, and was convicted of assault with intent to rape, such confession being judicial and sufficient to sustain a conviction of the graver offense, a confession of error by the Attorney General, on account of remarks of the prosecuting attorney, was immaterial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1171.*]

6. CRIMINAL LAW (§ 1055*)—OPENING STATEMENT—DENUNCIATORY LANGUAGE—OBJECTIONS.

Where the judge sustained an objection to denunciatory language, used by the prosecuting attorney in his opening statement concerning accused, and nothing further was requested, the statement was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2666; Dec. Dig. § 1055.*]

7. WITNESSES (§ 337*)—ACCUSED—IMPEACHMENT.

After accused had testified in his own behalf, the prosecuting attorney should have been permitted to prove that accused's reputation for morality and veracity was bad, though he was not entitled to show that he was a gambler of the worst sort.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1129; Dec. Dig. § 337.*]

8. CRIMINAL LAW (§ 706*)—OFFER OF PROOF.

Accused having testified in his own behalf, it was not error for the prosecuting attorney, in presence of the jury, to request permission to prove that defendant was a man of bad character, a gambler of the worst type, and unworthy of belief, the court having sustained defendant's only objection thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1661; Dec. Dig. § 706.*]

9. RAPE (§ 48*)—EVIDENCE—CIRCUMSTANCES.

In a prosecution for rape, evidence that prosecutrix made complaint is admissible under certain circumstances, but the details thereof are inadmissible, unless they are part of the res gestæ or corroborate prosecutrix's testimony when attacked.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 67-69; Dec. Dig. § 48.*]

10. RAPE (§ 38*)—CORROBORATION.

In a prosecution for rape, evidence of prosecutrix's physical appearance, and the condi-

tion where the crime was committed, are admissible in corroboration.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 65; Dec. Dig. § 38.*]

11. CRIMINAL LAW (§ 1055*)—APPEAL—SCOPE OF REVIEW—EXCEPTIONS—NECESSITY.

Language of the prosecuting attorney, denunciatory of accused, and assigned as error in a motion for a new trial, will not be considered on appeal, where no exception was taken at the time, and no rulings were asked thereon in the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2666, 2667; Dec. Dig. § 1055.*]

McCulloch and Hart, JJ., dissenting.

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Elijah Skaggs was convicted of assault, and he appeals. Affirmed.

Elijah Skaggs, Mrs. Margaret Irene Taylor, her brother, Mr. Todd, and a Mr. Allen, came to Ft. Smith in May, 1908, from Dallas, Tex., in and about which place these parties had resided for a number of years. When they reached Ft. Smith they went to a hotel and had dinner together. After they came out of the hotel, the suggestion was made that they see the town, and she proposed going to the park. Her brother proposed that he and Mr. Allen go together, and that she and Skaggs go together. This was agreed to. Her brother and Mr. Allen went somewhere else, and she and Skaggs got on a car and went to the park, some distance from the city. They walked around the park for some time, and then crawled out of the rear fence and went some little distance into the woods. What occurred there will be referred to later. She and Skaggs returned from the park on the same car, but not sitting together, and, immediately upon arrival in the city, she went to the mayor's office, and seemed rather excited. The city clerk told her the mayor was out, and asked her if there was anything she wanted, and she remarked that a rape had been committed. He told her that the mayor had nothing to do with it, and sent her to Sam Edmondson, a justice of the peace, to whom she then went and made complaint. He went out with her and Mr. Todd, her brother, and two officers. They went to the back end of the park, and saw the tracks where a man and woman had walked, and the imprint of the heels of the woman's shoes were similar to those worn by Mrs. Taylor. They found the place where these tracks led to, and it was trampled down, and the appearance of the ground indicated that persons had been scuffling there. Mrs. Taylor exhibited a torn undergarment. Skaggs was arrested, and had a preliminary trial before said magistrate. His conduct in said court was thus afterwards described by the justice of the peace (and Skaggs did not deny it): "Q. I will ask you if you arraigned the defendant, and advised him of the crime with which he was charged? A. I did. Q. What

was his answer? A. His answer was that he was guilty of rape, and he was guilty of murder, and I remarked to him if he wanted an attorney, and he said he did not; that he wanted to suffer the penalty of the law for what he had done, and I said to him that that was a very grave matter; that if he entered a plea of guilty in the case, the penalty was hanging, and I said, 'My friend, don't you want a lawyer?' and he said 'No; I am not only guilty of rape, but I am guilty of murder,' and I said I did not know of anybody being killed, how could you be guilty of murder, and he said, 'I am guilty of the crime for which I am accused. I am guilty of murder because I have taken that woman's honor'—and pointed to Mrs. Taylor." Mrs. Taylor testified in said examining court that when they reached the place where the scuffle was indicated, he had grabbed her, and she fought him, but he was strong and overcame her and ravished her, tearing her undergarment in order to accomplish his purpose; and that she immediately came back and made complaint as stated. She repeated this same testimony before the grand jury, and Skaggs was indicted for rape. While he was in jail she visited him four times. There was testimony that the first time she visited him he offered her \$500 to withdraw her charge, and she became very angry thereat, but later held long private conversations with him.

Skaggs was put on trial, and the state introduced Mrs. Taylor as the first witness. She testified that she had known Skaggs for four years, during which time he was preaching the gospel; that she believed him to be the King of Kings and Lord of Lords, and Elijah the prophet, and that she was a disciple of his; that before they came to Ft. Smith they made a covenant: The King was to restore all things, and she was willing to be a sacrifice to him; that they went to the park, to have the appearance of having committed an offense which he did not commit, so that he would be hung, in order that all men might have glory and peace and honor. In his testimony he was more explicit as to this covenant: He says that he and Mrs. Taylor agreed that he should die and rise on the third day; that he should die by hanging; that he knows he is King of Kings and Lord of Lords; that he is Elijah, King of the Gentiles, the same as Christ was King of the Jews; that he wanted to be hung, and on the third day rise and redeem the world; that he did not want to murder any one, and in order to accomplish the purpose it was agreed that a rape should be simulated. Mrs. Taylor testified that Skaggs did not ravish her physically; that the rape was a spiritual one. She admitted that her former testimony before the justice of the peace and before the grand jury made out a charge of rape against him, but said that the wrong

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

interpretation had been placed upon it; that she meant a spiritual and not a carnal rape. She says she tore the garment herself, and that he had not touched her. The state proved her former testimony, which she admitted, proved the appearance of a scuffle and the torn garment, and her excited and almost hysterical manner immediately after the occurrence, and also proved that in the trial before the justice of the peace Skaggs in open court confessed that he had raped her, and said that he wanted to be hung therefor. Other testimony was adduced showing admissions which he had made, and which tended to prove that his conduct was actuated by a carnal and not a spiritual mind, and that he had accomplished a physical rape. In his testimony he admitted practically all of the testimony adduced by the state, but claimed that he had committed this spiritual rape for the purpose of being hung and rising on the third day and redeeming the world. He said that he had consulted a lawyer before he went to the park (and this was also proved by the lawyer), to ascertain the punishment for the crime of rape in this state. He averred his readiness to be hung then, but said that he had been told by his best friends that the jury would not hang him, and that, if he pleaded guilty, they would send him to the penitentiary, and he did not want to go to the penitentiary; that he would rather be hung than go to the penitentiary. The defendant introduced the testimony of a deputy constable, who said he saw Mrs. Taylor and Skaggs at the park. He said he saw them turn towards the south side of the park, and they stayed about 30 minutes or a little longer. That he does not think they were out of his sight more than two minutes. The defendant did not touch her while in his sight. He was within about 30 or 40 feet of them when they were south of the park. He did not go out where they claimed they were. He says that he did not stop at the place where the scuffle was alleged by her to have occurred. He says that she was using profane language and cursing Skaggs. Mrs. Taylor was recalled, and denied that she saw this officer, and denied using the language which he attributed to her. This was substantially all the testimony in the case. The jury convicted him of assault with intent to rape, and assessed his punishment at 21 years in the penitentiary. Skaggs has appealed, and the Attorney General confesses error, and the prosecuting attorney of the Twelfth circuit files a brief insisting that there was no error.

Rowe & Rowe, for appellant. Wm. F. Kirby, Atty. Gen., Daniel Taylor, Asst. Atty. Gen., and A. A. McDonald, Pros. Atty., for the State.

HILL, C. J. (after stating the facts as above). 1. The first point upon which the Attorney General confesses error is the absence from the courtroom of the presiding

judge. The record on this point reads as follows: "While defendant's counsel was making his argument to the jury, the judge stepped across the hall from the courtroom to the water-closet, and was absent from the courtroom for the space of about two minutes, and while out of the courtroom T. S. Osborne, a regular practicing attorney of the bar, sat in the judge's chair, at the request of the judge. No objection was made to this, and no exception taken to it during the trial." The authorities are not entirely harmonious as to the effect of the absence of a judge from the bench during the progress of a trial. The subject may be found reviewed in *Horne v. Rogers*, 110 Ga. 362, 35 S. E. 715, 49 L. R. A. 176; *Ellerbe v. State*, 75 Miss. 522, 22 South. 950, 41 L. R. A. 569. This court had the subject before it in *Stokes v. State*, 71 Ark. 112, 71 S. W. 248, and the court followed the language of Judge Chalmers in *Turbeville v. State*, 56 Miss. 793, a leading case on the subject. The *Turbeville* decision is applicable here, as shown by the following excerpts: "During the arguments of counsel to the jury, the judge left the bench, and stepped into a room immediately adjoining and in the rear of the bench, and separated from it only by the thickness of the wall, through which a door opened. He placed a member of the bar on the bench, with instructions to call or notify him if needed. He remained in this room, thus absent from the bench, and distant from it, as the bill of exceptions shows, 5 or 6 feet, during the greater portion of the time consumed in the several addresses of counsel to the jury. It does not appear whether the door which opened from the bench or rostrum into this room (styled the judge's 'retiring room') was closed or open while the judge was thus absent. * * * If we could consider this statement of the facts as showing such absence from the room, on the part of the judge, as constituted even a temporary relinquishment of the control of the court and of the conduct of the trial, we should unhesitatingly reverse the judgment. There can be no court without a judge, and his presence, and the presiding genius of the trial, is as essential during the argument as at any other time. We do not mean to say that he must actually listen to every word that falls from the lips of counsel while they are addressing the jury, for this might impose a burden too heavy to be borne, but we do mean that the conduct and control of the argument within legitimate limits is confined to him as a judicial duty, and cannot be by him devolved upon another. While he will not be precluded from changing his seat to any portion of the room he may prefer, or from temporarily engaging in conversation, or reading, or writing, he must remain within the hearing of counsel, so as to be able instantly to assert his authority, if demanded by anything that may occur. While it will rarely be necessary or proper for him to interfere with counsel, in-

stances may arise that will require it; and, moreover, the conduct of the jurors, spectators, or officers of court may be such as to demand the instant interposition of his authority. * * * The bill of exceptions in this case fails to show clearly that there was any relinquishment by the judge of the functions of his office, or any such bodily absence as prevented their instant assertion when demanded; and we decline, on this account, to reverse the judgment."

It is thus seen that the determining test is whether the judge has lost control of the proceedings. If he has done so, even if it be but for a short time, the integrity of the trial is destroyed. Applying that principle here, the record fails to show that the judge was out of hearing of the proceedings of the court when he stepped across the hall to a closet for a brief space of time. It does not disclose the distance from the courtroom to the closet, or whether the doors were opened or closed, or whether the proceedings could or could not be heard by him. The matter then before the court was the address of the defendant's counsel to the jury. The trial having taken place in June, and the doors between courtrooms and halls at that time of the year being usually left open, it may well be inferred that the judge was within the hearing of the proceedings of the trial, and within the reach of it, so that he could instantly have asserted his authority. On the other hand, it may have been that the doors were closed, or that the closet was in such a position that he was withdrawn entirely from hearing the proceedings, and was unable to instantly control them, in which event it would vitiate the trial. The burden is on the appellant to show affirmatively that the judge had lost control of the trial; and this record fails to show that, leaving it, at best, a matter of conjecture as to whether or not he had removed himself for a brief period of time from the immediate presence of the proceedings, where he could not exercise his legitimate functions as presiding judge of the court.

2. The next confession of error is for the giving of the fourth instruction, which is as follows: "If you find from the evidence that the defendant made a confession that he had committed the crime of rape on the person of Margaret Irene Taylor, that alone would not be sufficient to authorize you to convict; but the confession of defendant, if made, accompanied by proof that the offense was actually committed, will warrant a conviction, and if you find from the evidence beyond a reasonable doubt that defendant made the confession of the crime, and that the crime was committed, you should convict." The Attorney General says that, under *Duckworth v. State*, 83 Ark. 192, 103 S. W. 601, and *Thomas v. State*, 85 Ark. 138, 107 S. W. 390, this instruction is erroneous. This is not an instruction on the weight of the evidence, and is not obnoxious to the objection for

which the instructions were condemned in those cases. The court left it to the jury to say whether or not the appellant made a confession, and told them that, if they found that he did make a confession, such fact alone would not authorize them to convict, but that they must also find that the offense was committed, which was tantamount to saying that they could not convict the defendant because he made the confession, but that they must go further, and find that his confession was true before they were authorized to convict. There was really no dispute in the evidence about the fact that the defendant had made a confession, and that it was a confession in open court. The instruction as a whole fairly submitted to the jury to find beyond a reasonable doubt whether the defendant made a confession, and whether the crime was committed. In other words, whether the confession was true. While the form of the instruction cannot be commended, prejudicial error is not found in it. If specific objection had been made to it, its awkward form could, and should, have been corrected. The real question in the case was not whether the confession was made, but whether the crime was committed; and the instructions on the only real issue were clear and sound. In one respect the instruction is more favorable to the defendant than he was entitled to. It is based on the theory that his confession in the examining court was an extrajudicial confession, and needed corroboration, pursuant to section 2385, Kirby's Dig.: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such offense was committed." Confessions made in preliminary examinations before magistrates are confessions in open court, or, as they are usually expressed, "judicial confessions." *Greenleaf on Evidence*, § 216; 12 Cyc. 459, 473; 6 Am. & Eng. Enc. 523; 8 Enc. of Ev. 352; *Matthews v. State*, 55 Ala. 65, 28 Am. Rep. 698; *State v. Needham*, 78 N. C. 474; *State v. Lamb*, 28 Mo. 218; *Speer v. State*, 4 Tex. App. 474; *Commonwealth v. Brown*, 150 Mass. 330, 23 N. E. 49. From these authorities it will be seen that a confession, made in a preliminary hearing, when made in the due course of proceedings of the examining court, is a judicial confession within the meaning of the law, which holds such confessions alone to be sufficient to sustain a conviction.

3. The Attorney General confesses error on account of remarks of the prosecuting attorney. He does it upon the ground that the testimony, if it established anything, established rape, and not attempt to commit rape, and that the testimony to sustain the conviction is weak, and that the improper argument of the prosecuting attorney may furnish the key to the verdict returned by the jury. In view of the confession in court being of itself sufficient to sustain the con-

viction, the force of the argument is broken. This confession was of the graver, and not of the lesser, crime; and it is within the power of the jury to find a defendant guilty of an assault to commit a rape, although the evidence justified a conviction of rape. This was settled in *Pratt v. State*, 51 Ark. 167.

4. The next confession of error is on account of the argument of the prosecuting attorney in his opening statement. He said that the defendant was a "man of lowest character, and unworthy of belief, a gambler of the meanest type, preaching in the daytime and gambling at night," and using other denunciatory language. The defendant objected to said statement, and the court sustained the objection. The judge was not asked to do anything, except to sustain the objection to the argument, which he did. Had the court been asked to have reprimanded counsel, for stating a matter not proper to be stated in presenting the state's case, and called the attention of the jury to the fact that the character of the defendant was not at that time in issue, and could not be, unless he was called as a witness, and then only for the purpose of impeaching him as a witness, doubtless it would have been done; and had the court failed to properly eradicate the improper remarks, there would then have been something before this court to consider. *K. C. S. Ry. Co. v. Murphy*, 74 Ark. 256, 85 S. W. 428. After the evidence was closed, the prosecuting attorney, in the presence of the jury, requested the court to permit the state to introduce evidence to show that the defendant was a man of bad character, a gambler of the worst type, and unworthy of belief. The defendant objected to said statements, and to the introduction of the evidence, and the court had the jury to retire from the courtroom, and afterwards heard argument on this point, and sustained the objection of the defendant. As the defendant had then testified, testimony as to his reputation for morality and veracity would have been competent; and the court should have permitted the prosecuting attorney to have introduced testimony on these subjects, but not as to the fact that he was a gambler. The ruling of the court was more favorable to the defendant than he was entitled to. There is nothing for this court to review upon it other than the question whether the effort of the prosecuting attorney to make this proof was such flagrant conduct as would, of itself, prejudice the defendant's cause. It was a mere offer, doubtless in good faith, to prove what he was entitled to prove—and a little more. The defendant did not ask that the effect of it be removed, and only objected to the testimony being admitted, and the court sustained his objection. He got all he asked of the court, and cannot complain that the court did not do more for him than he asked of it.

These are the only grounds upon which error is confessed. Appellant has not favored the court with a brief, but was content to submit the case upon the confession of error. The court has examined the other assignments of error in the motion for new trial, which were, briefly stated, as follows: Exception was taken to the evidence of witnesses to the effect that they accompanied the prosecuting witness to the park, and there found a man's and a woman's tracks leading to a place where the ground was trampled down in such condition that it gave the appearance of a scuffle having taken place. The fact that the prosecutrix made complaint is admissible under certain circumstances; but the details of the complaint are not admissible, unless they constitute a part of the *res gestæ*, or in corroboration of her testimony when it is attacked. Her physical appearance and the condition of her garments, and sometimes the condition of the place where the crime is alleged to have been committed, are admissible in corroboration. See *Pleasant v. State*, 15 Ark. 624; 10 Enc. Ev. 587, 590, and notes. It is wholly unimportant to go into that subject, because the defendant himself testified to the fact that he and Mrs. Taylor walked around the park for a while, and that they decided they would go and fix a place, mash down some weeds, and give the place the appearance of a scuffle having taken place, and then she would go back to town and have him arrested. In other words, they were manufacturing evidence, tending to prove that the rape had been committed; and the question was not whether their tracks were at the given place, whether the weeds were mashed down, and a garment torn, but it was whether there was a crime committed, or whether a mere stageplay had taken place. The court, at the instance of the prosecuting attorney, ordered the prosecutrix to be arrested for perjury at the conclusion of her testimony, after she had admitted that she had testified in the justice court to facts showing rape. No objection was made to this proceeding, no exception taken to the action of the court thereupon, and therefore there is nothing to review on this assignment of error. Other language of the prosecuting attorney denunciatory of the defendant was assigned as error in the motion for new trial, but exception was not taken to it at the time it was made, nor were any rulings of the court asked upon it. At another time during the trial the judge vacated the bench, and asked an attorney to occupy his seat; but he did not retire from the courtroom, merely going to a window in the courtroom for fresh air for a time. As stated in the *Turbeville Case* and the *Stokes Case*, heretofore referred to, the judge is not required to sit in one place in the courtroom, but so long as he is there, in the presence of the parties and the jury, and in control of the proceedings,

the integrity of the trial is not affected by a change in his seat.

Exceptions were taken to the instructions. The instructions merely followed the statutes on the subject of the crime and a few general principles governing it. There is no error in them. The court gave all requested by the defendant but one, and it was manifestly incorrect.

Judgment affirmed.

MCCULLOCH, J. (dissenting). It will be readily seen from a perusal of the statement of facts in the opinion of the Chief Justice that the only direct evidence of crime is the repudiated statements of the accused man and the accusing woman. The circumstances adduced in evidence are, at most, only corroborative of these statements. The woman having in her testimony at the present trial denied the truth of her former statements, and declared that no assault had been made upon her person, her testimony is without any probative force whatever. Her former statements cannot be received as substantive evidence of the commission of a crime. The only purpose of admitting it is to discredit her present testimony by showing her former contradictory statement; and, since her present testimony tends to prove nothing, the former statement is valueless. 2 Wigmore on Ev. § 1136. Nor can her former statement be received in evidence as part of the res gestæ. Her statements to the officers soon after she returned from the scene of the alleged crime is too remote, and is but a narrative of a past event, and not a part of the transaction itself. *Baker v. State*, 85 Ark. 300, 107 S. W. 983. The alleged incriminating circumstances prove nothing of themselves, for their relation to the commission of the offense depends entirely on the truth of the woman's former statements to the officers. The torn garment, the tracks, and evidences of a struggle on the ground in the public park, without other evidence connecting them with the crime, have no tendency towards proving the crime of rape or assault with intent to rape. This leaves nothing in the case except the repudiated confession of appellant himself. Appellant's offer, while in jail, to pay the woman money to withdraw the accusation adds nothing to the strength of the evidence, as it is but a tacit confession of guilt, and certainly amounts to no more than his direct confession.

The authorities cited in the opinion of the Chief Justice seem to sustain the conclusion, expressed therein, that the confession of an accused person, made to a justice of the peace in an examining trial, is a judicial confession, and may be sufficient to sustain a conviction without other evidence of the commission of the alleged crime. I do not dissent from that conclusion. But, aside from the legal insufficiency of the evidence, it is far from convincing that any crime has been

committed. The undisputed evidence of a previous plan between this man and woman to simulate the commission of the crime, their intimate and friendly association with each other, both immediately before and after the alleged crime, her frequent visits to and conferences with him in jail, and her narrative on the witness stand of their weird scheme to simulate the commission of the crime, so that he might exiate it on the gallows as a voluntary sacrifice of his life, convince me that no crime was in fact committed, but that the plan was born either of fanaticism or a vitiated taste for notoriety. I am so thoroughly convinced by the testimony that no crime was committed that I cannot consent for the conviction of the accused to stand.

The court gave, over appellant's objection, the following instruction, which is assigned as error: "(4) If you find from the evidence that the defendant made a confession that he had committed the crime of rape on the person of Margaret Irene Taylor, that alone would not be sufficient to authorize you to convict, but the confession of the defendant, if made, accompanied by proof that the offense was actually committed, will warrant a conviction; and, if you find from the evidence, beyond a reasonable doubt, that the defendant made the confession of the crime, and that the crime was committed, you should convict." The instruction is criticised on the ground that it invades the province of the jury in passing on the weight of the evidence. *Duckworth v. State*, 83 Ark. 192, 103 S. W. 601. The language of the instruction is ambiguous, and Mr. Justice HART and I are of the opinion that it was calculated to mislead the jury, when it is considered in the light of the very weak evidence in the case, even if the evidence should be held to be legally sufficient to sustain the verdict. The other judges think that the concluding words of the instruction save it from condemnation because the jury are in effect told that they must, in order to convict, find beyond a reasonable doubt, in addition to the confession, that the crime was committed by the defendant. While it is possible to place this construction upon the form of expression employed, it is ambiguous to the average mind, and calculated to induce in the minds of the jury the idea that, if they believe that the defendant made a confession, it was their duty to convict him. It was therefore misleading and prejudicial. It is proper for trial courts to instruct juries, in the language of the statute, that a confession not made in open court will not warrant a conviction unless accompanied with other proof that the offense was committed; but it is improper to give the converse of the proposition, unless it be coupled with the further statement or qualification that the evidence as a whole must satisfy the jury beyond a reasonable doubt of the guilt of the accused.

In that form it is not improper, but without the above qualification it is an instruction on the weight of the evidence.

I am unable to escape the conclusion that the jury must have been misled by this instruction, for I cannot find any evidence which would satisfy a jury, beyond a reasonable doubt, that appellant made an assault upon the woman with intent to rape her. It is, to my mind, preposterous to say that under this evidence the commission of the crime has been proved beyond a reasonable doubt. Therefore I dissent.

HART, J., concurs with McCULLOCH, J.

CHICAGO, R. I. & P. RY. CO. v. PLANTERS' GIN & OIL CO.

(Supreme Court of Arkansas. Oct. 19, 1908.
On Rehearing, Nov. 9, 1908.)

1. CARRIERS (§ 105*)—DELAY IN TRANSPORTATION—SPECIAL DAMAGES.

Where there was delay in the transportation of machinery intended for a special use known to the carrier, it was responsible for such damages as were fairly attributable to the delay, having been informed that special damages would result therefrom, though it was bound to accept the shipment when tendered, and under the Hepburn act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) could not make a special contract to compensate it for the additional risk.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 452, 452½; Dec. Dig. § 105.*]

2. CARRIERS (§ 95*)—DELAY IN TRANSPORTATION—CARE REQUIRED.

Notice to a carrier of special circumstances which would result in special damages to a shipper from delay in transportation of machinery imposes on the carrier the duty to use diligence commensurate with the requirements of the case, which duty the carrier performs when he uses reasonable diligence to forward the goods promptly.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 396; Dec. Dig. § 95.*]

3. CARRIERS (§ 47*)—DELAY—SPECIAL DAMAGES—NOTICE.

Where a carrier had 35 or 40 employees in a freight office, only 3 of whom were authorized to make shipping contracts, notice of special damages likely to result from delay in a shipment given to the person who caused the bill of lading to be executed, and who was put forward to transact the business for the carrier, was notice to it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 47.*]

4. CARRIERS (§ 105*)—DELAY—SPECIAL DAMAGES.

In an action against a carrier for delay in transporting cotton seed mill machinery, plaintiff could not recover as special damages losses sustained on contracts for seed made, not only subsequent to the notice to the carrier, but after the carriers' default; such contracts not having been made in reliance on the carrier's fulfillment of its obligation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 452, 452½; Dec. Dig. § 105.*]

5. CARRIERS (§ 105*)—DELAY—SPECULATIVE DAMAGES.

In an action against a carrier for delay in transportation of machinery for plaintiff's mill, the loss sustained by plaintiff of the saving in expense of the operation of the mill as a two-press mill, as contemplated, and as a one-press mill, as it was required to do on account of the carrier's delay in delivering the machinery, was speculative, and not recoverable.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 105.*]

6. CARRIERS (§ 105*)—DELAY—SPECIAL DAMAGES—IDLENESS OF PLANT.

In an action against a carrier for delay in delivering machinery for plaintiff's mill, plaintiff could recover the difference between the expense of shutting down the plant during the installation of the machinery at the later period and what it would have been at the earlier period had the machinery arrived within a reasonable time, provided the fixed charges of the mill were less when the machinery was due than when it was installed, and such element of the damage was brought to the carrier's attention at the time of shipment.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 105.*]

7. CARRIERS (§ 105*)—DELAY—DUPLICATION OF ARTICLE—DAMAGES.

Where, owing to delay in the transportation of machinery, the shipper was compelled to duplicate the same, but the carrier did not convert the machinery shipped, it was still the property of the shipper, and its damage was the cost of the duplicated machinery less the value of the delayed machinery utilized to its best advantage.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 105.*]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by the Planters' Gin & Oil Company against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff for less than the relief demanded, and both parties appeal. Reversed on both appeals and remanded.

The Planters' Gin & Oil Company was engaged in the manufacture and sale of cotton seed products at Baldwin, Miss. Its plant was a one-press mill. It was desired to increase its capacity to a two-press mill, and Mr. Justin Matthews was authorized by it to purchase in Little Rock, Ark., a cylinder, a head block, a pressing ram, and heavy castings for a cotton seed oil plant. Matthews did so, and drew a draft in favor of the vendor for \$500, the price of the machinery, which was paid by the oil company. He had the bill of lading made out and went to the freight depot of the Chicago, Rock Island & Pacific Railway Company to ship the machinery over said road to Baldwin, Miss., where the plant was located. The shipment was an interstate shipment, and would have to go over connecting lines. R. E. Palmer was the local freight agent at Little Rock, and he had 35 or 40 clerks under him in his office. The bill clerk, E. A. Bliss, and the chief clerk, G. A. Swope, and himself, were authorized to sign bills of lading, and were the only employees of the company in said office so au-

thorized. Mr. Matthews was not acquainted with the clerks or their duties. He went to the freight office and handed the bill of lading to one of the clerks, who pointed out another man as the one with whom he should transact his business. He went to this man and explained his business, and he took the bill of lading, went off with it, and presently returned with it duly signed. It was signed: "R. E. Palmer by B." It subsequently developed that it was signed by Mr. Bliss, and Mr. Bliss was not the man with whom Mr. Matthews was transacting the business. Mr. Matthews stated to this gentleman who handled the bill of lading for him that he wanted the railroad company to accept the shipment with the understanding that the oil company was to have a reasonable delivery of the machinery. He stated to him that delay in the shipment would be cause for damages, and said that the oil company had requested him to state that they had time contracts made for oil and meal, and that, in case of a decline in the market, they would be damaged for that cause, and that they would also be damaged by reason of the additional expense of handling the seed by hand. He also stated that they would be damaged by reason of the seed heating, and making an inferior grade of oil and meal and a less quantity of oil produced from it, and that they would not have room to store the seed, and would buy in anticipation of increasing the capacity of the mill, and in the meantime would have to operate a one-press mill. The agent made no reply to this, but, after hearing this statement, he took the bill of lading and went away, and presently came back with it signed. This was upon the 8th of September, 1906, and the machinery was shipped out of Little Rock on the following day. It was received at Baldwin, Miss., on October 29th. The oil company refused to receive it, and left it on the platform of the railroad. It was testified to, and not disputed, that seven to ten days was a reasonable time to allow for the transportation of machinery from Little Rock to Baldwin, Miss.

The oil company brought suit against the railroad company for \$4,987.50, and set forth nine elements of damages, to wit:

"(1) The plaintiff was forced to buy another set of articles described in Atlanta, Ga., and pay \$500 therefor because it could not complete its mill after waiting upon defendant for a long time.

"(2) The plaintiff, expecting to receive said machinery and complete its mill and manufacture products in a reasonable time, made contracts for the sale of oil, which it was forced to cancel by defendant's wrongful act, and pay \$375 to the parties who had bought said oil.

"(3) The plaintiff could not manufacture the seed in its seedhouse, and having, in anticipation of reasonable conduct on defendant's part, contracted for seed more than

enough to fill said seedhouse, was compelled to pay hauling storage on the same in the sum of \$100.

"(4) The seed in the house of plaintiff was kept there an unreasonable length of time and heated and deteriorated, thus making an inferior quality of oil, and damaging plaintiff in the sum of \$100.

"(5) The seed in the house of plaintiff was kept there an unreasonable length of time, and heated and deteriorated, and resulted in the manufacture of an inferior grade of meal, thus damaging plaintiff in the sum of \$375.

"(6) The plaintiff was put to increased cost of fuel by reason of having to run its boilers and engines when the mill was not up to full capacity and was thus damaged in the sum of \$137.50.

"(7) The plaintiff could only operate one press of its mill for a part of the time, and was thus damaged in the sum of \$200.

"(8) The plaintiff was damaged by the shutting down of its mill in the sum of \$300; this being the fixed expenses for such period in salaries.

"(9) The seed being heated from being stored an unreasonable length of time produced less oil than they otherwise would, and the plaintiff was thereby damaged in the sum of \$750."

The sixth ground was withdrawn by plaintiff during the trial. The jury returned a verdict for \$2,375, and the railroad and the oil company each appealed.

On the trial, in addition to the testimony above outlined, the following evidence was given: The president of the oil company testified that they commenced purchasing cotton seed about the latter part of September. By the 19th of October they had purchased from 800 to 1,000 tons, at from \$15 to \$18 per ton. They had capacity to store from 1,000 to 1,500 tons in their seedhouse. He testified as to the depreciation in the oil and meal producing qualities of seed, and in the quantity of oil produced therefrom by reason of the delay in handling it, the seed becoming heated when they were unable to work it promptly through the mill. Some time in the latter part of September or the 1st of October he made a contract with Armour & Co. for oil, to be delivered the last of October, and could have fulfilled the contract had this machinery arrived in time. Armour & Co. called on them for the oil, and they could not deliver it, and they effected a compromise of the breach of their contract by paying Armour & Co. \$375. He also testified that they expended \$100 in having to store their seed in a shed some four or five blocks from the oil mill. He stated that a two-press mill can run for almost as little expense as a one-press mill, as it only requires about one more employé to operate a two-press mill, and that there was an accumulation of extra labor which could have been utilized with the two-press mill, and that

they lost on that account \$200. He further testified that they lost \$300 by reason of having to shut down the mill for three weeks while installing new machinery in October, which they had purchased elsewhere before the arrival of this machinery. He said that the machinery had not arrived at the time that he made his contracts for the seed, and had already been delayed longer than it should have been. He further testified that he could not rent parts to take the place of the delayed machinery. On the 18th or 19th of October the oil company purchased elsewhere a duplicate set of machinery at the same price, and it arrived at about the same time that the first machinery did, and they installed the second set of machinery and did not receive the first and did not pay the freight thereon when it finally arrived, as it could not be used by them nor sold for anything except scrap iron. Mr. Palmer, Mr. Bliss, and Mr. Swope each denied that they received the notice of the necessity of prompt shipment as testified to by Mr. Matthews. It was evident that none of these gentlemen were the ones with whom Mr. Matthews had the conversation of which he testified.

Buzbee & Hicks, for appellant. H. M. Arnstead, for appellee.

HILL, C. J. (after stating the facts as above). 1. Appellant argues that the defendant as a common carrier was compelled to accept this shipment when tendered to it; that under the Hepburn act of Congress (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) it had no right to make any special contract to compensate it for assuming the additional risk that the notice of the special damages to flow from the failure to promptly deliver would place upon it. The cases of *Hooks Smelting Co. v. Planters' Comp. Co.*, 72 Ark. 275, 79 S. W. 1052, and *Globe Refining Co. v. Landa Oil Co.*, 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171, are relied upon as authorities fixing the principle that, to hold a party to a contract liable for special damages, there must be notice of the special circumstances at or before the making of the contract, so that the party sought to be charged for the breach of the contract may be free to insist on such additional compensation as he may choose to demand, or at liberty to refuse the contract. The argument is not without force, and there is language in these and other opinions applying the doctrine of *Hadley v. Baxendale*, 91 Exch. 341, to this effect. However applicable that doctrine may be where the contract is between parties at liberty to contract, it is inapplicable when applied to the implied contract of carriers, although the same language is frequently used in cases when discussing liability of carriers as when discussing the liability of manufacturers or machinists who enter into contracts to promptly furnish or repair machinery. In fact, *Hadley v. Baxendale* was a carrier

case itself, but the distinction was not then made. This difference is referred to in *Crutcher v. C., O. & G. Ry. Co.*, 74 Ark. 358, 85 S. W. 770. One is a matter of contract; the other is a legal obligation.

The court recently had before it the question of special damages flowing from the breach of the implied contract of a carrier to furnish cars, and, following the authorities, particularly *V. & M. Ry. Co. v. Ragsdale*, 46 Miss. 458, the court sustained such action. *C., O. & G. Ry. Co. v. Rolfe*, 76 Ark. 220, 88 S. W. 870; *Crutcher v. C., O. & G. Ry. Co.*, 74 Ark. 358, 85 S. W. 770; *St. L., I. M. & So. Ry. Co. v. Ozler* (Ark.) 110 S. W. 593. A much later case likewise applying to it is *St. L., I. M. & So. Ry. Co. v. Mudford*, 48 Ark. 502, 3 S. W. 814. The *Ragsdale Case*, heretofore referred to, which has been approved by this court in the *Mudford, Crutcher, and Rolfe Cases*, is a leading authority upon the subject, and has been much quoted and approved by text-writers. See 4 *Elliott on Railroads*, 1731; 3 *Hutchinson on Carriers*, 1369 (old Ed. 772); 3 *Joyce on Damages*, 1960. On this exact question the Mississippi court said: "(6) If the delay is in the transportation of machinery, to be applied to a special use, and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other approximate means, the expenses of idle hands, the loss of gain on work contracted to be done for another person, if such work could have been done if the machinery had been delivered, and the gain thereby definitely ascertained in proper time. (7) The party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses, and diminish the responsibility of the party in default to him." Mr. Hutchinson says, in referring to the justice of the rule which gives special damages where the circumstances would make the general rule inequitable: "And if, with a knowledge of these circumstances, the carrier should unreasonably delay the carriage, or if, having expressly contracted to carry them within a given time, or for a given purpose, he should negligently delay them beyond that time, or so as to defeat their purpose, the difference in the value of the goods at the time of their actual arrival and at the time when they should have been delivered may prove a very inadequate recompense to their owner." And again he says: "The fact that the carrier was notified of the special circumstances demanding greater diligence is thus seen to be a crucial one, and that the carrier was so informed must be both alleged and proved." 3 *Hutchinson on Carriers*, 1367. See, also, 4 *Elliott on Railroads*, § 1724.

While it is true that the carrier cannot refuse to receive goods, and while it may be true that under the recent act of Congress

he cannot make any special charge commensurate with his undertaking, yet such considerations cannot change his duty to promptly carry. Notice of the special circumstances puts upon him the duty to use diligence commensurate to the requirements of the case; and he has discharged his whole duty when he uses reasonable diligence to fulfill the implied contract which the law places on him to promptly forward the goods. It would not be consistent with the duties resting on a carrier to say that, where he has broken his implied contract to promptly deliver, he can escape responsibility for failing to exercise due care in promptly forwarding goods, because he could not refuse the goods when offered, nor charge a different rate than for similar goods shipped without notice. The test of his liability is his care in the execution of his duty, and the amount of damage is dependent upon the nature of the shipment and the circumstances under which it is made. Special damages present no question of liability, but a question of amount of damages, where liability is otherwise fixed. The liability is dependent solely upon the negligence of the carrier in the performance of his duty to promptly carry. 4 Elliott on Railroads, § 1712. The exercise of reasonable diligence in forwarding acquits the carrier of negligence and defeats the action based on a failure to deliver within a reasonable time. And in this way the carrier can always protect itself.

2. It is insisted that the notice was not brought home to a person properly representative of the company. The notice was given to the party who actually made the contract of shipment. The company had 35 or 40 employes in the freight office, only 3 of whom were authorized to make contracts of shipment. A shipper goes to the office, and is referred to a certain person as the proper one with whom to enter into his contract. He gives his notice to that person, and that person causes to be executed the contract—the bill of lading. It may be that that person did not personally sign it. That fact was not known to the shipper. Nor was it necessary to be known to him; for the man whom the company put forward to transact business did transact it for the company, did enter into the contract, and under the contract so executed the carrier received the goods, and shipped them, and notice to such person was notice to the company.

3. Having determined that the plaintiff has made out a case for special damages, it is necessary, then, to consider the damages recovered and sought to be recovered. Notice was given to the railroad company that contracts had been made for the purchase of seed by the oil company; but the evidence fails to establish this fact. On the contrary, the evidence of the president of the oil company shows that he only began contracting for the seed in the latter part of September or the 1st of October, and most, if not all,

of the contracts for seed were made in October. The machinery was delivered to the carrier on the 8th of September, and left Little Rock on the 9th. Under the undisputed evidence, seven to ten days was the usual and reasonable time to allow for its delivery to Baldwin, Miss. Where the time of delivery is not fixed by the contract, the law implies the time necessary to complete the transaction. But "the law does not attempt to fix by rule what is a 'reasonable time.' Each case is referred to its own peculiar circumstances; an account being taken of the mode of conveyance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities for transportation under the control of the carrier." 4 Elliott on Railroads, 1730. The testimony has fixed beyond dispute that a reasonable time for the delivery of these goods expired not later than the 19th of September. The president of the company says that the machinery had already been delayed an unreasonable length of time before he commenced contracting for seed. No assurance from this railroad company of its speedy arrival was shown. It may be taken under the facts of this case that the machinery was to have been delivered on or before the 19th of September as if that date had been definitely settled and fixed by contract in the beginning. The ground upon which special damages are allowed, where contracts have been made and they are breached, is that the carrier has notice of those contracts and the probable effect of the breach of them by reason of the carrier's default in delivery of the shipment in time for the shipper to fulfill his contract. 3 Hutchinson, 1367; St. L., I. M. & So. Ry. Co. v. Mudford, 48 Ark. 502, 3 S. W. 814. The Massachusetts court, speaking through Mr. Justice Endicott on this subject, said: "If, therefore, the defendant had received the ties for transportation according to its contract, and failed to deliver them at all, it would have been liable for their market value in Boston at the time when they should have been delivered; or, if it had negligently delayed the delivery, it would have been liable for the diminution in their market value during the delay. It would not, in either event, have been liable in damages for loss of profits sustained by the plaintiff under his subsequent contracts with other parties, unless it can be said that, by reason of the plaintiff's announcement that he intended to make such contracts, it was necessarily within the contemplation of the parties when they made the contract of transportation, and as the probable consequence of its breach, that the defendant might be liable for damages resulting to the plaintiff from his inability to fulfill such contracts, the terms of which were not, and could not, then be disclosed. The damages for which a carrier is liable upon failure to perform his

contract are those which result from the natural and ordinary consequences contemplated at the time of making the contract of transportation; and a larger liability can be imposed upon him only when it is in the contemplation of the parties that the carrier is to respond, in case of breach, for special and exceptional damages. In such a case the extent and character of the obligation he assumes should be known to the carrier, which in this case was impossible, as the contracts were not then made. The mere knowledge on the part of the defendant that the plaintiff intended to make contracts for the sale of the ties to be transported cannot impose liability upon the defendant for loss of profits on such contracts. * * *. We are therefore of opinion there was error in instructing the jury that the plaintiff could recover damages for loss of profits on his subsequent contracts. As the ties were not sent to Boston, the true measure of damages is the difference between the market price in Boston and the market price in Canada at the time when the defendant should have transported the ties according to its contract, deducting therefrom the price stipulated in the contract for transportation." *Harvey v. C. & P. R. Ry. Co.*, 124 Mass. 421, 26 Am. Rep. 673. In this case the contracts were not only subsequent to the notice to the company, but were subsequent to the default of the railroad company.

The second, third, fourth, fifth, and ninth elements of damage set forth in the complaint grew out of the contracts made long subsequent to the notice to the carrier, and from 10 to 30 days after the carrier had breached the contract by failing to promptly deliver the machinery. A shipper cannot recover damages growing out of contracts made subsequent to the shipment; for it is only such matters as are then in contemplation for which the carrier can be held, and, a fortiori, a shipper cannot recover on account of contracts made after the carrier was already in default in making delivery. It cannot be said that, when he made these contracts, he was relying upon the carrier to fulfill its obligation because it was already in default, and the oil company had no assurances from it that its default would be speedily remedied.

The seventh ground seems to be based upon the loss to the company of the saving in expense between a one-press mill and a two-press mill. This is but another form of recovering expected profits from a two-press mill, in that the fixed charges against the two-press mill would have gotten better results, as some of the hands were idle, while in operating the two-press mill they would not have been idle. This is too remote and speculative to be recoverable.

The eighth item may be recoverable; but it is not sufficiently developed here to definitely determine. If at the time the ma-

chinery was due the fixed charges against the mill were less than at the time when the machinery was received, and the cessation of business during the installation of the plant would be more expensive at that time than the earlier time, and if this was necessarily included in the notice, then the difference may well be recoverable.

The first item is recoverable, and the court erred in not giving instruction No. 3 asked by the oil company: "If you find that the plaintiff sustained actual damages by reason of being compelled to purchase a duplicate set of machinery and pay for same, after having paid for the set shipped over defendant's roads, and such damage was caused by the unreasonable delay of defendant in carrying said machinery, if you find there was an unreasonable delay, then the plaintiff is entitled to recover such actual damages as it sustained by reason of being compelled to buy the second set of machinery. You will consider this item of damage apart from the other claims for damage about which you have been instructed."

The oil company has also appealed, and assigns error for the failure of the court to give this instruction and permit it to recover on this item. The oil company waited long beyond the breach of the contract before purchasing other machinery. The railroad company had sufficient notice of the use for which this machinery was intended and of the consequences which would attend the failure to deliver it to the oil company to make it liable to it for the purchase price of the duplicate machinery obtained elsewhere when it had failed to deliver it within a reasonable time. "It is the duty of the shipper to exercise reasonable diligence and care to minimize the injury to his shipment caused by delay." 4 Elliott on Railroads, 1730. And he "must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses and diminish the responsibility of the party in default to him." *V. & M. Ry. Co. v. Ragsdale*, 46 Miss. 458. If the goods were absolutely worthless, the shipper could recover the full amount of the cost that he was put to in getting their duplication. *Wabash Ry. Co. v. Harris*, 55 Ill. App. 159. But, if they were of value, it was his duty to utilize them to advantage. The machinery was his, and the railroad did not convert it to its own use by its unreasonable delay. 3 Hutchinson on Carriers, § 1372; 4 Elliott on Railroads, § 1710. His measure of damage would be the cost of the duplicated machinery minus the value of the delayed machinery utilized to its best advantage.

The judgment is reversed upon both appeals, and the cause remanded for new trial.

On Rehearing.

Appellee files a motion for rehearing, and takes issue with the correctness of this statement in the opinion: "The president

of the company says that the machinery had already been delayed an unreasonable length of time before he commenced contracting for seed. No assurance from this railroad company of its speedy arrival was shown." Counsel calls attention to the testimony of the witness referred to, wherein he said that they had assurances from the railroad company that the machinery would be there, but, when he was asked what company, he replied: "Well, it was the company here, and the Thomas-Fordyce Manufacturing Company, and we had asked them to hurry it up." This was all the evidence upon the subject. Counsel say that, as the witness was testifying in Little Rock, it necessarily referred to the defendant railway company. This testimony was not overlooked in the consideration of the case, as supposed by counsel; but it was considered insufficient to prove any assurance on the part of the defendant railroad company, and insufficient to prove such a definite promise of the speedy delivery of the machinery that a reasonable man could rely upon it. In fact, it was considered so indefinite and uncertain as to amount to nothing, and it was decided to so treat it in the opinion.

The motion is overruled.

MARCUM v. THREE STATES LUMBER CO.
(Supreme Court of Arkansas. Oct. 26, 1908.)

1. MASTER AND SERVANT (§ 221*)—RISKS ASSUMED BY SERVANT—PROMISE TO REMOVE DANGER—CONTINUING AT WORK.

Where a servant notified the master of defects in a steam log skidder, and the master promised to remedy them, and requested him to continue working with it, his continuing to work with it did not preclude his recovery for an injury sustained within a reasonable time after the promise, if they did not create such an imminent danger that one of ordinary prudence would have refused to risk it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-647; Dec. Dig. § 221.*]

2. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—DEFECTIVE INSTRUMENTALITIES—QUESTION FOR JURY.

The apparatus being a complicated one furnished for the joint use of several servants, the question whether the injured servant in continuing at work after he knew of the defect exercised ordinary care was for the jury, though the facts were undisputed, unless the facts were such that reasonable minds could draw but one conclusion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1096, 1097; Dec. Dig. § 289.*]

3. MASTER AND SERVANT (§ 201*)—INJURY TO SERVANT—NEGLIGENCE OF VICE PRINCIPAL AND FELLOW SERVANT.

A master is liable for an injury to a servant caused by the concurrent negligence of a vice principal and a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 515; Dec. Dig. § 201.*]

Appeal from Circuit Court, Mississippi County; Frank Smith, Judge.

Personal injury action by James Marcum against the Three States Lumber Company. There was a directed verdict for defendant, and plaintiff appeals. Reversed and remanded for a new trial.

This is an action by James Marcum against the Three States Lumber Company to recover damages for breaking his leg on January 17, 1907, while in the employ of the company. The defendant company was at the time operating a steam log skidder, used for dragging or skidding logs from the woods to the railroad. The machine was made by the Clyde Iron Works, and consisted of a steam engine mounted on a flat car with a boom about 32 feet long at each end and extending in both directions, front and rear, at an angle of about 45 degrees, each of which stood directly over the railroad. It was about 32 feet from the engine to the end of each boom, and on the end of the boom was a pulley over which a steel cable worked. One end of the cable was attached to a drum near the engine, and it extended out over the pulley on the end of the boom. Attached to the other end of the cable was a pair of tongs which weighed about 75 pounds. They were constructed on the principle of ice tongs. They were made of octagon steel, six sided like a rifle barrel, and were, except at the points, 1½ inches in diameter. They were sharp pointed for the purpose of being fastened to a log four or five inches from its end. The machine was operated in this way: The tongs attached to the cable would be dragged into the woods, where the logs were, by a horse. The tongs would be fastened on the end of the log by a man called a "hooker." The hooker would then signal the flagman, and he, in turn, would then flag the engineer, who would start the engine. The engine would wind up the cable on the drum like a spool of thread, and this winding of the cable would skid the log to the railroad. The tongs were so constructed that, when in perfect condition, the harder the engine would pull the tighter the tongs would clutch the log. If, while skidding a log from the woods to the railroad, it should strike the root of a tree or other obstruction, the usual and customary way of releasing it was to unhook the cable from the ring in the end of the tongs, place it around a stump or a tree standing a little to one side or the other of a straight line from the log to the engine, and then again hook the cable to the ring in the end of the tongs. Then, by the same process of signaling as before, the engine would be started, the log wrenched to one side, and released from the obstruction.

When the Clyde Iron Works shipped this machinery to the defendant, it sent along

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

one Mr. Hall as an instructor, whose duty it was to teach the employés of the defendant company how to operate the machine. Plaintiff was an engineer by profession, and was placed in charge of the engine by defendant. Mr. Gibson, the general foreman of the defendant company, told him to do whatever Mr. Hall told him to do, to do it just like he told him to do it, and learn all about the business. About the fourth or fifth day after they commenced operating the machinery, Hall came to the plaintiff, and told him that he would take his place on the engine for a while, and directed plaintiff to go into the woods, help the hookers hook logs awhile, and learn how it was done. He gave as a reason for this order that he thought from all he had heard that plaintiff would be made foreman of the crew. On that morning they were running two lines of cables. Mr. Cannon was the hooker for one line and Mr. Reed for the other. The tongs that Cannon was using were fastened to the cable with a clevis or hook, similar to a hook on a log chain. The hook on the cable that Reed was using had been almost straightened out the day before, and the cable was welded on the tongs. The tongs that Reed was using on that morning were sprung—that is, they were nearer straight than they should be—and on account of this defect they would sometimes slip from the end of the log when the cable was being pulled, and jump a considerable distance, 35 or 40 feet. The fact that the tongs were sprung was known to the plaintiff at the time the injury was received. Either the day before or that morning the tongs had pulled out of a log. Then it came across the end of the boom and struck the side of the cab of the engine, and knocked a hole in it as big as a five-gallon keg. The cab was made out of seven-eighths inch pine lumber. At that time plaintiff was running the engine. He called the attention of Mr. Gibson to the accident, and told him some one would get killed or crippled with the tongs unless they were fixed. Mr. Gibson told the plaintiff to go ahead; that he would furnish new tongs or repair those in a day or two. When Mr. Hall directed plaintiff to go out in the woods and assist in the hooking and skidding for awhile, he first went over on Cannon's line, and saw him hook two or three logs. He then went over to Reed's line, and the first log they hooked after he arrived struck an oak tree that had been cut down, and the tongs slipped out. The oak tree was then cut out of the way, and, fastening the hooks in a new place, they started with the log again. They did not go far until the log struck a maple root. About 10 or 12 feet to the right of the cable, and about 35 feet from the end of the log, stood a stump. There was a man who rode a mule that drags the tongs back in the woods. Reed said: "We will have the rider to pull the line around the stump." Plaintiff said that he thought that Reed and

himself could pull the line over it; so Reed and the plaintiff took hold of the cable with their hands, lifted it over to the right, and placed it behind the stump. As soon as the cable was placed behind the stump, without waiting for the signal to start, the engine began to pull the cable, and the plaintiff at the same time started to get out of the way. He had gone only a few feet when the tongs slipped from the end of the log, and struck him, breaking his leg.

The plaintiff had worked around a saw-mill a great many years. He had assisted in operating other makes of log-loading machines. The plaintiff was the only witness examined at the trial, and the above is substantially his statement of how the injury occurred and the incidents connected with it. At the conclusion of his testimony, the court directed a verdict for the defendant, and plaintiff has appealed.

J. T. Coston, for appellant. W. J. Lamb and W. J. Orr, for appellee.

HART, J. (after stating the facts as above). In support of the judgment of the court directing a verdict for the defendant, now appellee, it is contended that upon the undisputed facts of the case the plaintiff, now appellant, must be deemed to have accepted the risk of such injury as befell him. In a note to the case of *Foster v. Chicago, etc., Ry. Co.*, 127 Iowa, 84, 102 N. W. 422, in 4 Am. & Eng. Ann. Cas. 153, the servant's assumption of risk as affected by the master's promise to repair is aptly stated as follows: "It is a well-settled general rule that the assumption of risk implied from a servant's knowledge that a tool, instrument, appliance, piece of machinery, or piece of work is defective or dangerous is suspended by the master's promise to repair, made in response to the servant's complaint, so that, if the servant is induced by such promise to continue at work, he may recover for any injury which he sustains by reason of such defect within a reasonable time after the making of the promise, provided he exercises due care, unless the defect renders the appliance so imminently and obviously dangerous that a reasonably prudent person would decline to use it at all until it was repaired." Many decisions from a great number of the states are cited to support the rule. Mr. Thompson, in his work on *Negligence* (volume 4, par. 4667), expresses the same views; and adds that, under such circumstances, "he will not as a matter of law be put in the position of having accepted the risk, but whether he has done so will be a question for the jury." See also, 1 Labatt on Master and Servant, par. 453.

The latest decision of our court in which the rule has been recognized and applied is the case of *St. L., I. M. & Sou. Ry. Co. v. Mangan*, 112 S. W. 168, in which the prior decisions of our court on the subject to the same effect as the rule above quoted are

cited and approved. In the case of *Greene v. Minneapolis & St. Louis Ry. Co.*, 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785, the court said: "If a servant who has knowledge of defects in the instrumentalities furnished for his use gives notice thereof to his employer, who thereupon promises that they shall be remedied, the servant may recover for an injury caused thereby, at least where the master requested him to continue in the service, and the injury occurred within the time at which the defects were promised to be remedied, and where the instrumentality, although defective, was not so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it. Under such circumstances, his subsequent use of the defective instrumentality would not necessarily, or as a matter of law make the servant guilty of contributory negligence, but it would be a question for the jury whether in continuing its use after he knew of the defect he was in the exercise of ordinary care." The opinion was delivered by Mr. Justice Mitchell, and in support of it he cited, among other cases, that of *Hough v. Railway Company*, 100 U. S. 213, 25 L. Ed. 612. The latter is a leading case on the question, and has been followed in numerous decisions of the state, as well as United States, courts. We also call attention to the following cases as sustaining the decision: *Indianapolis & St. Louis Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721; *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 69 N. W. 993, 60 Am. St. Rep. 66; *Rothenberger v. Northwestern Consolidated Milling Co.*, 57 Minn. 461, 59 N. W. 531; *Patterson v. Railway Co.*, 76 Pa. 389, 18 Am. Rep. 412; *McKelvey v. Ches. & Ohio Ry. Co.*, 35 W. Va. 514, 14 S. E. 261. Counsel for appellee rely upon the case of *Railway Co. v. Kelton*, 55 Ark. 493, 18 S. W. 993, to sustain the action of the court in directing a verdict for it. In that case the court said: "In an action by a house painter to recover damages for an injury occasioned by a fall from a defective ladder furnished by his employer, he is not entitled to recover if, knowing that the ladder could not be used with any assurance of safety, he continued to use it until the injury occurred, relying upon his employer's promise to furnish a safe ladder." In that case the facts were undisputed, and the court said as a matter of law that the promise on the part of the employer to furnish a better ladder would not justify the employé in looking to his employer for compensation for damages which he sustained by wantonly and recklessly encountering danger which he knew necessarily attended the use of the old ladder. Later adjudications of our court have said it was a question for the jury, where the servant relies upon the promise of the master to repair, where the appliance is so obviously and imminently dangerous that a reasonably prudent person would decline to use it until it was repaired. There

is an apparent, but no real, conflict in the two classes of decisions. In the *Kelton* Case no special knowledge was required to discern the danger of the continued use of the ladder. It was not an appliance which required the exercise of skill and care. The danger of its continued use could be as well comprehended by one man as another. It was used only by the one man. The case is different where the appliance is either so complicated that the servant may rely upon the superior knowledge of the master, or where it is a machine or appliance which requires several persons to operate it, and the danger in its continued use in its defective condition depends upon the mutual care toward each other of the servants operating it. This distinction is recognized in the following cases: *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393, and cases cited; *Swift v. O'Neill*, 187 Ill. 337, 58 N. E. 416; *Morden Frog & Crossing Works v. Fries*, 228 Ill. 246, 81 N. E. 862, 119 Am. St. Rep. 428; *Webster Mfg. Co. v. Nisbett*, 205 Ill. 273, 68 N. E. 936; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56. The application of the following rule differentiates the two classes of cases: "It is only when the facts are undisputed, and are such that reasonable minds may draw but one conclusion from them, that the question of negligence is ever considered one of law for the court." *St. Louis & San Francisco R. Co. v. Summers* (Tex. Civ. App.) 111 S. W. 211. Where the servant is engaged in ordinary labor with tools of simple construction, which are used by himself alone and where the facts are undisputed, reasonable minds must inevitably come to the same conclusion. Hence there is nothing to submit to the jury. On the other hand, in the case of complicated machinery, or in cases where the danger in the continued use of the machine or instrumentality depends upon the want of due care of the fellow servants engaged in operating it, although the facts are undisputed, reasonable minds might draw different conclusions. In such cases the question of negligence is one for the jury. The case under consideration is a good illustration.

The jury might have found that the proximate cause of the injury was the negligence of the master in furnishing defective tongs, together with the concurring negligence of the fellow servants, either the flagman in prematurely signaling the engineer to start the machinery in motion, or the engineer in starting it without a signal. That a master is liable for the negligence of a vice principal concurring with that of the fellow servant we refer to the following cases: *Archer Foster Const. Co. v. Vaughn*, 79 Ark. 20, 94 S. W. 717; *Kansas City, Ft. Scott & Memphis R. Co. v. Becker*, 67 Ark. 1, 53 S. W. 406, 46 L. R. A. 814, 77 Am. St. Rep. 78. The court should also have submitted to the jury under proper instructions the sufficiency of the complaint by the servant and the promise to re-

pair by the master and the servant's reliance on this promise, and the reasonableness of the time to repair.

The judgment is therefore reversed, and the cause remanded for a new trial.

BROWN v. CRYSTAL ICE CO.

(Supreme Court of Tennessee. Oct. 10, 1908.)

COURTS (§ 246*)—JURISDICTION—COURTS OF APPELLATE JURISDICTION.

Under Acts 1907, p. 233, c. 82, § 7, declaring that the jurisdiction of the Court of Civil Appeals shall extend to all cases brought up from the chancery courts with certain exceptions, the Court of Civil Appeals, not the Supreme Court, has jurisdiction of an application for a supersedeas of an interlocutory order directing the issuance of a mandatory injunction in a suit by a stockholder to compel the corporation to permit him to examine its books.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 246.*]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Bill by Bowdry Brown against the Crystal Ice Company. An interlocutory order was granted directing the issuance of a mandatory injunction, and defendant applied to the Supreme Court for a supersedeas of such interlocutory order which was granted, and complainant moves to dismiss the supersedeas. Motion granted.

R. B. Cooke, for appellant. Pritchard & Sizer, for appellee.

NEIL, J. On the 1st of June, 1908, Bowdry Brown filed a bill against the defendant company, in which he alleged, in substance, that he was the owner of certain shares of stock in the defendant corporation, and that he had made application to the officers of the company for permission to examine the books of the company, with a view to finding out the facts about the business of the organization, for the purpose of enlightening himself as to the value of his stock; that a colorable permission had been given him, but that, when he attempted to really make use of it by taking some notes of the matters he observed upon the books of the company, the books were forcibly taken from him, and he was not permitted to examine them further. The bill prayed for a mandatory injunction to be issued against the officers and agents of the company, requiring them to permit him to make such examination. The chancellor by a fiat on the bill directed the mandatory injunction to issue. This order was made ex parte on the 29th day of May before the actual filing of the bill. On the 1st day of June, 1908, the day on which the bill was filed, a petition was presented to the chancellor, reciting the issuance of the injunction under the fiat of the chancellor, its service on J. H. Wilson, secretary and treas-

urer of the defendant company, and that the said Wilson had disregarded the fiat and refused to allow petitioner to have access to the books, and had informed petitioner that he could not see them. The petition prayed that the said Wilson be committed for contempt, and that attachment might issue, to the end that he be brought before the chancellor for this purpose; that is, to answer for the contempt. The attachment was ordered, and was issued on the said 1st day of June, 1908.

Thereupon the Crystal Ice Company notified the complainant that on the 3d day of June it would apply to one of the judges of this court for a supersedeas of the interlocutory order granted on the 29th of May above referred to, directing by an ex parte order the issuance of the mandatory injunction.

A petition was accordingly filed and was presented to one of the judges of this court, and a supersedeas was ordered.

The ground stated in the petition was, in substance, that the mandatory injunction was in the nature of final relief, and could not be granted at the beginning of the suit by an ex parte order.

The complainant has appeared in this court and moved to dismiss the supersedeas because it was improvidently granted.

The ground of the application to discharge the supersedeas is that this court has no jurisdiction, but that the jurisdiction of the matter is with the Court of Civil Appeals.

The decision of this question involves a construction of section 7, c. 82, p. 233, Acts 1907, which fixes the jurisdiction of the Court of Civil Appeals.

Section 7 of the act referred to reads as follows:

"That the jurisdiction of said Court of Civil Appeals shall be appellate only, and shall extend to all cases brought up from courts of equity or chancery courts, except cases in which the amount involved, exclusive of costs, exceeds \$1,000.00, and except cases involving the constitutionality of the statutes of Tennessee, contested elections for office, state revenue and ejectment suits, and to all civil cases tried in the circuit and common law courts of the state in which appeals in the nature of writs of error, or writs of error may be applied for, for the purpose of having the action of said trial court reviewed. In all cases in which appellate jurisdiction is herein conferred upon said Court of Civil Appeals, the appeals, and appeals in the nature of writs of error, from the lower court shall be taken directly to said Court of Civil Appeals, and said court, or any judge thereof, is hereby given the same power to award and issue writs of error, certiorari and supersedeas, which the Supreme Court has heretofore had in such cases, returnable to said Court of Civil Ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

peals. The practice in such cases in said courts shall be the same as is now prescribed by law for the Supreme Court. In all cases in which appellate jurisdiction is not conferred by the terms of this act upon said Court of Civil Appeals, appeals therefrom shall be directed to the Supreme Court, and in such cases, writs of error, certiorari and supersedeas shall be issued by, and made to the Supreme Court, as is now provided by law; and in such cases the Supreme Court shall have exclusive jurisdiction, and shall try and finally determine the same, and shall not, after this act takes effect, assign the same for trial by the said Court of Civil Appeals."

We think that under a true construction of this section the present case is not within the jurisdiction of this court, but in that of the Court of Civil Appeals. It does not involve any special amount of property—simply a right asserted by the complainant. It does not involve the constitutionality of any statute of the state, nor a contested election for office, nor does it involve state revenue, nor is it an ejectment suit. It is observed that under the terms of the section jurisdiction is given to the Court of Civil Appeals of all chancery causes, except those involved in the four classes mentioned, and except those in which the amount involved, exclusive of costs, exceeds \$1,000. As an illustration of the soundness of this construction it may be stated that we have held that habeas corpus cases instituted in the chancery court go before the Court of Civil Appeals when brought up for review.

We are of opinion, therefore, that the motion to discharge the supersedeas should be granted.

Let an order be entered accordingly. The petition will also be dismissed.

CINCINNATI, N. O. & T. P. R. CO. v. HAMILTON COUNTY.

(Supreme Court of Tennessee. Jan. 23, 1908.)

1. COUNTIES (§ 192*)—SPECIAL TAXES—PURPOSES—COURT EXPENSES.

A county has no authority to levy a special tax to pay expenses of the circuit court.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 300; Dec. Dig. § 192.*]

2. TAXATION (§ 538*)—"INVOLUNTARY PAYMENT"—DURESS.

A payment of taxes in order to be involuntary, so as to entitle the taxpayer to recover them for illegality, must be made on compulsion to prevent an immediate seizure of the taxpayer's goods or the arrest of his person; mere threats of litigation or apprehension of levy of distress warrants being insufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1000; Dec. Dig. § 538.*]

For other definitions, see Words and Phrases, vol. 4, p. 3764.]

3. TAXATION (§ 538*)—ILLEGAL TAXES—VOLUNTARY PAYMENT.

Payment of illegal taxes under protest before the taxes had become delinquent and with-

out any demand or threat to levy merely to prevent the imposition of a penalty and interest which would accrue on the succeeding day was voluntary, so that the taxes paid could not be recovered.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1000; Dec. Dig. § 538.*]

4. TAXATION (§ 446*)—COLLECTION—TAX BOOKS—DELINQUENT LIST—JUDGMENT—EXECUTION.

The tax books in the hands of the county trustee, who was the sole tax collector, and the delinquent list thereafter to be furnished the constables, etc., prior to the time the tax became delinquent, did not have the force of a judgment and execution against the taxpayer.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 783, 784; Dec. Dig. § 446.*]

Appeal from Circuit Court, Hamilton County; M. M. Allison, Judge.

Suit by the Cincinnati, New Orleans & Texas Pacific Railroad Company against Hamilton county. Judgment for defendant, and plaintiff appeals. Affirmed.

Pritchard and Sizer, for appellant. Joe V. Williams, for appellee.

McALISTER, J. The object of this suit is to recover certain taxes said to have been illegally collected by the county from the railroad company for the years 1903 and 1904. The cause was presented to the circuit court on a stipulation of agreed facts; the material recitals being that in the year 1903 the county of Hamilton levied on the property of plaintiff 30 cents on each \$100 in value for general county purposes, and in excess thereof made a levy of 15 cents on the \$100 for the purpose of paying the expenses of the circuit court of Hamilton county. The 15-cent levy for circuit court purposes amounted to \$1,914.08.

On the 29th day of February, 1904, the day before the tax became delinquent by law, the company paid it in order to avoid the imposition of the penalty and interest which would accrue unless said taxes were paid prior to the 1st of March, as provided in the assessment act of 1903, and in order to avoid the cost and expense incident to any attempt that the proper authorities might make under the law to collect said taxes by levy on and sale of its property. Said tax was paid under protest, and that fact was recited in the receipt executed by the county trustee.

In the year 1904 Hamilton county again levied, in excess of and in addition to the 30 cent levy, for general county purposes, 10 cents on the \$100 for circuit court purposes, and this levy was paid by the company on February 23, 1905, the day before the same became delinquent by law in the same manner and for the same reason just stated for the preceding year, and a receipt of the same character was executed by the county trustee, namely, "the ten cent levy for circuit court purposes, amounting to \$1,276.00, is paid under protest; its legality being denied."

It is also agreed in said stipulation that at the time of the payment of said taxes no demand for payment had been made by said county or its trustee or other agent except the fact of levy and assessment as shown on the tax books in the hands of said trustee, who was up to the time of said payments the sole collector of said taxes.

It is insisted on behalf of the county that upon the statement of agreed facts it appears that these payments were purely voluntary, and that plaintiff is without remedy to recover them. The circuit judge was of opinion that "the tax was voluntarily paid for the purpose, as stated in the declaration, of saving costs, interest, and penalty before it became delinquent, when no demand had been made, no threat of levy, and no delinquent list to give force of judgment or execution or distress warrant and no attempt was being made to collect it or intimation that such attempt would be made—without even a request for payment—but voluntarily appeared and paid it, and simply had the receipt recite that this item was paid under protest. A simple statement that a tax is paid under protest does not constitute the payment an involuntary one or reserve to payor any right of action, except as to state tax as provided by the statute."

The railroad company appealed, and has assigned as error the action of the circuit judge in denying it a recovery.

It is conceded that the tax collected by the county was illegally assessed under the ruling of this court in *Newman v. Southern Railway*, decided at Knoxville September term, 1905. In that case it was expressly adjudged that the county was without authority to levy a special tax for payment of the expenses of the circuit court; that the maintenance of the circuit court was a general county purpose, and its expenses must be paid out of the tax authorized by law, for general county purposes, and that therefore the circuit court tax was illegal.

The determinative question then arising on this record is whether the payment of these taxes by the railroad company was voluntary.

It will be observed that Acts 1903, p. 681, c. 258, provide as follows:

"Sec. 50. That all the taxes remaining unpaid on the first day of March of each year shall immediately be collected by the county trustee by distress and sale of any personal property liable therefor; and the tax books in the hands of said trustee, and the delinquent lists to be furnished as herein provided, to deputy trustees or constables, shall have the force and effect of a judgment and a distress warrant, and an execution from a court of record authorizing him to make such distraint and sale."

It will be observed that the taxes for the year 1903 were paid by the company on the 29th day of February, 1904, the day preceding the 1st day of March of that year, on which day the taxes for 1903 would become delin-

quent, and it is recited that payment was made "in order to avoid the imposition of the penalty and interest which would accrue unless said taxes were paid prior to the first of March," as provided for in the section just quoted, and in order to avoid the cost and expense incident to any attempt that the proper authorities might make under the law to collect said taxes by levy and sale of the company's property.

It will be noticed that the payment was made in each year before the tax had become delinquent, and at a time when no demand had been made for payment by the tax collector. As already shown, the receipts executed by the county trustee for these taxes recite that they were paid under protest; the legality of the tax being denied.

It is very ably and earnestly argued by learned counsel for the company that, upon the facts presented, the payment of the tax in question was involuntary and upon compulsion. It is argued that the tax books in the hands of the county trustee have the force of a judgment, and that the delinquent list in the hands of deputies or constables operates to the same effect as an execution or distress warrant. It is said the statute imperatively requires that "all taxes remaining unpaid on March first shall be immediately collected by distress and sale," and that the trustee "shall furnish the deputy with a list of delinquent tax payers with a description of the property assessed against each and the amount of taxes due from each." It is said that "all taxes bear interest from the first day of March of the year following that for which they are assessed," and, in addition, there is a penalty provided of "one per cent. for each month the taxes are delinquent to be added on the first day of each month beginning with the first of March." Acts 1903, p. 681, c. 258, § 49.

The position of counsel is that, in the face of these provisions of the statute, the taxpayer is not bound to wait until the penalty and costs have actually accrued against him and distress warrants have been placed in the hands of deputy trustees; but that with this condition imminent and impending the taxpayer may pay the tax to prevent the issuance of the distress warrant, and such a payment is not voluntary, but upon coercion.

With this statement of the case we shall notice some of the authorities.

In *Cooley on Taxation*, p. 566, it is said:

"That a tax voluntarily paid cannot be recovered back has been held by the authorities with very few exceptions. It is immaterial in such case that the tax has been illegally laid, or even that the law under which it was laid was unconstitutional."

In *Dillon on Municipal Corporations*, § 942, it is said:

"Money paid by a person to prevent an illegal seizure of his property or person by an officer claiming authority to seize the same, or to liberate his person or property from

illegal detention by such officer, may be recovered back in an action for money had and received on the ground that the payment was compulsory, or by duress or extortion." Again in the same work (section 943) it is said:

"The coercion or duress which will render a payment involuntary must in general consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment, over the person or property of another, and from which the latter has no other means of immediate relief than by making payment." In *Cauvin & Duprez v. Mayor and City Council of Nashville*, 3 Baxt. 454, an effort was made to recover an excess of money paid the city on license for billiard tables. The court said:

"The correct principle is given in 2 Dillon on Municipal Corporations, p. 857:

"The payment must have been made on compulsion to prevent the immediate seizure of his goods or arrest of person, and not voluntary."

In *Lea v. City of Memphis*, 9 Baxt. 108, it was said:

"Threats of litigation, or apprehension of the levy of distress warrants on property by the weight of authority, would not make a payment of taxes under such threats or apprehensions compulsory."

In *Railroad v. Williams*, 101 Tenn. 148, 46 S. W. 448, the rule again was stated to be that a tax illegally collected might be recovered if exacted and paid under protest and to save seizure of property.

In *Bank v. Memphis*, 107 Tenn. 73, 64 S. W. 15, the suit was against the city of Memphis to recover illegal taxes paid. The court said:

"If it was paid willingly, though irregularly, and without application, it may not be recovered back, but, if under protest and duress, it may if it was illegally assessed and collected."

It seems to be well settled by our cases that, to entitle a party to recover taxes illegally collected, they must not only have been paid under protest, but under duress; that is, to prevent the seizure of goods or the detention of the person.

It is said, however, on behalf of the railroad company, that this court has decided that the tax book in the hands of the county trustee is equivalent to a judgment against a taxpayer, and that payment of an illegal tax under protest, under such circumstances, is an involuntary payment, and may be recovered back.

In *Bright v. Halloman*, 7 Lea, 310, a suit had been instituted to recover an illegal tax collected by the county court of Obion county for the year 1877. The court said:

"It is insisted the plaintiff ought not to have recovered because his payment was voluntary. We do not assent to this contention. The tax book was process equivalent to an execution in the hands of the offi-

cer, and payment under protest entitled the party to sue for so much as was deemed illegal."

But the taxes involved in that case were delinquent, and the tax book or a copy of it was in the hands of the constable or deputy collector when making collections.

In *Alexander v. Henderson*, 105 Tenn. 431, 58 S. W. 648, *Bright v. Halloman* is referred to and approved.

In *Bank v. Memphis*, 116 Tenn. 646, 94 S. W. 608, the question was whether certain taxes were paid voluntarily. The court said:

"We think this point is covered by the case of *Bright v. Halloman*, 7 Lea, 310. In that case it was held that the tax book was process equivalent to an execution in the hands of the officer and payment under protest entitled the party to sue for so much as was deemed illegal, and this was true, although the taxes involved were county taxes, and no special provision was made for payment of this class of taxes under protest under Acts 1873, p. 71, c. 44, carried into Shannon's Code, § 1059." *Railroad v. Williams*, 101 Tenn. 148, 46 S. W. 448.

It is said on behalf of the county that these cases do not apply in the present instance, since they all related to the collection of delinquent taxes, and that section 50 of chapter 258 of the Acts of 1903, providing that the tax books in the hands of the trustee and the delinquent list furnished to collecting officers shall have the force and effect of a judgment and a distress warrant, applies to taxes remaining due on March the first of each year, as stated in that section.

As already seen, the taxes in question were not delinquent at the time they were paid by the company, and, as to these taxes, the tax books in the hands of the trustee and the delinquent list thereafter to be furnished to constables, etc., did not have the force of a judgment and execution. By the plain language of the statute these provisions only apply to taxes remaining unpaid on the 1st day of March of each year. In all of the cases cited by counsel for the company the taxes when paid were delinquent. At the time the payments were made in the present case it is agreed no demand for payment had been made by the county trustee, and the taxes were paid "in order to avoid the imposition of the penalty and interest which would accrue unless said taxes were paid prior to the 1st of March, as provided for in the assessment act of 1903, * * * and in order to avoid the cost and expense incident to any attempt that the proper authorities might make, under the law, to collect said taxes by levy and sale of its property."

Our decisions on the subject of voluntary payment are in accord with the ruling of the United States Supreme Court. The leading case upon this question is *Railroad v. Commissioners*, 98 U. S. 541, 25 L. Ed. 196. That was a suit to recover taxes claimed to have been illegally assessed and which were

paid under protest. The opinion of the court was delivered by Chief Justice Waite, who said:

"Before these payments were made there had been no demand for the taxes, and no special effort had been put forth by the treasurer for their collection. The company had personal property in the county which might have been seized; but no attempt had been made to seize it, and no other notice than such as the law implies had been given that payment would be enforced in that way.

"At the time the several payments were made the company filed with the treasurer a notice in writing that it protested against the taxes paid, for the reason that they were illegally and wrongfully assessed and levied, and were wholly unauthorized by law, and that suit would be instituted to recover back the money paid.

"We had occasion to consider the same general subject at the last term in *Lamborn v. County Commissioners*, 97 U. S. 181, 24 L. Ed. 928, which came up on a certificate of division from the circuit court for the district of Kansas. As that was a case from Kansas, we followed the rule adopted by the courts of that state, which is thus stated in *Wabaunsee County v. Walker*, 8 Kan. 431: 'Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal without an immediate and urgent necessity therefor, or unless to release his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment voluntary.'"

This, as we understand it, is a correct statement of the rule of the common law.

The following cases announce the same rule: *Little v. Bowers*, 134 U. S. 554, 10 Sup. Ct. 620, 33 L. Ed. 1016; *Bank of Kentucky v. Stone* (C. C.) 88 Fed. 390; *Hoke v. Atlanta*, 107 Ga. 420, 33 S. E. 412. See, also, *Weston v. Luce County*, 102 Mich. 533, 61 N. W. 15. Affirmed.

HEART v. EAST TENNESSEE BREWING CO.

(Supreme Court of Tennessee. Nov. 4, 1908.)

1. CONTRACTS (§ 103*)—ILLEGALITY.

All contracts which provide for doing a thing which is contrary to law, morality, and public policy are void.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 468; Dec. Dig. § 103.*]

2. LANDLORD AND TENANT (§ 34*)—LEASE—UNLAWFUL PURPOSE—TERMINATION.

Where a lease provided for the letting of a building for a saloon, it was terminated by a subsequent statute making the sale of intoxicating liquors in the city where the property was located unlawful, and the landlord could not therefore maintain an action for subsequent rent on the lessee's refusal to further oc-

cupy the premises or pay rent for the remainder of the term.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 34.*]

Appeal from Chancery Court, Knox County; Joseph W. Sneed, Chancellor.

Action by Frank Heart against the East Tennessee Brewing Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Lewis Tillman, for appellant. Webb, McClung & Baker, for appellee.

SHIELDS, J. Complainant on August 31, 1902, leased a certain house and lot situated in Knoxville, Tenn., and owned by him, to the defendant for a term of eight years, to be used as a saloon or place for the sale of intoxicating liquors, as expressed in the written lease that day made and executed by both parties. The defendant entered into possession of the property, and paid the rent contracted for to November 1, 1907, but after that declined to further use it, or to pay any rent. Complainant sues to collect rent accruing since November 1, 1907. The contract of lease was exhibited with and made a part of the bill, and therein the terms of the contract and the purposes for which the property was to be used are fully set forth.

The chancellor sustained a demurrer to the bill upon the ground that by chapters 17, 206, 207, pp. 81, 752, 755, Acts Gen. Assm. 1907, the sale of intoxicating liquors was made unlawful and prohibited in the city of Knoxville from and after November 1, 1907, and therefore the purpose for which the lease was made was from that time illegal, and the contract void and unenforceable, and complainant has brought the case to this court for review.

There is no error in the action of the chancellor. When the contract was made, the purpose for which the property was leased—the sale of intoxicating liquors in Knoxville—was lawful, and the lease valid and enforceable. Afterwards, November 1, 1907, that purpose was made unlawful by the acts of the General Assembly above referred to, and thus by operation of law the lease became and is void and unenforceable at the instance of either party.

It is a principle of general application that all contracts are void which provide for doing a thing which is contrary to law, morality, and public policy. *Yerger v. Rains*, 4 Humph. 259; *Wetmore v. Brien*, 3 Head, 723; *Henderson v. Waggoner*, 2 Lea, 134, 31 Am. Rep. 591; *Rhodes v. Summerhill*, 4 Helsk. 205; Page on *Contracts*, § 326.

It has been applied to contracts of this character, and held, for that reason, that the rent contracted to be paid could not be collected. *Ralston v. Boady*, 20 Ga. 449; *Sherman v. Wilder*, 106 Mass. 537; *Mound v. Barker*, 71 Vt. 253, 44 Atl. 346, 76 Am. St. Rep. 767; *Riley v. Jordan*, 122 Mass. 231;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Holmead v. Maddox, 2 Cranch, C. C. 161, Fed. Cas. No. 6,629; 2 Taylor's Landlord and Tenant, § 521.

The rule is the same when the purpose of the contract, although lawful when made, becomes unlawful by statute enacted before the full performance of its terms. In Mr. Parson's work on Contracts (volume 2, p. 674) it is said:

"That the illegality of a contract is in general a perfect defense must be too obvious to need illustration. It may indeed be regarded as an impossibility by act of law; and it is put upon the same footing as an impossibility by act of God, because it would be absurd for the law to punish a man for not doing, or, in other words, to require him to do that which it forbids his doing. Therefore, if one agrees to do a thing which is lawful for him to do, and it becomes unlawful by an act of the Legislature, the act avoids the promise, and so if one agrees not to do that which he may lawfully abstain from doing, but a subsequent act requires him to do, this act also avoids the agreement."

In Hammon on Contracts, § 210, pp. 345, 346, it is said:

"Where the performance of an executory agreement which was lawful in its inception is made unlawful by subsequent enactment, the agreement is thereby dissolved and the parties discharged from its obligations."

Other text-books are to the same effect. Clark on Contracts, 681; Lawson on Contracts, §§ 423, 424.

The rule has also been frequently applied by this and other courts of last resort. In Railroad Company v. Green, 9 Heisk. 592, it was held that a contract for the payment of Confederate notes, lawful when made, but afterwards made unlawful by law, could not be enforced. It is there said:

"The law had therefore made it impossible for the plaintiff to perform that portion of the condition precedent which required them to demand payment in Confederate notes. The nonperformance of a contract will always be excused where it is occasioned by act of law."

The case of Gray v. Sims, Fed. Cas. No. 5,729, is directly in point. This was a suit upon a policy of marine insurance. The vessel insured was to be employed in importing goods from Calcutta or Madras into the United States, and the contract of insurance specified this as one of the purposes of the voyage. After the policy was written, and before the return of the vessel, it became by act of Congress illegal to import goods into the United States from those points. The master undertook to do so, and the ship was seized and confiscated. The loss was within the terms of the policy. A recovery was denied. The court said:

"But if the contract be legal when it is made, and the performance of it is rendered

illegal by a subsequent law, the parties are both of them discharged from its obligation. The insured loses his indemnity and the insurer his premium."

Other cases in accord are: Sauner v. Phoenix Insurance Co., 41 Mo. App. 480; Corrigan v. Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; Jamieson v. Gas & Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; Presb. Church v. New York, 5 Cow. (N. Y.) 538.

It is not necessary in this case to determine whether or not the contract contained in the lease restricts the use of the property for the sale of intoxicating liquors. It was the purpose of both lessor and lessee, as clearly expressed in the instrument, that it should be used as a saloon, and, this being made unlawful by law, the contract is no longer enforceable.

The decree of the chancellor is affirmed, with costs.

WILLIFORD v. PHELAN.

(Supreme Court of Tennessee. Sept. 30, 1908.)

1. WILLS (§ 30*) — PERSONS ENTITLED TO MAKE—MARRIED WOMEN.

At common law a married woman could make a will of property not yet reduced to the husband's possession with the husband's assent to the particular will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 64; Dec. Dig. § 80.*]

2. WILLS (§ 29*)—MARRIED WOMEN—PROPERTY SUBJECT TO WILL.

Independently of assent of the husband, a married woman may dispose of her separate property by will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 56, 59; Dec. Dig. § 29.*]

3. WILLS (§ 28*) — MARRIED WOMEN — STATUTES.

Acts 1869-70, p. 113, c. 99 (Shannon's Code, §§ 4242-4247), regulating a married woman's power to dispose of property by will, applied exclusively to her power to dispose of real estate, and did not enlarge her power to dispose of her personal property by will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 28.*]

4. HUSBAND AND WIFE (§ 10*)—MARRIAGE—EFFECT—WIFE'S PERSONAL PROPERTY.

Marriage at common law amounted to an absolute gift to the husband of all personal goods of which the wife was actually or beneficially possessed at any time during coverture.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 10.*]

5. HUSBAND AND WIFE (§ 11*)—WIFE'S PERSONAL PROPERTY—REDUCTION TO POSSESSION.

The common-law rule that a husband may receive and reduce to possession during coverture all choses in action, whether in the form of notes, debts, or legacies belonging to the wife at the time of their marriage or afterwards accruing, prevails in Tennessee.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 47; Dec. Dig. § 11.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. HUSBAND AND WIFE (§ 10*)—PERSONAL PROPERTY OF WIFE—POSSESSION—PROPERTY OF HUSBAND.

Possession of personal property by a wife is the possession of the husband in law and makes the property his, nothing appearing to show it to be the separate property of the wife.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 10.*]

7. HUSBAND AND WIFE (§ 110*)—SEPARATE ESTATE—RIGHTS OF WIFE.

A wife may hold a separate estate free from debts, contracts, and control of her husband with power of disposition by will or otherwise.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 110.*]

8. HUSBAND AND WIFE (§ 116*)—SEPARATE ESTATE—PERSONAL PROPERTY.

A separate estate in personal property may be created in a married woman not only by writing but by parol gift, though, if the gift is from a stranger, the intention to create a separate estate must usually appear from the donor's express language, while, in case of a gift by husband to wife, the intent to include his own rights is inferred from the relation of the parties.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 414; Dec. Dig. § 116.*]

9. HUSBAND AND WIFE (§ 116*)—WIFE'S SEPARATE PROPERTY—EARNINGS OF HUSBAND.

Where a husband currently gave his earnings to his wife which she deposited in a bank in her own name, because of the husband's belief that she would outlive him, and because he knew she would take care of it for him, there was no sufficient gift of the money to the wife as of her separate estate to entitle her to dispose of it by will.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 414; Dec. Dig. § 116.*]

10. HUSBAND AND WIFE (§ 127*)—WIFE'S REAL ESTATE—HUSBAND'S RELATION—EFFECT.

Where a husband by deed released all his right, title, and interest in law and equity in real estate devised to his wife, the husband thereby surrendered all claim to the rents and to damages collected for injuries thereto, so that such items constituted the wife's separate estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 465; Dec. Dig. § 127.*]

11. WILLS (§ 428*)—WILL OF WIFE—PROBATE—CONCLUSIVENESS ON HUSBAND.

Where a husband, with knowledge of an existing will of his wife, took out letters of administration and reduced to possession a bank deposit in her name, the husband was not precluded by the subsequent probate of the will to challenge her right, in a proceeding by her administrator with the will annexed against him to recover the sum so appropriated, to dispose of such property on the theory that it belonged to him by right of the marriage, or to defeat his right to administer her estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 917; Dec. Dig. § 428.*]

12. WILLS (§ 428*)—WILL OF WIFE—RIGHTS OF HUSBAND.

Where a wife attempted to dispose by will of her personal property which was not distinctly impressed with the character of a separate estate, her husband was entitled to ignore the will and to qualify as his deceased wife's administrator, and reduce to possession any choses in action of which she died possessed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 917; Dec. Dig. § 428.*]

Certiorari to Court of Civil Appeals.

Action by A. J. Williford, as administrator with the will annexed of Elizabeth Phelan, deceased, against J. J. Phelan. Decree for complainant in the chancery court of Shelby county was affirmed by the Court of Civil Appeals, and defendant brings certiorari. Reversed, and bill dismissed.

Lee Thornton, for complainant. Canada & Phelan and McFarland & Canada, for defendant.

McALISTER, J. Complainant, as administrator with the will annexed of Mrs. Elizabeth Phelan, deceased, filed this bill to recover of J. J. Phelan, surviving husband and the original administrator of the said Elizabeth, the sum of \$1,028 alleged to have been unlawfully appropriated by him. Mrs. Elizabeth Phelan died in the city of Memphis on June 19, 1905, leaving surviving her, her husband, J. J. Phelan, and their infant child Angela, born October 19, 1903. Shortly after the death of said Elizabeth, her husband, J. J. Phelan, qualified as her administrator and collected from the Union & Planters' Bank two certificates of deposit in the name of his wife, aggregating the sum of \$1,189.37. There were no creditors of the estate, excepting the amount due for funeral and administration expenses, amounting to \$162.75, and after the payment of these sums, the administrator receipted for the balance, to wit, \$1,028.82, as distributee and husband of the decedent. The present administrator with the will annexed has brought this suit to recover of the said J. J. Phelan this sum of \$1,028.82 and as a basis of recovery exhibits a will made and executed by the said Elizabeth in Hamilton, Ontario, Canada, on August 1, 1901, wherein she bequeathed and devised all of her estate equally to her husband, her father, her two brothers, and her sister. The estate of the testatrix consisted of the bank deposit already mentioned, and certain real estate situated in Hamilton, Canada, and in Shelby county, Tenn. The infant daughter, Angela, was not born until about 14 months after the execution of the will, and, of course was not mentioned therein. The theory of the present bill is that the bank deposit appropriated by the husband as administrator did not belong to him, but passed to the legatees mentioned in the will of the said Elizabeth Phelan. The defendant, J. J. Phelan, answered the bill, admitting that he had reduced to possession the bank deposit mentioned, claiming that he was entitled to this fund, first, because it represented his earnings whereof he had constituted his wife the mere custodian; and, second, because as surviving husband it was his right to reduce to possession and retain all choses in action of his deceased wife.

On the hearing the chancellor was of opin-

ion that the defendant Jos. J. Phelan was only entitled to one-fifth of the bank deposit collected by him and that the balance thereof belonged to the other legatees mentioned in the will of Elizabeth Phelan. The chancellor accordingly pronounced the decree against the defendant J. J. Phelan and the National Surety Company, his bondsmen, for the sum of \$918.52, and the costs of the cause. On appeal the decree of the chancellor was affirmed by the Court of Civil Appeals, and the cause is here on a writ of certiorari granted by this court at a former day of the term. The defendant Jos. J. Phelan has assigned as error the decree of the Court of Civil Appeals.

It is contended on behalf of the said J. J. Phelan that the will of his wife in which she undertook to dispose of this personal property was void for the reason that it was not her separate estate, but belonged to the defendant as husband jure mariti. In the case of *Perry et al. v. Gill*, 2 Humph. 218, the rule of common law in respect of the right of a married woman to make a will was stated as follows:

"(1) She can make a will of property which is hers, not yet reduced into the husband's possession; but this with the assent of the husband, not in general, but to the particular will, and in such case the assent avails nothing unless he survive, it being but his waiver of his right of being her administrator.

"(2) Independently of the assent of her husband, a wife has power of disposition by will of her separate property."

It has been supposed that the power of a married woman to execute a will of her personal property has been enlarged by Acts 1869-70, p. 113, c. 99 (Shannon's Code, §§ 4242-4247), but this is a mistaken idea. An attentive examination of this act will show that it was intended to deal exclusively with the power of the married woman in the disposition of her real estate by will, deed, etc.

In *Pritchard on Wills*, §§ 83-84, the law on this subject is well stated:

"The uniform rule in this state has been to deny to married women testamentary capacity except in certain cases and to enforce the rules of the common law except so far as they have been modified or abrogated by statute. To the wife's testamentary incapacity there were certain exceptions, principally applicable to personal property, which were recognized in England, and which are still recognized in this state, and the rules of common law with respect to real property have been so much modified by statute in this state that coverture has almost ceased to be a disability to making a will of that class of property. Our statutes have been principally directed to conferring on married women powers of disposition of their real estate, and to the enlargement of those powers from time to time, leaving the rules governing their power over personal property undisturbed."

The next inquiry that arises is in respect of the legal status of this bank deposit—whether it was the separate estate of the wife, or whether it was such personal property as belonged to the husband jure mariti. The general principle of the common law is that marriage amounts to an absolute gift to the husband of all personal goods of which the wife is actually or beneficially possessed at the time, or which comes to her during coverture. *Prewitt v. Bunch*, 101 Tenn. 735, 50 S. W. 748; *Wade v. Cantrell*, 1 Head, 345; *Allen v. Walt*, 9 Heisk. 242; *Joiner v. Franklin*, 12 Lea, 422; *Handwerker v. Diermeyer*, 96 Tenn. 619, 36 S. W. 860.

The common-law rule that the husband is entitled to receive and reduce to possession during coverture all choses in action, whether in the form of notes, debts, or legacies, belonging to the wife at the time of their marriage or accruing afterwards, prevails in Tennessee. *Prewitt v. Bunch*, supra; *Rice v. McReynolds*, 8 Lea, 86.

Personal property in possession, and the possession of the wife in such cases is the possession of the husband, is in law the property of the husband, nothing else appearing to show a separate property of the wife. *Prewitt v. Bunch*, supra; *Wade v. Cantrell*, 1 Head, 345; *Hollingsworth v. Miller*, 5 Sneed, 472; *Cox v. Scott*, 9 Baxt. 305.

While these principles are well settled, the right of the wife to hold a separate estate free from the debts, contracts, and control of her husband, with the power of disposition by will or otherwise, is also well settled.

"A separate estate in personal property may be created, not only by writing, but by a parol gift. When the gift is from a stranger, the intention to create the separate estate must usually appear from the express language of the donor; but, where a gift of personal property is made by the husband directly to the wife during coverture, the intention to include his own rights is inferred from the relation of the parties without the use of the express words that would be required where a third person is the donor." *Pritchard on Wills*, § 86.

It remains to apply the principles of law just stated to the facts disclosed in the record. It is conceded that the defendant, J. J. Phelan, was a railroad engineer and received a salary for his services varying from \$160 to \$200 per month, and that during his married life he turned over to his wife his salary as it was paid him. It is contended, however, on behalf of the defendant, Phelan, that this fund was accumulated in the hands of his wife as mere custodian for the purpose of defraying household and other incidental expenses, and that the surplus belonged to him. It is the theory of the complainant that this fund was an absolute gift from the husband to the wife, and that it thereby constituted her separate estate by implication and intendment of law without the necessity

of appropriate words fixing its character at the time it was paid the wife. The proof relied on to show a gift by the husband is as follows:

The defendant, J. J. Phelan, was asked:

"Q. 21. If any, what custom did you have regarding your checks representing your monthly salary?

"A. Always gave them to my wife as soon as I got them.

"Q. 22. If you had any particular reason in doing this, please state exactly what the reason was?

"A. Because she was good and kind, and I knew she would take care of it.

"Q. 23. Did either you or she understand that you were giving her those checks for her own personal use, or merely constituting her custodian for the fund for your common benefit?

"A. I always placed that confidence in her that she was good and kind, and would take care of my money for me.

"Q. 24. Now, Mr. Phelan, your wife, the said Mrs. Elizabeth Phelan, deceased, recognized your right to the fund which you intrusted to her, did she not? State to what extent she recognized such right.

"A. Well, she always gave me whatever I asked her. When I wanted \$10, \$20, or \$30, I always got it.

"Q. I believe you have testified that she did not say in whose name that deposit was being made?

"A. No, sir; I never asked her. I said: 'You always put it in your own name. I will not outlive you.' That was one time that we were talking about it. I merely passed the remark and I didn't expect to outlive her."

We find in this testimony no proof of an absolute gift of the husband's salary to the wife. It was merely his intention to constitute her the custodian of this fund because he "knew she would take care of it," or, as the witness otherwise expressed it, "would take care of my money for me." There is no other proof on this subject in the record.

It appears from the stipulation of agreed facts that:

"Mrs. Elizabeth Phelan at the time of her death was an owner of real estate near the corner of Main street and Iowa avenue in the city of Memphis. That said real estate, together with the sum of \$276.18 paid to her about the 21st day of July, 1903, was left her under the will of John Mynehan, deceased, but that said property was not impressed by said will as a separate estate. It is further agreed that on or about the 14th day of November, 1904, Mrs. Elizabeth Phelan collected from the city of Memphis, as damages to her said real property on Iowa avenue occasioned by the construction of a subway, the sum of \$1,200 less the sum of \$300 paid as counsel fees, and that on payment of said amount she and her husband,

J. J. Phelan, executed a joint receipt therefor. It is further agreed that H. H. Roynan, real estate agent, collected rent on said property for several months, paying it over to Mrs. Phelan until March 1, 1903, when she informed him that she would attend to future collections of rent. It is further agreed that the sum of \$1,189.57 mentioned in the inventory filed by said J. J. Phelan, administrator, represented collections from the Union & Planters' Bank, in which said Mrs. Elizabeth Phelan held two certificates of deposit, both payable to her order, one for \$928.72, dated November 22, 1904, the other calling for \$280.85, dated December 1, 1904. It is further agreed that the bank officials state they have no record showing when this money was placed in the bank and no means of knowing where it came from; that it may have been deposited there on above mentioned dates, or the certificates may have been renewals; that the books previous to these debts were placed in the vaults when the bank moved to its present location; and that to hunt them up would entail more time than the bank officials are willing to take."

It thus appears from the agreed statement that not only the salary of J. J. Phelan went into the hands of his wife, but that she also received the sum of \$900 as damages to her property on Iowa avenue; that she also received the sum of \$276 under the will of John Mynehan, deceased, and that she also collected and received rents upon her property in the city of Memphis; and that she also received from Canada other sums amounting to several hundred dollars. The record fails to disclose the source from which Mrs. Phelan derived the fund of \$1,189 deposited to her credit in the Union & Planters' Bank at the date of her death and which is the subject of the present controversy.

In *Wood v. Polk*, 12 Helsk. 222, it is said: "It is a doctrine of the law long recognized in this state that in a gift of property to a feme covert, if it be the intention of the donor to interfere with the marital right of the husband, that intention must be expressed in the clearest and most unequivocal terms; and, if a doubt exists as to such intention, it must be resolved in favor of the marital right. This right is a favorite of the law, and the courts will protect it in all doubtful cases with the same readiness with which they will foster the independent estate of the wife when the intention to create that is clear."

It is said that the fund that went into the hands of Mrs. Elizabeth Phelan arising from rents of her real estate, the fund derived from the city in liquidation of damages inflicted upon this property, constituted her separate estate for the reason that on December 12, 1903, the said Joseph J. Phelan executed a deed to his wife in which he released all his estate, right, and interest in the real estate of his wife. As we have already seen, this real estate was devised to

her by John Mynehan, deceased, but was not impressed as a separate estate by the terms of the will. The release of the husband recited that: "The said Joseph J. Phelan had remised, released, and forever quitclaim unto my beloved wife, Elizabeth Phelan, aforesaid, her heirs and assigns forever, all the estate, right, title, and interest, which at law or in equity I now have or may hereafter acquire as tenant by the curtesy in and to the following described tracts or parcels of land situated in the city of Memphis [describes them]."

And stated:

"That the above mentioned parcels of land, being the same owned at the time of his death by John Mynehan, deceased, late of Shelby county, Tennessee, and by him devised to the grantee herein."

It will thus be observed that the husband, Joseph J. Phelan, not only released every possible interest he may have had in said real estate, but also any interest he might thereafter acquire as tenant by the curtesy in and to this real estate. It appears from the record that the sum of \$900 which went into the hands of the wife arose from the settlement of a claim for damages sustained by this real estate, and that the rents that went into Mrs. Phelan's hands were also derived from this real estate. The husband having by deed released all his right, title, and interest both in law and in equity to the real estate, it follows that he also surrendered all claim to rents and damages arising therefrom. It follows that these items constituted the separate estate of Mrs. Phelan; all interests thereto and therein having been released by the husband prior to her death.

But it is impossible to say after a thorough examination of the evidence that this bank deposit arose from the separate estate of the wife. If it be treated as personal property coming into the hands of the wife during coverture, it became the property of the husband *jure mariti*; or, if the certificates of deposit which represented this fund be treated as choses in action (as they are), the husband had a right, after the death of his wife, to administer on her estate and reduce them to possession. In either event the bank deposit became the property of the husband. It is said, however, that this court must assume that this fund constituted a part of the separate estate of the married woman, and that in the disposition of it she had a right to bequeath it by last will and testament without the consent of her husband. This argument is based upon the fact that the will was duly probated in the county court of Shelby county, and that this probate was not only conclusive of the formal execution of the will, but likewise of the testamentary capacity of the testatrix until it might be decided otherwise on an issue of *devisavit vel non* in the circuit court. Counsel cites the case of *Williams et al., ex parte*, 1 Lea. 530, wherein the testamentary capaci-

ty of the testatrix was attacked upon the ground of her infancy. The court said:

"The question as to the infancy of the testatrix might undoubtedly have been made upon the offer of the will for probate in the county court, or upon contest in the circuit court, and the judgment of the court establishing the will would, if unreversed, have been conclusive whether the court in fact adjudged that she was of full age, or that an infant might devise realty. In either case it would have been the judgment of a court of exclusive jurisdiction and in the nature of a proceeding in rem. So that upon principle the probate must be as conclusive of the testamentary age of the testatrix as it is of testamentary capacity in other respects until set aside in the regular mode."

Mr. Pritchard in his work on Wills, § 44, says:

"The probate of a will in the county court is in the nature of a proceeding in rem, operating on the subject-matter and binding generally. In the absence of a fraud and collusion, the probate is conclusive until annulled, as to the capacity of the testator, the testamentary character of the instrument, and its due execution, and not even a court of chancery can inquire into these matters, even though fraud and undue influence in procuring the will are alleged. The only mode in which the probate can be set aside is upon a contest successfully prosecuted upon an issue of *devisavit vel non* in the circuit court."

It appears that, before the will in question was probated, the defendant, Phelan, qualified as administrator of his wife, and reduced the choses in action to possession. It is true, as disclosed by this record, that the defendant Phelan was informed and knew of the existence of the will of his wife before he took out letters of administration and appropriated the bank deposit in question.

We are of opinion, however, that the husband is not concluded by the probate of his wife's will to challenge her right in this proceeding to dispose of personal property that belonged to him *jure mariti*, or to defeat his rights to administer on her estate and reduce to possession her choses in action. This is an entirely different question from that decided in *Williams, ex parte*, 1 Lea. 530. While the probate of the will in that case was conclusive of the formal execution of the will and the testamentary capacity of the testatrix when questioned in a collateral proceeding, the question here presented is the right of the wife by last will and testament to dispose of the property of the husband and to defeat his right to administer on her estate. Under such circumstances the husband had a right to ignore the will, qualify as the administrator of his deceased wife, and reduce to possession any choses in action of which she might die seised and possessed, unless such property was distinctly impressed with the character of a separate

estate. We have found no such separate estate in this property, and it follows that the wife had no right to dispose of it by last will and testament. We are therefore of opinion the decrees of the chancellor and of the Court of Civil Appeals were erroneous and are reversed, and complainant's bill dismissed with costs.

STATE v. RICHARDS et al.

(Supreme Court of Tennessee. Sept. 30, 1908.)

1. COSTS (§ 216*)—TAXATION—RETAXATION—JURISDICTION OF COURT.

The taxation of costs is an incident to the suit, and the question of correcting the taxation is for the court which determines the suit, and, where a taxation is erroneous, the costs may be retaxed by such court at the instance of the party aggrieved.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 822; Dec. Dig. § 216.*]

2. COSTS (§ 315*)—TAXATION—RETAXATION—JURISDICTION OF COURT.

Shannon's Code, §§ 673, 4954, 7593, 7594, 7598, relating to the taxation of costs, committing to the criminal court and Attorney General in the first instance the taxation of costs in criminal cases with power of the Comptroller of the State and judge of the county court to correct bills of cost before payment, etc., provide a remedy for the correction and retaxation of costs in the criminal court of a county, and the chancery court should not exercise jurisdiction to correct and retax such costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1189-1191; Dec. Dig. § 315.*]

3. COSTS (§ 315*)—TAXATION—RETAXATION—JURISDICTION OF COURT.

Costs improperly taxed in the criminal court of a county and paid may be retaxed by that court, and the improper amount caused to be refunded, even at a subsequent term of the court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1189-1191; Dec. Dig. § 315.*]

4. CLERKS OF COURTS (§ 75*)—TAXATION OF COSTS—ACTIONS—ILLEGALLY COLLECTED—JURISDICTION OF COURT.

Acts 1903, p. 705, c. 258, § 80, authorizing revenue agents appointed by the Comptroller to sue "by motion or otherwise," delinquent revenue collectors or officers and sue for fees wrongfully certified and received, etc., does not confer any new jurisdiction on the chancery court, but only confers on the revenue agents the power to sue to recover delinquent revenue, and to recover costs illegally collected.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 75.*]

5. CLERKS OF COURTS (§ 75*)—ACTIONS—JURISDICTION—FRAUD.

Since the criminal court of a county is clothed with exclusive jurisdiction to retax costs in cases tried by it, and to pronounce judgment against the clerk and others for costs illegally taxed and collected, the chancery court will not assume jurisdiction of a suit for costs illegally collected by the clerk of the court on the ground of mistake or fraud.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 75.*]

6. EQUITY (§ 51*)—JURISDICTION—MULTIPLICITY OF SUITS.

Where the question of the illegality of costs taxed in the criminal court of a county may be

settled by motion in a few cases in such court, equity will not take jurisdiction to prevent a multiplicity of suits.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 167; Dec. Dig. § 51.*]

7. CLERKS OF COURTS (§ 75*)—RETAXATION OF COSTS—REPAYMENT OF COSTS ILLEGALLY PAID—ACTIONS.

Where the state seeks to recover of the clerk of the criminal court of a county and his sureties costs illegally collected by the clerk, a petition should be filed in the criminal court under Acts 1903, p. 705, c. 258, § 80, for an account and retaxation of all costs alleged to have been illegally collected.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 75.*]

8. CLERKS OF COURTS (§ 61*)—ACCOUNTING—RETAXATION OF COSTS—REPAYMENT OF COSTS ILLEGALLY PAID.

The question of the liability of the clerk of the criminal court of a county for fines, costs, and Attorney General fees collected and paid to the county trustee, instead of the State Comptroller, should be submitted to the criminal court, and might be embraced in a petition filed in the criminal court for the retaxation of the costs involved therein.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 61.*]

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Suit by the State against Jerome E. Richards and others. From a decree granting insufficient relief, both parties appeal. Reversed, and bill dismissed without prejudice.

Attorney General Cates and Carroll & McKellar, for the State. Fitzhugh, Biggs & Fitzhugh and Greer & Greer, for defendants.

MCALISTER, J. The object of this bill is to recover of the defendant, as clerk of the criminal court of Shelby county, and his official bondsmen, moneys alleged to have been illegally collected by said clerk from the state of Tennessee. It is charged in the bill that said Richards is indebted to the state of Tennessee in the sum of \$34,703.04, whereof \$32,066.79 had been collected by him from the Comptroller of the State upon illegal bills of costs, and that \$2,636.25 is due from him on account of state taxes, fines, and Attorney General fees which had been collected by him and not covered into the treasury of the state. It was further alleged: That the illegal cost bills covered a period extending from the January term, 1903, to and including the January term, 1906, in all nine terms of the criminal court of Shelby county, and that of the amount collected by defendant Richards on account of illegal cost bills, \$25,811, had been received by him where no valid judgment for costs therefor had been rendered against the state or return of nulla bona as required by law, although he, the said Richards, presented certificates to the Comptroller showing that such judgments and nulla bona returns had been made.

That, in order to validate said cost bills, the defendant, after he had collected the amount thereof as above set out, and at the September term, 1906, of said court, procured the entry in said court of nunc pro tunc orders or judgments, and thereby sought at said term of court to have judgment entered against the state for the amount of said bills of costs, when, in fact, no judgments had theretofore been entered so that said nunc pro tunc judgments were void.

That during the period covered by the nine terms of court referred to the defendant Richards collected and received the sum of \$11,112.10 in felony cases in which the state was not liable for costs in any event, and that he collected \$1,696.90 double costs in the same cases.

That the aforesaid sums were obtained from the state of Tennessee by the defendant Richards upon forwarding to the Comptroller of the State bills of costs purporting to be properly audited by the judge and Attorney General, under and within the statutory law, whereby it is made the duty of said judge and Attorney General to take the cost bills made out and to certify to the correctness after having examined, inspected, and audited the same, and the complainant avers that the aforesaid sum of \$25,811.60 was paid by the Comptroller of the State to said clerk upon the faith of the certificate of said officials and upon itemized cost bills made up as the law requires and upon a full reliance upon the fact that these cost bills were in all respects regular. That the items which appeared thereon were proper, and that there had been valid judgments taken in order to justify the certification of the said cost bills to the Comptroller from which to issue his warrants upon the treasury of the state, and complainant avers that, notwithstanding the aforesaid cost bills purporting to have been examined and audited and certified to, they were not based upon a valid judgment for costs against the state of Tennessee; for no valid judgment was ever taken upon an adjudication of insolvency or return of nulla bona as the basis of any one of the cost bills collected under the false certificates of the Attorney General and criminal judge. It was also alleged that the said Jerome E. Richards, as clerk of the criminal court of Shelby county, certified and received from it illegal fees, both in cases where defendants were convicted and where defendants were acquitted under the felony charges in said court; that the amount of said illegal fees so collected by said Richards aggregates the sum of \$11,112.10, whereof \$3,834 are improper items of charge against the plaintiff in not guilty felonies, and which said amount does not enter into the aforesaid sum of \$25,811.59, but in addition to that amount, with interest thereon, the complainant is entitled to recover of said Jerome E. Richards the further sum of \$3,834.60. It is further averred that the said sum of \$11,112.10 was col-

lected by the said Richards without rendering any service for which he would have been entitled to make a charge, and the items thereof, in part, consist of fees erroneously charged for "entering on record state motions," "entering on record of state orders," "orders remanding the defendant to jail," "judgments for costs," "entering judgment against the state for costs," "entering orders to turn over stolen property," "entering orders for state witnesses to report back," "entering orders to reset cases for trial," "entering orders continuing cases," no one of which items was the defendant Richards entitled to receive, for the very obvious reason that the record books of said court failed to show that proper entries were made, which is a condition prerequisite to the right of defendant to receive costs for the state of Tennessee, the plaintiff herein, and that the plaintiff is therefore entitled to have and recover of the said Richards, not only the aforesaid sum of \$25,811.59, but the additional sum of \$3,834.60. The complainant further avers that, in addition to the items charged for in the cost bills embracing what purports to be the aforesaid entries set forth in the preceding part of this paragraph, the defendant has charged illegal fees for copying indictments on the records and issuing subpoenas for witnesses, when, under the law, he was not required to issue the same, and that the defendant Richards has charged and collected other fees which he was not entitled to, all of which will be shown on the hearing hereof as a matter of record, not only of the criminal court of Shelby county, Tenn., but of the Comptroller of the State of Tennessee.

The complainant further avers that, in addition to the aforesaid sums, the defendant Jerome Richards is further indebted to the state in an amount aggregating many hundreds of dollars, the precise amount of which plaintiff is not able to state, because he has certified to and collected costs for himself and others wherein the defendants were acquitted of felony charges in cases other than cases of homicide, rape, robbery, burglary, arson, embezzlement, incest, bigamy, larceny, and assault with intent to commit murder; the state not being liable for costs in such cases.

It is further charged that the defendant is indebted to the complainant in the sum of \$1,696.90 and perhaps in an amount exceeding that sum on bills of cost certified by him, which he had previously collected, and covering also costs in cases where several defendants were jointly indicted in said court and no severance had as to the individual defendants, and while, under the law, he was entitled to certify and collect only one cost bill, he wrongfully certified and was paid a cost bill for each one of the individual defendants jointly indicted. The prayer of the bill is that:

"The court adjudge and decree that the

nunc pro tunc judgments ordered to be entered by the judge of the criminal court of Shelby county, Tenn., on the ——— day of September, 1906, by which it was sought to then take judgment over against the state for costs which accrued in cases of felony convictions, be declared void and set aside and for nothing held; that the court decree that the defendant Richards has collected of the complainant illegal and improper fees, and fees to which he was not entitled, to the amount of \$32,066.70; and that the court also decree that the defendant Richards has collected, or should have collected, state tax, state fines, and Attorney General fees, which amount to \$2,636.25, and which sums have not been paid to the complainant, and that judgment be rendered against the defendant and the United States Fidelity & Guaranty Company, surety, for the sum of \$15,000, the amount of the bond given by him as required by law."

On June 11, 1907, a demurrer was filed to the original bill, which was sustained by the chancellor as to all the demands made by the complainant, excepting the sum of \$2,636.25 sought to be recovered by the state on account of taxes, fines, and Attorney General fees, and, as to this latter item, the demurrer was overruled.

On August 31, 1907, the state was permitted to file an amended bill wherein the allegations of the original bill were reiterated and charges of fraud in the certification of said bills of costs were made with more particularity. The amended bill also exhibited transcripts of the bills of costs and other records illustrating the allegations of the amended bill. The demurrer to the original bill was refiled to the amended bill and was by the chancellor sustained except as to that portion of the bill charging an indebtedness of \$2,636.25 for state tax, fines, and Attorney General's fees already mentioned. Defendants thereupon filed an answer to that portion of the bill reserved by the chancellor, showing that the items charged consisted of fines and costs which had been paid or worked out by prisoners who had been sent to the county workhouse as provided by law. It was also averred in said answer that these fines and costs, when collected by the superintendent of the county workhouse, were paid over to the clerk of the criminal court, who, in turn, paid them over to the county trustee upon receivable warrants of the judge of the county court. An exhibit was filed with the answer showing the sum of \$2,332.25 as the total amount of fines and costs so collected. The answer denied any indebtedness to the state on account of any of said items, but averred that said amounts, excepting certain items therein enumerated, had been paid over to the trustee of Shelby county, Tenn., upon orders of the chairman of the county court, from time to time from the 1st day of September, 1902, until the 30th day of June, 1906. Defendants also filed as Exhibit

O a certificate and receipt duly signed by the chairman of the county court and the county trustee showing that the said amount of \$2,332.25 had been paid over to the county, excepting certain small items aggregating about \$250, which were fully explained in the answer. On the hearing the chancellor pronounced a decree on the bill and answer against the defendants for the sum of \$2,332.25, interest and penalties. The cause is before this court on the cross-appeals of the state and defendant. The state appealed from the action of the chancellor in sustaining the demurrer to the original and amended bills, and the defendants appealed from the decree of the chancellor wherein they were adjudged liable for the payment of \$2,332.25 on account of state fines, costs, etc., collected. We shall first notice the assignments of error filed on behalf of the state to the action of the chancellor in sustaining the demurrer to the original and amended bills. The grounds of the demurrer are thus summarized on the brief of learned counsel for the defendant:

"(1) Because said bill does not show that any effort was made in the suits wherein the improper cost bills were collected to have the same retaxed; and only in the court having original jurisdiction and cognizance of these matters was any right ever given to the complainant to collect or recover any of said illegal fees.

"(2) Because the said bill on its face shows that the amounts now claimed against Richards in the present suit were adjudged to be due him in the criminal court of Shelby county, Tenn., and said adjudication having been made in said court, and no motion having been made to retax said costs as provided by statute and no appeal having been taken therefrom, the same cannot be reopened in another forum, and the said cost bills retaxed therein.

"(3) Because it appears from the face of said bill that all the costs collected by the said Richards, and which are sought to be recovered in this cause, were paid to him upon certificates of the Attorney General and judge of the criminal court wherein said cases were tried, and after said cost bills had been examined and certified as required by law; and it is not averred in said bill that the Comptroller did not pay out said money to the said Richards upon said certificates.

"(4) Because the Comptroller of the State of Tennessee by law is made the judge of the correctness of all cost bills, and his decision upon the same is final, and not subject to be reviewed by the courts.

"(5) And, for further ground of demurrer, defendants state that this court has no jurisdiction to correct or pass upon judgments nunc pro tunc returned by a court of co-ordinate jurisdiction, where no allegation of fraud in the procurement of said judgment is made in the bill.

"(6) Because the allegations in said bill

are vague, indefinite, and uncertain in their nature, and insufficient to justify their specific recovery against the defendants.

"(7) Because it is not shown in said bill wherein and how judgment in said cases against the state of Tennessee were not valid, nor wherein nor how the Attorney General and the criminal judge certified false statements and had issued false certificates and in what respect the said certificates were false.

"(8) Because it appears from the face of said bill that all such amounts were collected from the state of Tennessee from proceedings in another court and in a manner pointed out by statute, and it does not appear that the state of Tennessee, which is a party to said suit, has ever by motion to retax the costs in said causes or otherwise, in said court, undertaken to correct any improper cost bills which may have been collected by the said Richards or to have the same corrected."

The first question to be determined on the assignments of the demurrer is in respect of the jurisdiction of the chancery court to entertain the present bill. The theory of the demurrer is that the present bill is brought for the retaxation of costs that were improperly and illegally taxed against the state by the attorney general and judge of the criminal court of Shelby county. It is claimed in the bill that these costs were not properly chargeable against the state, and were improperly paid by the Comptroller for the reason, first, that no judgment had been taken against the state for said costs on the return of a nulla bona as to the individual defendants. It is further claimed on behalf of the state that a portion of the costs so allowed and paid by the clerk were not a legal charge against the state under the provisions of what is known as the "Jarvis Law." Another reason assigned by the state is that some of these costs had already been collected by the clerk of the criminal court, and some other reasons are assigned why said costs were illegal and not collectible against the state. Our first inquiry is whether the chancery court has jurisdiction to entertain such a bill upon the allegations thus made and to grant the relief prayed. As early as the case of *Whitesides v. Rayle*, 3 Humph. 205, such jurisdiction was denied. In that case a bill was filed by Thomas Whitesides and others in the chancery court at Tazewell against Wm. Rayle, praying for the collection of a bill of costs in a suit at law between the defendant and complainants erroneously taxed. The defendant demurred to the bill, and the chancellor sustained the demurrer, and the complainant appealed to this court. The court, in part, said:

"It is possible that a case might exist in which, owing to the wrong or fraud of a party in a suit at law, a court of chancery might be clothed with jurisdiction to investigate, supervise, and correct the taxation of

costs. But so summary and so ample is the power of a court of common law over the subject that it is difficult to imagine even the existence of such a case. On the other hand, the rule and law of costs is so different in a court of chancery, and the taxation of them so foreign from the habits, studies, and jurisdiction of that court, that for it to take upon itself their adjustment and supervision would indeed be something novel and strange. Moreover, the taxation of costs in any court is but the incident to a suit in such court. There are the process, subpoenas, orders, rules, etc., and all the materials for the proper adjustment of the matter, and there, and there only, it is peculiarly proper that it should be left. How would or could the chancellor get properly before him all these materials? The thing is impracticable, not to say absurd. On grounds, therefore, the most obvious of public convenience, the mere incidental jurisdiction of correcting and adjusting costs, must be left in the forum which investigates and determines the principal matter, the suit itself. So strongly does this court adhere to this principle that it is a settled rule of practice here in chancery cases not to entertain jurisdiction for the purpose of correcting the most erroneous judgment on the subject of costs merely."

See, also, *Ross v. McCarty*, 3 Humph. 169.

In *State v. Goodbar*, 8 Lea, 451, the court said:

"The taxation of costs is an incident to a suit, and the jurisdiction of adjusting and correcting the taxation must be left to the forum which determines the suit. If the taxation be erroneous, the cost may be retaxed at the instance of the party aggrieved."

In *Troutt v. Railroad*, 97 Tenn. 364, 37 S. W. 90, it appeared that certain costs had been illegally taxed and allowed in the court below and this court on appeal was asked to correct the same, but it was held that this court was without jurisdiction unless "a motion has been made in the court below to correct the taxation, the opinion of that court had thereon, and the motion and judgment entered of record. The taxation of costs in the court below belongs to that court."

See *Arnold v. State*, 96 Tenn. 84, 33 S. W. 723; *Clark v. Stull*, 1 Shannon's Cases, 660.

It will be observed that the case of *State v. Goodbar* was decided after the passage of the act of 1877, which enlarged the jurisdiction of the chancery court, and yet the rule on this subject announced in *Whitesides v. Rayle*, supra, was followed. This line of cases seems to have settled the rule that costs are incident to a suit, and, if illegally or improperly taxed, a motion for correction must be made in the court that had jurisdiction of the suit. This rule would seem to be reinforced when we consider that the examination and certification of bills of costs in the criminal court is committed in

the first instance to the Attorney General and the judge of that court with a statutory power lodged in the Comptroller of the State and judge of the county court to review and correct such bills of cost so certified before payment. This matter having been especially committed to the judge and Attorney General of the criminal court, and there being an ample statutory remedy for the correction and retaxation of costs that have been improperly certified, it would seem clear that no such jurisdiction should be exercised by the chancery court.

See Shannon's Code, §§ 673-4954-7593-7594-7598.

It is argued, however, that the costs herein have already been collected, and that the statutory remedy embraced in the actions of the Code just cited refer to the correction of costs by motion for retaxation before they are paid. It is said in reply to that, that the state is bound to avail itself of its statutory remedies within a reasonable time, and it is also argued that, even if costs have been paid, they may be retaxed and corrected and caused to be refunded, even at a subsequent term of the court. This seems to have been held in the case of *Williams' Lessee v. Henderson*, 1 Overt. 424.

It is insisted, however, by the Attorney General that the jurisdiction of such a suit may be entertained by the chancery court by virtue of section 80, c. 258, p. 705, Acts 1903. That act provides, among other things, for the appointment by the Comptroller of three revenue agents for the state, and defines their duties. The particular language of the statute invoked in this case is as follows, viz.:

"They shall have the right to bring suit by motion or otherwise against any delinquent revenue collector or officer in the name of the state, upon order of the Comptroller, or upon their own motion, for any state, school, or county revenues collected and not reported by said officials, or any moneys, revenues, costs, or fees which have been wrongfully certified, received, disbursed or retained by said official or any moneys or revenues which were due the state or county."

In addition to this special act, it is said on behalf of the state that the bill may be retained under the inherent jurisdiction of the chancery court to correct mistakes of fact or to recover money procured to be paid through fraud of the defendant. The theory of the state is that the bulk of this money was paid by the Comptroller of the state under a misapprehension that a judgment had been pronounced against the state on a return of nulla bona against the defendants, and, further, that there were items embraced in said bills of cost which had been theretofore paid, and other items for which the state was not liable under the provisions of the Jarvis law. So far as the act of 1903 is concerned, it does not purport to confer

any new jurisdiction on the chancery court. It simply confers upon the revenue commissioners the power to bring suit to recover delinquent revenue and to recover costs illegally collected, by motion or otherwise. It cannot be supposed that the Legislature intended by the use of the word "otherwise" to confer a jurisdiction on the chancery court which had been uniformly denied by the decisions of this court. Nor is this a case in which the jurisdiction of the chancery court may be invoked on the ground of mistake or fraud, or to prevent multiplicity of suits. The remedy for the correction of these errors, as we have already held, is in the criminal court, where the suits were pending, and that court has ample jurisdiction to correct these bills of costs for mistake or fraud. It is not necessary that this acknowledged ground of equity jurisdiction should be invoked in this case, since the criminal court is clothed with exclusive jurisdiction to retax costs and to pronounce judgment against the clerk and others for costs improperly or illegally taxed and collected. Nor do we think a bill in equity is necessary to prevent a multiplicity of suits, since the questions presented might be settled by motion in a few cases in the criminal court.

The proper practice would be to file a petition against the clerk and his sureties in the criminal court, under section 80, c. 258, p. 705, Acts 1903, for an account and retaxation of all costs alleged to have been illegally collected.

We next proceed to notice the assignment of error filed on behalf of defendants to the action of the chancellor. The chancellor, as already stated, pronounced a decree against the defendants for the sum of \$2,332.25 for certain state fines, costs, and Attorney General's fees. The chancellor held:

"That the defendant Jerome E. Richards collected and paid over to the county trustee, under order of the chairman of the county court, certain sums, aggregating \$2,332.25, which had been collected on account of fines, costs, and Attorney General fees which should have been paid over to the Comptroller of the State instead of the trustee; that the payment by the clerk to the trustee was made in good faith, and, while the trustee is liable for the amount to the state, the court is of the opinion that the defendant is primarily liable therefor."

We are of opinion that this matter should also have been submitted to the criminal court and may be embraced in any petition which the complainants may see proper to file in the criminal court for the retaxation of the costs involved therein. In a word, the demurrer to the whole bill is sustained for want of jurisdiction in the chancery court to adjudicate the matters presented by the bill. It follows, therefore, that the decree of the chancellor against the clerk and his sureties for the sum of \$2,332.50 for

certain state fines, costs, and Attorney General fees is reversed, and the entire bill will be dismissed, but without prejudice to present all the matters embraced in the bill by petition or motion to the criminal court. The other matters of demurrer are not adjudicated.

SCHOOLFIELD v. COGDELL et al.

(Supreme Court of Tennessee. Sept. 30, 1908.)

1. MORTGAGES (§ 418*)—COMPELLING FORECLOSURE—RIGHTS OF CREDITOR.

A judgment creditor upon a return of nulla bona can by bill have a matured mortgage upon the debtor's land foreclosed without the mortgagee's consent, and have the surplus proceeds applied to the judgment.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1239; Dec. Dig. § 418.*]

2. MORTGAGES (§ 418*)—COMPELLING FORECLOSURE—SUPPLEMENTAL BILL—RIGHT TO FILE—DELAY.

On a bill to foreclose liens that surplus proceeds might be subjected to complainant's claim, leave to file an amended and supplemental bill showing the existence of other liens when the original bill was filed, and seeking to make the lienors parties, was properly refused, where leave was asked over two years after the original bill was filed and after a master's report of the incumbrances existing when the original bill was filed, and after a sale under the first mortgage was directed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1239; Dec. Dig. § 418.*]

3. MORTGAGES (§ 418*)—COMPELLING FORECLOSURE—SUPPLEMENTAL BILL—RIGHT TO FILE.

On a bill to foreclose liens that the surplus proceeds might be subjected to complainant's claim, leave to file an amended and supplemental bill, showing the existence of other liens when the original bill was filed, and seeking to make the lienors parties, was properly refused where the filing would have stirred up fresh litigation which would have delayed and embarrassed prior mortgagees in collecting their debts.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1239; Dec. Dig. § 418.*]

4. MORTGAGES (§ 186*)—FORECLOSURE—PRIORITIES.

Where, on a bill to foreclose liens that the surplus proceeds might be subjected to complainant's claim, it appeared that the owner's grantor was to pay prior mortgages out of the purchase money, and that the purchase-money note had never been paid, in fixing the priorities, it was proper not to deduct from the grantor's claim the amount of such mortgages.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 455; Dec. Dig. § 186.*]

5. MORTGAGES (§ 418*)—RECEIVERSHIP—RENTS—RIGHT TO.

That on a bill to foreclose liens that the surplus proceeds might be subjected to complainant's claim a receiver was appointed and rents impounded at complainant's instance does not give him priority in subjecting them to his debt; he having no lien on the property.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1239; Dec. Dig. § 418.*]

6. MORTGAGES (§ 548*)—FORECLOSURE—RENTS—RIGHT TO.

On a bill to foreclose liens that the surplus proceeds might be applied to complainant's claim, the rents were properly apportioned among the several lien creditors according to

their priorities, a subsequent mortgagee not being entitled to them where his trustee did not take possession of the land, and the deed of trust did not permit the trustee to collect the rents.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1566; Dec. Dig. § 548.*]

7. MORTGAGES (§ 176*)—PRIOR MORTGAGES—NOTICE TO TRUSTEE—EFFECT.

Notice to a mortgagee trustee of a prior unrecorded mortgage is notice to his principal.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 425; Dec. Dig. § 176.*]

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Bill by A. A. Schoolfield against Elizabeth Cogdell and others. From the decree, complainant and defendant L. L. Pearson appeal, and defendant F. C. Demuth assigns error. Affirmed.

Carroll & McKellar and Hubert Fisher, for complainant. R. M. Heath and Henry Craft, for defendants.

McALISTER, J. The original bill herein was filed on the 11th of June, 1903, for the purpose of rescinding a contract for the sale of a half interest in the growing timber on what is known as the "Pearson tract" of land on the ground of fraud. The bill alleged that W. E. Cogdell had pointed out timber as being on the land bought of Pearson which was not thereon, and that Schoolfield has paid \$1,000. He further alleged that L. L. Pearson had a lien on the land for about \$7,000 purchase money which would be due some time in December, 1905, and that a deed of trust had been given to secure the same. It was stated in the bill that various incumbrances which were enumerated were still outstanding against the property. It was claimed therein that Schoolfield was entitled to a rescission of the contract and to a lien on the land for the return of \$1,000 which he had paid to Cogdell. Complainant also asked for a decree foreclosing all the liens upon the aforementioned property, and to have the proceeds of sale applied in discharge of the indebtedness owing by the defendants in order of priority. It was stated in the bill that the corpus of the property is not sufficient to pay the entire indebtedness due, and that complainant is entitled to the appointment of a receiver to take charge of and rent out the property pendente lite, and to impound the rents and property. The chancellor on the pleadings and proof pronounced a decree in favor of the complainant, Schoolfield, and against the defendants W. E. Cogdell and Elizabeth Cogdell for the sum of \$1,060, but held that no lien existed in favor of the complainant for satisfaction of this judgment on the land purchased by L. L. Pearson of the defendants. The bill, as already stated, averred the insolvency of Cogdell and wife, and sought, among other things, a foreclosure of all the liens upon the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

property known as the "Pearson Tract." A receiver was appointed, who was directed to rent out the Pearson tract and collect the rent. The land was rented out by the receiver for the year 1906, and rents were collected by him approximating \$750 on that year. It is also shown that \$400 is in the hands of the receiver arising out of the rents for 1905. It appears that while the Pearson land was in the custody of the court through its receiver, R. M. Heath, trustee in the Pearson mortgage, at the instance of Pearson, sold the land, comprising about 653 acres, and it was purchased by Pearson. Pearson thereafter filed a petition, claiming the rents in the hands of the receiver upon the theory that the rents were collected after his purchase. The chancellor further decreed that the costs of the receivership and other costs were payable out of the rents, and directed that the residue be paid over to said Pearson. As already stated, the chancellor denied the right of the complainant to the lien on the land or any part of it, and also decreed that he was not entitled to any portion of the rents. This decree was pronounced on March 19, 1907, and, from so much of the decree as denied complainant a lien on the land and any portion of the rents impounded by him, complainant appealed to the Supreme Court, and assigned the following errors:

"(1) In not affirming that he was entitled to a lien upon the land upon granting a rescission of the contract.

"(2) That it was error not to have ordered a reference to ascertain the amount of the outstanding debts secured by the several mortgages described, and, after judicially ascertaining the several amounts, to have decreed a sale of the several tracts of land pursuant to the prayer of the bill and in accordance with the practice of the court of chancery to have adjudged the priorities among the lienors; and

"(3) In not affirming that the rents accruing subsequent to the appointment of the receiver were applicable to the debt of the appellant against Cogdell and so decreeing."

This court at the April term, 1907, entered the following decree on the errors assigned, viz.:

"(1) That the sale of the lands described in the original bill of A. A. Schoolfield v. Elizabeth Cogdell and Others, by R. M. Heath as trustee, in a conveyance made to him in said lands for the benefit of L. L. Pearson, is null and void, the said lands being at the time of the sale made without the permission of the court, and the decree of the chancellor approving said sale and refusing said land to be sold in these causes is hereby reversed.

"(2) That these causes be remanded to the chancery court of Shelby county, and that the amounts of the several incumbrances upon said land existing at the time the bill of A. A. Schoolfield was filed be ascertained by a proper reference or otherwise, that the said lands then be sold under a proper de-

cree to be entered in said court for that purpose, and that out of the proceeds of said sale the said several incumbrances upon said lands be paid in the order of their priority, to be decreed by the chancellor, and, if a surplus remain, that the same be applied to the satisfaction of the decree granted in said court in favor of A. A. Schoolfield and against Elizabeth Cogdell and W. E. Cogdell.

"(3) That the decree of the chancellor disposing of the rents of the said lands while in the custody of the court in these causes be reversed, and that he make such proper disposition of the same in payment of the costs of these causes and the liabilities of the defendants, W. E. and Elizabeth Cogdell, as may be meet and proper under the adjudications of this court and the equities and rights of the parties in such cases, except that no part of the rents of 1906 will be applied to the payment of the compensation of the receiver for 1905.

"(4) In all other respects the decrees of the chancellor are affirmed.

"(5) The defendant L. L. Pearson will pay all the costs of this appeal for which execution will issue against him and G. H. Gilham, security on his bond for the prosecution of his appeal."

On June 14, 1907, after the remandment of the cause to the chancery court of Shelby county, a decree of reference was entered by counsel for the complainant, directing the master "to ascertain and report the amounts due upon the several incumbrances upon the said land, all of which are set forth in the pleadings herein, and report the same to the court."

It seems, however, that no steps were taken to execute this order of reference, and on September 2, 1907, L. L. Pearson applied to the chancery court for permission to sell under his deed of trust. Accordingly a decree was entered September 2, 1907, allowing such a sale to be made, and appointing R. M. Heath special commissioner to make it. The decree, however, recites:

"The clerk and master will execute the reference hereinbefore ordered, but the sale allowed and directed will not be delayed or suspended by the said reference, as each may proceed independently of the other, and all rights will be hereinafter adjusted by proper decrees."

It appears that a sale of the land was made by R. M. Heath, special commissioner, October 15, 1907, to L. L. Pearson, for \$1,000 and reported to the court October 29, 1907. On January 7, 1908, the clerk and master filed his report under the order of reference made June 14, 1907, showing the following debts and incumbrances, as well as the order of priorities, viz.:

Sarah Rickett.....	\$1,568 00
Goodman Bros.....	2,243 00
L. L. Pearson.....	7,105 00
F. C. Demuth.....	1,063 65
Mrs. F. P. Haberling.....	548 80
A. A. Schoolfield.....	1,110 00

The clerk and master also mentioned a trust deed to R. M. Heath and Geo. H. Gilham, trustees, to secure L. L. Pearson the sum of \$700, saying it was dated and recorded after the Schoolfield bill was filed, and for that reason was not included in the incumbrances reported. The clerk and master also reported that L. L. Pearson was liable for the Sarah Rickett and Goodman Bros. debt. The case coming on to be heard, the chancellor in memorandum opinion held:

"(1) That Mabel Haines (meaning Mabel Haines Francis) could file her petition, and have it reported on instantler.

"(2) The deed of trust securing F. C. Demuth was held inferior to the deed of trust securing L. L. Pearson.

"(3) The Rickett and Goodman Bros. deeds of trust were held to be superior to L. L. Pearson's deeds of trust.

"(4) The rents in the hands of the receiver, less compensation of the receiver, will be applied on claims according to priority like proceeds of land. Pearson will account in same way for rent of 1907.

"(5) The report of the clerk and master, except as indicated in memorandum opinion, was to be confirmed.

"(6) The sale made by R. M. Heath, special commissioner, will be set aside and a sale ordered free from debts—that is, to satisfy all claims according to priority—R. M. Heath to be again appointed special commissioner to make the sale.

"(7) There is no necessity for the amended and supplemental bill of Schoolfield, and the application to file same is denied."

A decree was accordingly entered March 30, 1908, setting aside the sale by R. M. Heath, commissioner, made October 15, 1907, "as the reference had not been executed at the time such sale was made." The decree reappointed R. M. Heath special commissioner, and directed him to again sell the land for cash. The decree of the chancellor fixed the order of priority of the respective incumbrances as fixed by the clerk and master, which have already been stated. This decree further stated that W. E. Cogdell claimed that the debt secured by the A. B. Pittman deed of trust had been paid, but that Mabel Haines Francis claimed such debt was still due her, and that neither Mabel Haines Francis nor A. B. Pittman, trustee, were parties to the suit, and that said Mabel Haines Francis had withdrawn her application to file a petition. It is further stated in this decree that the Walter A. Woods Mowing & Reaping Company in their bill claimed a right to subject the land to two judgments of \$471.44 and \$240.89, respectively, but that such company was not a party to the suit herein. The decree further held that none of the beneficiaries or trustees in the Sarah Rickett trust deed, Goodman Bros. trust deed, or A. B. Pittman trust deed were parties to this litigation. It was

further held that A. A. Schoolfield's application to file an amended and supplemental bill, "if ever proper, was made too late. The same was not contemplated by the Supreme Court of Tennessee, and the results aimed at have been accomplished by the reference herein." The decree further held that the trust deed securing F. C. Demuth was held to be secondary to the deed of trust securing \$7,105 to L. L. Pearson. The decree directed the special commissioner in selling the land to announce at the sale the order of priority of the six specified claims aggregating \$13,638.45. It was further decreed that, if L. L. Pearson became a purchaser at such sale, he was not to be required to pay any cash unless his bid was greater than the amount of his claim, \$7,105, except such cash necessary to pay proper costs of sale. The \$7,105 could be used in discharging purchase money; Pearson assuming payment of the Sarah Rickett debt of \$1,568 and the Goodman Bros. debt of \$2,243. It was further decreed that, while the Cogdells owed L. L. Pearson \$810 and \$700 in addition to the \$7,105, Pearson could not use such debt as a part of the purchase money of the land if bought by him.

It was further decreed that any purchaser of the land would have to take same subject to the rights of Mabel Haines Francis claiming under the A. B. Pittman trust and to the rights of the W. A. Wood Mowing & Reaping Company, if such parties had any rights. The decree held that such parties were not parties hereto, and that their claims which were contested could not be determined herein. The decree further held that the rents of 1906 in the hands of the receiver and the rents of 1907 collected by L. L. Pearson "will be treated as a fund to pay debts of W. E. Cogdell and Elizabeth Cogdell, and will be applied to payment of such debts provided for in this decree. Such rents, however, will not be used in discharging the Sarah Rickett debt and Goodman Bros. debt, as such debts will have to be assumed by any purchaser of the lands. Such rents will be used in discharging anything that may remain due on L. L. Pearson's \$7,105, and after sale made as ordered, and any surplus may be used in paying successively and according to priority F. E. Demuth, Mrs. F. B. Haberling, and A. A. Schoolfield. The proper compensation of the receiver will be first deducted out of the rents in his hands."

L. L. Pearson excepted to all the parts of the decree setting aside the sale made to him made October 15, 1907, and decreeing that the rents of 1906 and 1907 should be used in paying debts as decreed. He claimed that the sale of October 15, 1907, should be confirmed, and the rents of 1906 and 1907 be adjudged to belong to him to be applied on the debts of \$810 and \$700 and \$80 due him from the Cogdells. The said L. L. Pearson then

prayed an appeal from such parts of said decree and from that part of the decree charging him with costs to the next term of the Supreme Court, which was granted.

A. A. Schoolfield also appealed from the foregoing decree, as well as from the order denying him the right to file an amended and supplemental bill, and that part of the decree applying to the rents and profits, and adjudging costs against him. F. C. Demuth has also sued out a writ of error. The assignments of error filed on behalf of A. A. Schoolfield are as follows:

"(1) The chancellor erred in declining to permit the amended and supplemental bill to be filed by the plaintiff in order to bring before the court the parties owning the mortgage debts secured by the incumbrances upon the property anterior to the Pearson title.

"(2) The chancellor erred in decreeing a sale of the property under the Pearson mortgage.

"(3) The chancellor erred in not charging the defendant Leland L. Pearson with

"First. The rents which he received while a mortgagee in possession under a void sale.

"Second. With the prior incumbrances to the amount of the indebtedness (a) to Sarah Rickett; (b) to Goodman Bros.; (c) the indebtedness due to the Walter A. Wood Mowing & Reaping Company.

"(4) The chancellor erred in not applying the rents in the hands of the receiver to the indebtedness due to the complainant.

"(5) The chancellor erred in taxing the plaintiff with any costs conditional or otherwise."

The first assignment of error is based upon the refusal of the chancellor to permit complainant to file an amended and supplemental bill to bring into the record the incumbrances upon the property that were prior to the title of the defendant Leland L. Pearson, who had conveyed the property to Elizabeth Cogdell under a warranty deed. It is said that the filing of an amended and supplemental bill was absolutely necessary in order to ascertain the surplus in the property and subject it to the payment of complainant's debt. It is said that, although prior lienors might object to the foreclosure of their liens before they were matured, yet it nevertheless was a proper proceeding to bring them before the court—citing *Cloud v. Hamilton*, 3 Yerg. 81.

The rule is well settled in this state that a judgment creditor upon a return of nulla bona has the right by a bill in chancery to have a mortgage upon the land of the judgment debtor which has matured foreclosed, and, without the consent of the mortgagee, to have the land sold, and the proceeds applied, first, to the payment of the mortgage debt, and the surplus to his judgment. *Fulghum v. M. C. Cotton*, 6 Lea, 590; *Craigsmiles v. Hays*, 7 Lea, 724; *Schultz v.*

Blackford, 9 Lea, 434; *Wessel v. Brown*, 10 Lea, 705; *Bridges v. Cooper*, 98 Tenn. 394, 39 S. W. 723; *McClurg v. McSpadden*, 101 Tenn. 436, 47 S. W. 698.

While the complainant had no lien on the land involved in this controversy, nevertheless, as a judgment creditor he was entitled under the well-settled practice to bring before the court all lienors holding incumbrances prior to the Pearson mortgage, and as to all such matured mortgages to have a foreclosure and sale of the property with a view of reaching any surplus arising therefrom after the satisfaction of the mortgage indebtedness according to priorities. This principle was applied on the former hearing of this case in this court, and it was decreed:

"That these causes be remanded to the chancery court of Shelby county and the amounts of the several incumbrances on said lands existing at the time the bill of A. A. Schoolfield was filed be ascertained by proper reference or otherwise."

The original bill herein was filed June 15, 1905, and stated a number of mortgages outstanding on this property and made the trustees parties defendant and in some instances brought the mortgages before the court. After the remandment of the cause by this court on May 28, 1907, the complainant on the 15th of October, 1907, made application to the chancellor to file an amended and supplemental bill bringing before the court, not only the incumbrancers whose mortgages, deeds of trust, and liens were shown in the original bill, but alleging the existence of other mortgages and liens at the date of the filing of the original bill and seeking to make such lienors parties defendant. In some instances the liens of those incumbrancers were claimed to have been paid and settled, and as to them the amended and supplemental bill would have precipitated fresh litigation. As already seen, this amended bill was not sought to be filed until more than two years had elapsed since the filing of the original bill, nor was it presented in the chancery court until more than four months after the remandment by this court, and not until the chancellor had ordered a reference and a report had been made of the incumbrances on the land in controversy in existence at the date of the filing of the original bill. Indeed, the application to file the amended and supplemental bill was not made until the chancellor had pronounced a decree on the 15th of October, 1907, directing R. M. Heath as special commissioner to sell the land under the first mortgage. We are therefore of the opinion that the chancellor properly refused the application of complainant to file an amended and supplemental bill, because, first, of the great delay in presenting it; secondly, it was calculated to stir up fresh litigation as to contested claims of F. C. Demuth, the Wood Mowing & Reaping Company, and Mabel Haines Francis, and

thus delay and embarrass prior mortgagees in the collection of their debts. In *Fulghum v. Cotton*, supra, it was said:

"While we are of opinion that the mortgagee can have no just ground of complaint at a decree of sale after the maturity of the mortgage and in accordance with its terms, yet whether he shall be delayed and prevented from selling is a wholly different question. It would be manifestly unjust where a mortgagee is secured by a prior mortgage, as to which no dispute exists between him and the mortgagor, that the former shall be delayed in his remedy by litigation between the mortgagor and other creditors as to which he has no interest. We should say that in general the mortgagee ought not to be thus delayed and embarrassed, but should be allowed to proceed at once to sale, either under the power of his mortgage or by decree, leaving the other parties to litigate over the proceeds. * * * We think a mortgagee would have a much stronger ground to complain at being thus delayed and embarrassed than in being forced to a sale," etc.

The third assignment of error is based upon the action of the chancellor in fixing the amount of the Pearson mortgage, and in disposing of the rents that Pearson had received. The chancellor fixed the Pearson incumbrance at the sum of \$7,105, with interest from the first day of January. It is insisted on behalf of the appellant complainant that the Sarah Rickett mortgage due January 1, 1906, amounting to the sum of \$1,568, and the Goodman Bros. mortgage, amounting to \$2,243, together aggregating the sum of \$3,811, should be deducted from the Pearson debt, for the reason that Pearson undertook and agreed to pay off these incumbrances. This subtraction would reduce the amount of Pearson's indebtedness to \$3,294. It appears from the bill that complainants admit that the sum of \$7,105 was due Pearson on his mortgage. If Pearson assumed the payment of the Sarah Rickett and Goodman Bros. indebtedness, it is also shown that the Cogdells were to pay Pearson the sum of \$7,105, the purchase money of said land, and out of that purchase money Pearson was to pay the Sarah Rickett and Goodman Bros. indebtedness. The Cogdell note to Pearson for purchase money has never been paid.

The fourth assignment of error is that the chancellor erred in not applying the rents in the hands of the receiver to the indebtedness due the plaintiff. When this cause was heard at the last term, the decree of the chancellor in the disposition of the rents was reversed, and it was ordered that he make such proper disposition of the same in payment of the costs of these causes and the liabilities of the defendants W. E. and Elizabeth Cogdell as may be meet and proper, except that no part of the rents of 1908 will be applied to the payment of the compensation of the receiver for 1905. On the last hearing, after the re-

mandment of the cause, the chancellor decreed:

"That the rents for the year 1906 in the hands of the receiver and the rent of the same lands for 1907 collected by L. L. Pearson will be treated as a fund to pay the debts of W. E. Cogdell and Elizabeth Cogdell, and will be applied to payment of such debts provided for in such decree. Such rents will not be used, however, in discharging the Sarah Rickett \$1,568 and Goodman Bros. \$2,243 debts, as such debts will have to be assumed by any purchaser of the lands. Such rents will be used in discharging anything that may remain due on L. L. Pearson's \$7,105 debt after sale made as ordered, and any surplus be used in paying successively according to priority F. C. Demuth, Mrs. E. P. Haberling, and A. A. Schoolfield."

It is contended that the chancellor erred in not applying the rents in the hands of the receiver to the indebtedness due the complainant, Schoolfield. The basis of this contention is that the receiver was appointed and the rents impounded at the instance of the appellant Schoolfield, and that, therefore, he is entitled to priority in subjecting them to the satisfaction of his debt. We do not concur in this contention. The complainant had no lien on the property involved, and was therefore not entitled to assert a prior lien on the rents of the property. An examination of our cases will show that no bill has been maintained to impound rents and subject them to the satisfaction of the indebtedness of a single contract creditor or judgment creditor with no lien on the specific property.

This principle is illustrated in the case of *Moore v. Knight*, 6 Lea, 438, which was a case involving the vendor's lien, and where rents were sought to be subjected to the satisfaction of unpaid purchase money. Said the court:

"The true ground on which to rest the rights of the vendor are that he has primarily the security of the land for the payment of his debt. If this is not sufficient, after failure of payment by the vendee, and it is shown, either by allegation in the original bill or during the litigation to enforce the lien by petition or application to the court, verified by affidavit, that probably the primary security is insufficient, then when he has retained the legal title he may have a receiver appointed and appropriate the rents to the payment of his debt as an incidental part of his security."

We therefore hold that appellant Schoolfield is not entitled to priority in satisfaction of his claim out of the rents.

It is insisted on the appeal of Pearson that he is entitled to have these rents applied, not to the debt of \$7,105, secured by the Cogdell deed of trust, but that they should be applied to the satisfaction of later deeds of trust executed by the Cogdells to secure the \$810, \$700, and \$80 debts due to Pearson from

Cogdell. In *Cowan, McClung & Co. v. Gill*, 11 Lea. 688, the following general rules were recognized as governing the appropriation of rents:

"(1) That 'a trustee holding the legal title to land under a deed of trust to secure creditors, but not in possession, is not entitled to the rents, nor can the same be attached by the beneficiary for the payment of his debt.'

"(2) That 'rents accruing after execution of the mortgage, and before sale, in absence of contract as to same belong to mortgagor.'

"(3) That in Tennessee the mortgage is always treated as a mere security for the debt, and, when the mortgagee is out of possession, it is the corpus of the property, not its rents and profits, which constitute the fund for the satisfaction of the debt.

"(4) That a mortgagee has no specific lien upon the rents and profits of the mortgage land, unless he has in the mortgage stipulated for a specific pledge of them as part of his security."

"(5) 'The general rule is that the mortgagee as against the mortgagor in possession, or, those deriving title under him subsequent to mortgage, is not entitled to a receiver of rents pendente lite.'"

In *Lincoln Savings Bank v. Ewing*, 12 Lea, 598, the court said:

"In this state it has been invariably held that the legal title to the property conveyed rents in the mortgagee, and he is entitled to the immediate possession unless the mortgage otherwise provides."

In *Reed Fertilizer Company v. Thomas*, 97 Tenn. 481, 37 S. W. 221, it was said:

"While the instrument does not expressly state who shall have the rents of the real estate during the two years delay, yet we think a fair construction of the instrument is that these rents should go to the trustee just as the growing crops are directed to go. In the absence of any provision for possession, it passes, with the execution of the instrument, to the grantee." *Reeves v. John*, 95 Tenn. 434, 32 S. W. 312.

"But we think the fair and proper construction of this instrument is that the subsequently accruing rents during the two years' delay passed, like the crops then growing, to the grantee, the grantor remaining in possession as the tenant of the trustee, and responsible to him for the rental proceeds."

Applying these general principles to the facts of this case, it appears that the trustee of Pearson did not take possession of the land involved at the date of the execution of the deed of trust by Cogdell and wife, and that being so, and nothing appearing in the instrument indicating an intention to permit the trustee to collect the rents, it follows that the rents of the property belonged to the mortgagor or grantor Cogdell and wife. But since those rents have been impounded by the court they are now held as a fund for the satisfaction of the claims of creditors primarily who have liens on the

land. The chancellor apportioned these rents among these several lien creditors according to priorities, and held that complainant Schofield should not participate in such rents until the satisfaction of these prior lienors. We think there was no error in this disposition of the rents by the chancellor.

We have considered the other errors assigned by Pearson, and find none of them well taken.

The last matter to be noticed comes up on the writ of error sued out on behalf of F. C. Demuth. It appears that on December 21, 1904, W. E. Cogdell and his wife, Elizabeth Cogdell, executed a deed of trust to G. H. Gilham, trustee, which was filed for registration December 22, 1904, and duly recorded. This deed of trust was executed to secure the payment of a note for the sum of \$900 due F. C. Demuth for money borrowed of him by the Cogdells. The Pearson deed of trust executed by W. E. Cogdell and his wife, Elizabeth Cogdell, to R. M. Heath and G. H. Gilham, trustees, to secure a note for \$6,000 due L. L. Pearson, was dated December 7, 1904, and was not filed for registration until January 25, 1905. It thus appears that the trust deed in favor of Pearson, though executed at a date prior to the execution of the trust deed made to secure Demuth, was not filed for registration until the Demuth deed of trust had been recorded for more than a year. The chancellor was of opinion, and so decreed, that the Pearson deed of trust, though recorded subsequently to the registration of the Demuth deed of trust, was entitled to priority, for the reason that George H. Gilham, trustee for Demuth, had notice of the execution of the Pearson deed of trust when he became trustee for F. C. Demuth. In the argument submitted in this court on behalf of the priority of the Demuth mortgage it is denied that Gilham had any knowledge of the existence of the trust deed to secure Pearson prior to the execution of the Demuth deed of trust. We think an examination of the deposition of Gilham will show that he had knowledge of the unrecorded mortgage executed by Cogdell and wife to Pearson before the \$900 loan was made by Demuth. Moreover, Gilham testified:

"I am sure at the time I gave Mr. Demuth all the information I had regarding the title."

W. E. Cogdell also testified that F. C. Demuth, before he loaned the \$900 debt, was informed of Pearson's unrecorded deed of trust.

It is certain on this record that Geo. H. Gilham, trustee for F. C. Demuth, when he accepted the trusteeship had notice of the existence of the prior unrecorded mortgage of L. L. Pearson. It was held in *Myers v. Ross*, 3 Head, 59:

"If * * * the agent or trustee has notice of the prior incumbrance or conveyance, it is notice to the principal."

In that case notice of a prior incumbrance-

had been communicated to John Netherland and Chas. J. McKinney. Netherland and McKinney were made trustees in a deed of trust securing a bank. The court said:

"They [the trustees] no doubt believed at the time, as did Ross himself, that he could in a short time adjust the debt with Myers; but this cannot impair the legal effect of the notice. It is difficult to perceive how the beneficiary in a deed of trust can claim the advantage of its provisions without being effected with a notice to the trustees of a prior incumbrance."

The authority of this case has been challenged by counsel, and we are earnestly asked to overrule it. This case has been several times cited in subsequent cases, and especially in the case of *Robinson v. Owens*, 103 Tenn. 91, 52 S. W. 870.

There is no error in the decree of the chancellor, and it is in all respects affirmed.

MATTOX v. CITY OF BRISTOL.

(Supreme Court of Tennessee. Oct. 31, 1908.)
COURTS (§ 246*)—JURISDICTION—COURTS OF APPELLATE JURISDICTION.

Under Acts 1907, p. 233, c. 82, § 7, declaring that the jurisdiction of the Court of Civil Appeals shall extend to all cases brought up from the chancery courts, except cases in which the amount involved exceeds \$1,000, and cases involving the constitutionality of statutes, contested elections for office, state revenues, and ejectment suits, the Court of Civil Appeals, not the Supreme Court, has jurisdiction of an appeal from a decree adjudging the rights of the parties in a suit by a riparian owner to restrain the diversion of water from a stream on the ground that it would materially impair the operation of his mill.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 246.*]

Appeal from Chancery Court, Sullivan County; Hal. H. Haynes, Chancellor.

Bill for injunction by John H. Mattox against the City of Bristol. From the decree, complainant appeals, and defendant moves to strike the cause from the docket on the ground that the Court of Civil Appeals, not the Supreme Court, has jurisdiction. Motion granted.

William R. Page, Page & Fulkerson, John P. Smith, and Jerome Templeton, for appellant. A. B. Whiteaker and Joseph H. Burrow, for appellee.

NEIL, J. This case is before the court on motion to strike from the docket, because the jurisdiction to determine it is in the Court of Civil Appeals, and not in this court.

The bill alleges, in substance, that the complainant is the owner of a mill located on Sinking creek, in Sullivan county, on land belonging to him; that the defendant city is the owner of one of the main sources of Sinking creek, and is a riparian proprietor above complainant's mill, and is engaged in

the construction of a system of waterworks for the purpose of supplying the inhabitants of the city with water, and is now laying a pipe from one of its old water mains to the chief source of Sinking creek preparatory to the diversion of more than two-thirds of the volume of the waters of the creek, and that this water, after having been so diverted, will not be returned to the stream before it reaches the property of the complainant; and that such diversion will very materially impair the operation of his mill, and greatly lessen its value. The prayer of the bill is for a perpetual injunction to restrain the threatened action of the defendant.

The defendant answered, and admitted that it was engaged in the erection of a system of waterworks for the benefit of its citizens, and that it had purchased certain water rights at the source of Sinking creek from owners there, and was about to divert a portion of the water, but averred that a sufficiency would be left in the stream to operate complainant's mill, and denied that he would be injured by the diversion. The chancellor rendered a decree adjudging the rights of the parties, from which decree the complainant prayed, and obtained, an appeal to this court.

We think the motion should be sustained. By section 7, c. 82, p. 233, Acts 1907, it is provided that the jurisdiction of the Court of Civil Appeals shall extend to all cases brought up from court of chancery, except cases in which the amount involved, exclusive of costs, exceeds \$1,000, and cases involving the constitutionality of the statutes of the state, contested elections, state revenues, and ejectment controversies. It is further provided that, in all cases in which jurisdiction is conferred by the act upon the Court of Civil Appeals, appeal shall be taken directly to that court. The present controversy does not fall within either of the excepted classes, and the jurisdiction is therefore in the Court of Civil Appeals.

DUTTON et al. v. MAYOR AND ALDERMEN OF KNOXVILLE.

(Supreme Court of Tennessee. Oct. 31, 1908.)

1. MUNICIPAL CORPORATIONS (§ 616*)—ORDINANCES—VALIDITY—PROTECTION FROM FORESTALLING.

Under Knoxville City Charter (Acts 1907, p. 755, c. 207), giving the city power to regulate the inspection of provisions, to restrain and punish forestalling and regrating of provisions, and to establish and regulate markets, the city had power to prevent the unlawful raising of prices of produce through forestalling by passing an ordinance prohibiting the hawking from wagons of fruit, vegetables, or poultry by others than those raising their own produce.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1356; Dec. Dig. § 616.*]

2. WORDS AND PHRASES—"FORESTALLING."

"Forestalling" consists of buying victuals on their way to market before they reach it, with intent to sell again at a higher price.

3. WORDS AND PHRASES—"REGRATING."

"Regrating" is the buying of corn or other dead victual in any market and selling it again in the same market.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6035.]

4. MUNICIPAL CORPORATIONS (§ 626*)—ORDINANCES—VALIDITY—UNLAWFUL DISCRIMINATION.

The ordinance was not invalid for unlawful discrimination, since those prohibited from selling belonged to a distinct class from those permitted to sell, the first being those who would violate the law by forestalling and regrating the market, and the others producers of provisions who would sell direct to consumers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1380; Dec. Dig. § 626.*]

5. MUNICIPAL CORPORATIONS (§ 592*)—ORDINANCES—VALIDITY.

The ordinance was not inoperative because the state and county had granted hucksters licenses to those prohibited from hawking in the city, since the licenses would not authorize the licensees to violate a city ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. § 592.*]

Appeal from Chancery Court, Knox County; Joseph W. Sneed, Chancellor.

Bill by H. W. Dutton and others against the mayor and aldermen of Knoxville to restrain the execution of an ordinance. A demurrer to the bill was sustained, and complainants appeal. Affirmed.

Jno. W. Green and F. M. De Armond, for appellants. J. Pike Powers, Jr., for appellees.

NEIL, J. The complainants charge in their bill that they are hucksters, each engaged on his own account in selling from wagons direct to consumers in the city of Knoxville vegetables, butter, eggs, poultry, fruit, and other products of the farm, garden, and orchard; that each has a license from Knox county authorizing him to carry on the trade of a huckster, and has paid to the county the tax fixed by the Legislature for carrying on business of this character; that each is a resident, citizen, and taxpayer of Knox county; that all of the complainants have been engaged in the business referred to for a long period of time, and many of them for years; that this business constitutes their only means of livelihood.

It is further alleged that the complainants buy the articles thus handled by them sometimes direct from the producer, and sometimes on the market; that they do not raise the articles themselves.

It is further alleged that the city of Knoxville affords the principal and practically the only market for the sale of their goods; that, when they took out their licenses from the county court of Knox county, they did so

with a view to, and for the purpose of, selling to the people of the city of Knoxville: that a business of this character has been carried on, not only by themselves, but by others for years in the city of Knoxville without arrest.

It is further alleged that the city refused to permit them, or any of them, to carry on the business referred to inside the city limits; that whenever one of complainants begins to sell, or to offer his goods for sale, he is required to cease selling, and, if he persists, he is arrested; that complainants have offered to pay the city authorities, and have tendered to them money to pay for a huckster's license, and not only so, but have agreed to pay any reasonable tax the city might require of them; that the city, however, has refused to accept their money, or to issue licenses to them, and has warned complainants that, if they persist in selling, they will be arrested, and that some of the complainants have been arrested and fined: that the result of this condition of affairs is that the complainants' business has been destroyed, and they have lost their occupation and means of livelihood.

It is further alleged that the defendant, while refusing to permit the complainants to carry on the trade of hucksters inside the city limits, permits any person who grows his fruit or vegetables or raises his poultry or other produce on his own land to carry on the trade of a huckster from wagons in the city of Knoxville without license, and without hindrance.

It is further alleged that chapter 207, p. 755, Acts 1907, incorporating the city of Knoxville, expressly confers the power upon the city to license hucksters, hawkers, peddlers, grocers, merchants, etc.

It is further alleged that allowing persons who raise their own produce to sell the same from the wagons without license, and refusing to allow persons who do not raise the produce which they offer for sale the right to sell from their wagons without license, is an unlawful and unjust discrimination between the complainants and the citizens last referred to.

It is further alleged that such ordinance of the city is void as in violation of the Constitution of this state, and of the United States.

Thereupon the complainants asked for, and obtained an injunction to restrain the execution of the ordinance under which the city is acting.

To this bill the defendant city filed a demurrer, making several points, but we need only notice the following:

That the charter referred to in the bill gave to the city the power "to regulate the inspection of milk, butter and lard, and other provisions and fish and vegetables; to restrain and punish forestalling and regrating of pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

visions; to establish and regulate markets," and that the right exercised by the city falls within the provisions of the charter just quoted, particularly within the provision against "forestalling and regrating," that the complainants and persons who raise their own produce are not in the same class, but are in a different class, and a discrimination between the two is reasonable and natural.

We think the chancellor acted correctly in sustaining the demurrer.

The city had the right under its charter to protect its inhabitants against the unlawful raising of the price of the necessities of life, such as would naturally result from the practice of forestalling the market by persons who would buy from the producers of market products for the purpose of resale within the city. "Forestalling" is defined: "Buying vituals on their way to market before they reach it, with intent to sell again at a higher price." 1 Bouv. L. Dict. p. 677. "Regrating" is the buying of corn or other dead victual in any market, and selling it again in the same market, since this enhances the price of the provisions, as every successive seller must have a successive profit. 4 Black, St. Com. In *Nightingale's Case*, 28 Mass. 168, an ordinance was sustained reading as follows: "That no inhabitant of the city of Boston, or any town in the vicinity thereof, not offering for sale the produce of his own farm, or of some farm in his neighborhood, shall at any season of the year, without permission of the clerk of Faneull Hall Market, be suffered to occupy any stand with cart, sleigh or otherwise; for the purpose of vending commodities in either of the streets mentioned in the first section of this ordinance; and every such person, on being so ordered, shall remove from out of said streets." Responding to the objection that this ordinance was partial because it did not operate upon all of the citizens of the commonwealth equally, but made a distinction between the citizens of Boston and its vicinity and the inhabitants of distant towns in the commonwealth, the court said: "We cannot think that there is any weight in this objection. A regulation of this description could hardly be framed so as to avoid a partial operation arising from local situation and other circumstances. But the partial operation of the ordinance can be no objection to its validity, providing it does not infringe private rights, and it is very clear that it does not. The city government had an undoubted right to prohibit the occupation of a stand in the streets by any one, or by any one not having a license or permission for that purpose from the clerk of the market. In the case of *Vanderbilt v. Adams*, Treasurer of N. Y. Hospital, 7 Cow. (N. Y.) 349, it was decided that an act authorizing the harbor masters to regulate and station vessels in East and North rivers in New York, and imposing a penalty for disobeying their orders, extends to wharves in the hands

of private owners, and is not unconstitutional, but is valid as a police regulation. There is certainly nothing contained in the ordinance in question which can be pretended to operate as a violation of private rights; nor does it operate as an improper restraint of trade, but is a wholesome regulation of it, to prevent the market from being unnecessarily thronged and incumbered." 28 Mass. 168, 171. In *Louisville v. Roupe* the Kentucky Court of Appeals had under consideration a controversy wherein the following facts appeared: An act amending the charter of the city of Louisville authorized the mayor and council, by ordinance, to define the offense of forestalling, regrating, or engrossing, and more effectually to suppress the same by adequate fines and penalties. The tenth section of an ordinance relating to the market prohibited, under a penalty of \$20, the sale or offer for sale within any of the market houses, and during market hours, of articles of provision or other kind of marketing which was sold, purchased, or forestalled at any place within the city. The eleventh section of the same ordinance prohibited, under a penalty of \$4, any person residing within the city from occupying any part of the market house, during market hours, for the purpose of selling, or offering for sale, any provisions, or any kind of marketing, except vegetables of their own growth, meat of their own slaughtering, or flour, meal or sausage of their make. The court said, in considering the questions thus raised: "The question is whether the city council have power to prohibit and punish the sale in market by a citizen of marketing articles not produced or prepared by himself. The prohibited act implies necessarily that the articles have been, by some means, collected for the purpose of selling them in the market, which, in reference to particular articles, might constitute regrating or engrossing. It furnishes, also, a presumption that the articles have been purchased or contracted for on their way to market which may constitute the offense of forestalling. It may tend, also, to enhance the price in market, which is the great evil apprehended from each of those offenses, and the city council has power to extend the definition of the offense for the very purpose of preventing this evil. We are of opinion, therefore, that the selling at market of articles not produced or prepared by the vendor is so closely connected with the offenses mentioned in the statute, even according to their definition by common and statute law, and constitutes so palpable and convenient a means of committing those offenses, if they do not constitute the offenses themselves, that under the power of defining and suppressing them the mayor and council were authorized to prohibit and denounce penalties against such selling; and that, even if they might have included in the prohibition other persons besides citizens, they were not bound to do so. Wherefore, as the evidence

proved without contradiction, that the defendant, a resident of the city of Louisville, did on the day mentioned in the warrant sell in the market, in market hours, large quantities of turkeys, chickens, eggs, etc., and was in the habit of doing so on other market days, and there was no evidence, nor upon these facts any presumption, bringing him within the exception in the ordinance, if as to all the articles he could be brought within the exception, we are of opinion that judgment should have been rendered against him for the penalty, and that the police court erred in dismissing the warrant." 45 Ky. 593.

There can be no doubt of the validity of the ordinance in the present instance, because it falls directly within the terms of the charter of the city.

There is no basis for the complaint of unlawful discrimination because the complainants belong to a distinct class from those persons permitted by the city to sell; the complainants being those who would violate the law by forestalling and regrating the market, and those permitted to sell being the reverse, those who are the producers of provisions and who sell them to consumers at first hand.

The ordinance is not rendered inoperative by the fact that the state and county have granted a huckster's license to each of the complainants. That would not authorize them to violate a city ordinance. *Commonwealth v. Fenton*, 139 Mass. 195, 29 N. E. 653; *Commonwealth v. Ellis*, 153 Mass. 556, 33 N. E. 651. Moreover, under their huckster's license, the complainants can sell other things besides the kinds of provisions referred to.

Affirm the decree of the chancellor, with costs.

MEMPHIS ST. RY. CO. v. FLOOD.

(Supreme Court of Tennessee. Oct. 26, 1908.)

1. JUSTICES OF THE PEACE (§ 85*)—PROCESS—SUFFICIENCY.

A warrant issued by a justice of the peace notifying defendant to appear and answer plaintiff "in a plea of damages under \$500" does not comply with Code 1858, § 4146 (Shannon's Code, § 5958), requiring a general statement of the nature of the demand sued upon, but it should contain a brief statement sufficient to reasonably notify defendant of what he is called upon to answer.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 279; Dec. Dig. § 85.*]

2. JUSTICES OF THE PEACE (§ 80*)—PROCESS—STATUTORY PROVISIONS.

Code 1858, § 2815 (Shannon's Code, § 4520), which is among the general provisions of the Code as to the commencement of actions, prescribes a form of summons which does not require the cause of the action to be stated therein, but leaves it discretionary with plaintiff or the officer issuing the same. Code 1858, § 2817 (Shannon's Code, § 4522), provides that

a summons from a justice's court shall be substantially the same. Code 1858, § 4146 (Shannon's Code, § 5958), in the chapter especially relating to proceedings before a justice of the peace, prescribes a form of summons which shall contain a general statement of the nature of the demand sued upon. *Held*, that Code 1858, § 2815 (Shannon's Code, § 4520), is peculiarly applicable to actions begun in a court of record, and so far as it applies to a summons issued by a justice of the peace, and authorizes an omission of a statement of the cause of action, is in conflict with Code 1858, § 4146 (Shannon's Code, § 5958), and that the latter is controlling because found in the chapter especially relating to proceedings before a justice of the peace.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 253; Dec. Dig. § 80.*]

3. JUSTICES OF THE PEACE (§ 85*)—PROCESS—WAIVER OF.

Code 1858, § 4119 (Shannon's Code, § 5931), allowing a case to be tried before a justice of the peace by consent of the parties without a warrant, is without avail in an action in which a warrant does not contain a general statement of the nature of the demand sued upon, as required by Code 1858, § 4146 (Shannon's Code, § 5958), where there has been no such consent.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 85.*]

4. JUSTICES OF THE PEACE (§ 85*)—PROCESS—CORRECTION OF IRREGULARITIES.

A warrant issued by a justice of the peace, which contains no general statement of the nature of the demand sued upon, as required by Code 1858, § 4146 (Shannon's Code, § 5958), is not cured by Code 1858, §§ 2842, 2879 (Shannon's Code, §§ 4533-4600), relating to the amendment of a summons or other proceedings in a civil case, their intent being that no process or other proceeding shall be quashed for a formal defect, and in certain cases for a matter of substance, where application to amend is seasonably made, and not to make a defective process or proceeding valid and effective for all purposes.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 85.*]

5. JUSTICES OF THE PEACE (§ 85*)—PROCESS—WAIVER OF OBJECTIONS.

A warrant issued by a justice of the peace which contained no general statement of the nature of the demand sued upon, as required by Code 1858, § 4146 (Shannon's Code, § 5958), was not cured by an oral statement of the cause of action on the trial before the justice of the peace, where there was an appeal to the circuit court, as the proceedings before the justice could not in any way affect the trial in the circuit court.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 85.*]

6. JUSTICES OF THE PEACE (§ 85*)—PROCESS—WAIVER OF OBJECTIONS.

A warrant issued by a justice of the peace, which contained no general statement of the nature of the demand sued upon, as required by Code 1858, § 4146 (Shannon's Code, § 5958), was not cured by an oral statement of the cause of action on the trial in the circuit court on appeal from the justice's court.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 85.*]

7. JUSTICES OF THE PEACE (§ 85*)—PROCESS—WAIVER OF OBJECTIONS.

A defect in a warrant issued by a justice of the peace, in that it contained no general statement of the nature of the demand sued upon, as required by Code 1858, § 4146 (Shannon's Code, § 5958), was not waived by going to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trial in the circuit court, on appeal from the justice's court, without moving to quash the warrant.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 85.*]

Appeal from Circuit Court, Shelby County; H. W. Laughlin, Judge.

Action in a justice's court by Carrie Flood against the Memphis Street Railway Company. Plaintiff had judgment, and defendant appealed to the circuit court, which court, after verdict for plaintiff, sustained a motion by defendant in arrest of judgment. The Court of Civil Appeals reversed the judgment of the circuit court, and entered judgment for plaintiff, and defendant appeals. Judgment of the Court of Civil Appeals reversed.

T. R. Waring, Jr., for appellant. T. F. Kelly, for appellee.

SHIELDS, J. This is an action begun before a justice of the peace of Shelby county by Carrie Flood against the Memphis Street Railway Company. There was a trial before the justice of the peace and judgment in favor of the plaintiff, from which the defendant appealed to the circuit court of the county. The trial in that court resulted in a verdict for \$250 in favor of the plaintiff. The defendant moved for a new trial, and its motion was overruled. Thereupon it made a motion in arrest of judgment upon the ground that the warrant failed to state a cause of action, and was void upon its face. This motion was sustained and judgment entered dismissing the case, from which the plaintiff prosecuted an appeal in the nature of a writ of error to the Court of Civil Appeals. That court reversed the judgment of the circuit court, and entered judgment in favor of the plaintiff for \$250 and costs of suit. The case is now before this court to review and reverse the judgment of the latter court. The sole question presented is whether or not the trial judge was correct in sustaining the motion to arrest judgment.

The warrant of the plaintiff is in these words:

"State of Tennessee, Shelby County.

"To any lawful officer to execute and return. You are hereby commanded to summon The Memphis Street Railway Company, if to be found in your County, to appear before me or some other justice of the peace in and for said County, to answer Miss Carrie Flood in a plea of damages under \$500.00.

"Given under my hand and seal this 17th day of September, 1906.

"A. J. Williford, J. P."

It appears in the bill of exceptions that when the case was tried before the justice of the peace, under a rule of practice of his court, counsel for the plaintiff and the defendant, respectively, made oral statements

of the facts constituting the plaintiff's claim for damages, being a personal injury claimed to have been sustained by her while a passenger upon one of the defendant's cars when the same collided with another car, and the defenses relied upon.

And it further likewise appears that when the case was called for trial in the circuit court, under a rule of that court, similar statements of the cause of action and defenses were made by counsel in all things, as was done upon the trial before the justice of the peace.

The contention of the plaintiff in error is that the warrant fails to state any cause of action upon its face, and is void, and that no valid judgment can be rendered upon it.

That of the defendant in error is that the warrant contains a sufficient statement of her cause of action; but, if it does not, then the defect complained of was cured by the oral statements made in the two courts, and that by these the plaintiff in error was given full notice of the claim sued upon.

The first case decided by this court involving this question called to our attention is that of *Parris v. Brown*, 5 Yerg. 267. The warrant in that case issued to "summon James Brown to answer the complaint of Solomon C. Parris on a plea of trespass to his damage in a sum under twenty dollars." It did not state the nature of the trespass nor the property trespassed upon. The case was appealed to the circuit court, and there, after verdict in favor of the plaintiff, the defendant moved in arrest of judgment because the nature of the trespass and the property trespassed upon were not set out in the warrant, so that the defendant could know what he was charged with. The motion was sustained and the plaintiff appealed to this court. Catron, C. J., delivering the opinion of the court, said:

"This being the creation of a new jurisdiction, and to be proceeded in summarily, everything necessary to give the defendant a proper knowledge of the charge against him must be stated, so that he may prepare himself for his defense. The cause of action is not properly set forth in this warrant. We think the circuit court decided correctly in arresting the judgment in this case, and are of the opinion that the judgment should be affirmed."

Afterwards, upon petition to rehear, the Chief Justice further said:

"This tribunal was authorized to imprison the person by force of its process, and yet it is insisted the face of the process need give the defendant whilst in the common jail not the slightest notice why he is there, save that it is at the instance of the plaintiff. And this we are told was supposed necessary by the Legislature, because of the illiterate and ignorant condition of the magistrates of the county. The very extensive

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
113 S.W.—25

jurisdiction conferred is a great contradiction of the assumed grounds of incapacity to state a plain fact. For instance, it is said this action in fact was brought for taking and carrying away the plaintiff's colt. Why was not the defendant told so? Suppose bail had been required. The warrant at first was for \$50 damages, and the circuit court caused it to be altered to \$20. The constable had put the defendant into jail. He had called on his neighbors to bail him. It is probable, if poor, he could have obtained it. The plaintiff under this warrant could have charged him with any cause of action not barred by time. The cause might for want of obtaining the evidence have been continued a month or more. Suppose he had applied for a writ of habeas corpus to a circuit court judge who had called on the constable for the causes of caption and detention, detention in a common jail, and as the authority this warrant had been produced as containing the cause of complaint and authority to imprison, would any judge have supposed it sufficient? The truth must be that the act of 1829 was passed on the supposition of high intelligence on the part of the magistrates of the country, which, in many instances, in almost every county is true; and, as evidence of the fact, this most unguarded law has been executed with a degree of moderation and even-handed justice, so as to produce rarely a complaint of its rigor. Is it possible to believe that any man in the commission of the peace is so very ignorant as not to be capable of stating on the face of the warrant, not in set form, but in substance, plainly and briefly, that the defendant is summoned to answer the plaintiff on a plea of trespass for taking and carrying away his colt, or for killing his cow or his ox, or for throwing down his fence, or breaking open his house?

"It cannot be that this is requiring too much, when heretofore the courts had jurisdiction, and it was not necessary to set forth in set form in a declaration the whole fact for which the warrant is a substitute; and, if the fact was not well alleged, the judgment was arrested, because no cause of action appeared on the record. In such case the jury formerly found the defendant guilty in form and manner as the plaintiff had alleged against him. So in this case the jury found the defendant guilty of the trespass complained of, and assessed his damage to \$15. In giving judgment the court must refer to the case of complaint. Here was none set forth, and no judgment could be given. It is anxiously urged the decision will do great harm, that many causes are depending on general warrants like the present, and that many judgments have been given on such warrants. The defective warrants will be amended if required, and the judgments are all valid, though erroneous."

In *Davis v. Parks*, 8 Yerg, 260, where the warrant summoned "Parks and Campbell to

appear and answer Elisha Davis in a plea of trespass on the case under fifty dollars," the judgment was arrested upon the ground that no cause of action was stated. It is there said:

"This case shows the necessity of requiring a substantial but brief description of the cause of action in cases brought before two justices."

In *Kirby v. Lee*, 8 Yerg. 438, the warrant in question was held to state a cause of action. The court there said:

"In proceedings before justices against millers, the statute gives an action of debt for the penalty, in which no further description of the offense is necessary in the warrant than to notify the defendant in a plain and sensible manner why he is sued, so that he may bring proof to defend himself. In these causes there is no pleading, the warrant is a mere notice to appear before the justice, and there go to trial *viva voce*, when the plaintiff must prove his cause of action, giving the justice jurisdiction and authorizing a recovery. But, if the warrant gives no notice of the cause of action, it will be quashed unless amended because the plaintiff might have given in evidence, not that his grist was ground out of turn, but on account of goods sold, work and labor or any other matter, or before the justice one cause of action might be given in evidence, and if insufficient, and judgment went for the defendant, the plaintiff might appeal and in court set up a different demand, and recover the debt and all cost. Did the warrant, therefore, give notice to the defendant Lee of the cause of complaint so that he might come prepared to make his defense? and, second, did it preclude the plaintiff from harassing the defendant with any cause of action he might elect to rely upon at the trial?"

While the warrant was held to state a cause of action in that case, the principle settled in that of *Parris v. Brown*, *supra*, was approved and followed.

In *Pryor v. Hays*, 9 Yerg. 417, the warrant commanded Pryor to "appear before some two justices of the peace for said county and answer the complaint of Mary Ann Hays in a plea of damages under fifty dollars, occasioned by beating and wounding her." It was held good upon the ground that the defendant was given notice of the cause and nature of the plaintiff's claim against him, and the case of *Parris v. Brown* was again approved.

In the case of *Wood v. Hancock*, 4 Humph. 465, the question was whether the proof offered was relevant to the cause of action stated in the warrant. This court said:

"In proceedings before justices of the peace the strictness in pleading which is required in courts of record has never been enforced. All that we can expect or demand from these domestic tribunals is such reasonable precision and certainty in their proceedings as

may be necessary for the attainment of justice.

"It has often been held by this court that it is not necessary that the warrant should set out the cause of action with that particularity and precision which are required in a declaration in a court of record. Some general statement indicating the ground of action, so that the defendant may not be misled in preparing his defense, is all that is necessary. The warrant does not stand in lieu of a declaration. It is simply a summons to the defendants to appear and answer. The pleadings are *ore tenus*. And that which in a court of record may be done by proper pleading and proof may, as a general rule, be done before a justice of the peace by the production of the proof alone."

The case of *Manning v. Wells*, 9 Humph. 746, 51 Am. Dec. 688, also involved a question of variance. It is there said:

"In this warrant the defendant is required to answer on promises. But on the evidence the plaintiff seeks to make him liable for tort. Although we do not hold a justice of the peace to the strictness which is required in proceedings in courts of record, yet we have always held that they must give some general statement of the cause of action. Here the cause of action stated is repugnant to that proved. The evidence was therefore inapplicable to the action."

These cases were all decided before the Code was enacted in 1858, and at a time when there was no statute prescribing the form of a warrant in proceedings before justices of the peace. While it was held that the object and purpose of the warrant was to bring the defendant before the court to answer to suit of the plaintiff, and that the pleadings in the justice's court were *ore tenus*, yet in every case involving the question it was distinctly and consistently adjudged that the warrant must state the nature and cause of the plaintiff's complaint, so as to give the defendant notice of the general nature of the suit against him, that he might prepare his defense to the same. This is in accordance with sound principle. Indeed, when the question is considered for a moment, every one must be convinced that a summons which does not give the defendant notice of the demand which he is called upon to defend against, and the nature of which he cannot know until the plaintiff has introduced his proof, is practically no notice, and would often work great injustice.

The case of *Bodenhamer v. Bodenhamer*, 6 Humph. 264, is said to be in conflict with those above cited. The question there was not as to the sufficiency of the statement of the cause of action in the warrant, but that "the form of action was incorrectly stated." The court held, in substance, that, if the warrant gave notice of the nature of the claim sued upon, the form of the action, whether debt, *assumpsit*, or trespass, stated, was immaterial. In other words, that forms of ac-

tion as then recognized by common-law pleading did not obtain in proceedings before justices of the peace. This was all that was held in that case, and it is not to any extent in conflict with that of *Parris v. Brown*, and others following it. The case of *Large v. Dennis*, 5 Sneed, 596, is limited to the same point.

When the Code was enacted in the chapter relating to proceedings before justices of the peace in civil cases, a form for a civil warrant to be issued by a justice of the peace was prescribed. It is in these words:

"State of Tennessee, ——— County.

"To any lawful officer to execute and return.

"Summon A. B., to appear before me or some other justice of the peace for said county to answer C. D., in a civil action by note (or upon an account or otherwise as the case may be), under ——— dollars. This ——— day of ———, 18——. E. F., J. P."

This form, it is evident from reading it, requires some general statement of the nature and character of the demand sued upon, and, instead of changing the practice outlined by judicial decision and in force previous to the Code, it enacted it into statutory law.

The first case which we have been able to find construing this section of the Code is that of *Odell v. Koppee*, 5 Heisk. 90, and it is there held in accordance with previous decisions that the warrant must contain some statement of the cause of action sufficient to give the defendant notice of the character of the demand he is called upon to answer. The warrant in that case commanded the officer to summon the defendant to answer the plaintiff, "in an action of damages for a sum under \$250," practically the same as in the case at bar, and it was held that a motion in arrest of judgment would have been sustained if seasonably made. The court said:

"Every intendment is to be made in favor of the validity and sufficiency of proceedings before a justice of the peace. Code 1858, § 4176. But, while we cheerfully conform to this mandate of the Legislature in favor of these domestic tribunals, still we must go no further than the law authorizes; nor should we violate the positive requirements of the Code in order to sustain them.

"The form of a warrant by a justice of the peace, as given by the Code of 1858, § 4146, is that it shall be in substance as follows: 'Summon A. B., etc., to answer C. D., in a civil action, by note, or upon open account, or otherwise, as the case may be, under ——— dollars.'

"Here it is plainly prescribed that the warrant is, in substance, to state briefly the cause of action. It has been held by this court, and we think correctly, that there must be some sufficient statement in the warrant to indicate the charge he is to answer. In the language of the court, in the case of *Wood v. Hancock*, 4 Humph. 467:

'Some general statement indicating the grounds of the action, so that the defendant may not be misled in preparing his defense.' See, also, 9 Humph. 749.

"In this warrant there is no statement at all of any 'cause of action,' but only a claim for damages, but for what cause is not stated. There is no compliance with even the most liberal construction of the law in favor of these proceedings."

The case of *Watkins v. Kittrell*, 3 Baxt. 42, involved a question of variance between the warrant and the proof, and it is there said:

"If the plaintiff might thus go into proof of this last transaction, he might as well have introduced proof of a dozen different causes of action, and thus without any notice to the defendant take his chances to recover upon any or all of them, at least to the extent of the magistrate's jurisdiction. This, we think, would be in substance to recover, without any warrant at all, as to those causes not in any way referred to in the warrant, and we think it cannot be done."

The necessity of a statement of the cause of action in the warrant and that the proof offered by the plaintiff conform to that statement and be relevant to the issue there presented is recognized in numerous decisions of this court. *Sale v. Eichberg*, 105 Tenn. 333, 59 S. W. 1020, 52 L. R. A. 894; *Harrison v. McMillan*, 109 Tenn. 78, 69 S. W. 973.

The last case involving the sufficiency of a warrant, and holding that where no cause of action is stated a motion in arrest of judgment will lie, is the unreported case of *Archer v. Railroad Co.*, in which the opinion was delivered by Mr. Justice Nell at Jackson in 1904. The warrant required the defendant to appear and answer "in an action to his damage in the sum of fifty dollars." This was held bad, and there decided, if properly made, a motion in arrest of judgment would have been sustained. The court said:

"It is insisted that the failure to state a cause of action in the warrant was cured by the verdict.

"We do not think that this position is well taken. Shannon's Code, § 5958, gives the form of warrant before a justice of the peace, and this form requires the cause of action to be stated in the warrant. See the notes to that section in Shannon's Code. Also *Odell v. Koppee*, 5 Heisk. 88. The verdict will cure defects in the declaration where the cause of action is imperfectly stated, or where the plea supplies the matter omitted from the declaration (*Memphis Gayoso Gas Co. v. Williams*, 9 Heisk. 324; *Read v. Memphis Gayoso Gas Co.*, 9 Heisk. 550), but not where no cause of action is stated at all (*Cannon v. Phillips*, 2 Sneed, 185, 191).

It is urged that the warrant in this case is in the form of the summons prescribed by

Code 1858, § 2815 (Shannon's Code, § 4520), which is applicable to proceedings before justices of the peace (Code 1858, § 2817; Shannon's Code, § 4522), and that this form does not require the cause of action to be stated in the summons, but leaves it discretionary with the plaintiff or the officer issuing the warrant. This section is found under the general provisions of the Code in relation to the commencement of actions, and is peculiarly applicable to actions begun in courts of record. So far as it applies to warrants issued by justices of the peace and authorizes the omission of a statement of the cause of action, it is in conflict with the form above quoted, prescribed by section 4146 of the Code of 1858 (Shannon's Code, § 5958), and we think the latter is controlling so far as such conflict exists, because it is to be found in the chapter especially relating to proceedings before justices of the peace, and is specific legislation prescribing and fixing the form of a warrant to be issued in civil cases.

The defendant in error also relies upon Code 1858, § 4119 (Shannon's Code, § 5931), to the effect, that a case may be tried before a justice of the peace by the consent of the parties without a warrant. This can have no application in this case because there was no such consent.

Much stress in the brief of counsel for the defendant in error, and the opinion of the Court of Civil Appeals is placed upon statements contained in some of the earlier cases herein quoted from, that the warrant is solely for the purpose of bringing the defendant into court, and that the pleadings before justices of the peace are viva voce. There is nothing in this. These cases were decided before the provisions of the Code prescribing the form of the warrant requiring the cause of action to be therein briefly stated, but in all of them it is distinctly held that the warrant must contain a sufficient statement of the nature of the action. It is therefore evident that, when it is said that the pleadings before the justice of the peace are oral, those subsequent to the warrant are referred to, and such has been the actual practice.

The form of the warrant prescribed by the Code, and the construction placed upon that provision by the subsequent cases construing it, show that it was intended not only as the original process to bring the defendant before the court, but also to, at least to some extent, take the place of a declaration.

We cannot agree with the argument of counsel that the requirement that the cause of action be briefly stated in the warrant is a mere technicality of which courts are now freeing their proceedings in order to reach the justice of controversies. That defendants may have notice of complainants made against them so that they may be able to prepare their defense is of the highest importance to them, and absolutely necessary

to prevent surprise and injustice. The provisions of the law requiring such notice are anything but technical or formal in their character. It was held by this court long before the enactment of the Code, as appears from the cases from which we have quoted, that a warrant that did not state the cause of action sufficiently to give the defendant notice of the demand against him was void, and judgment upon the verdict in the circuit court would be arrested in such cases. Such has been the consistent holding of this court. When this rule was first announced, the jurisdiction of the justices of the peace in this state was of very small and insignificant matters. This jurisdiction has been increased and extended greatly since that date, and now includes cases of very great importance. Justices' courts are now of greater dignity and importance, and the public interest and rights of litigants require that their proceedings be conducted in better form and with more regularity and order, and the tendency of legislation and judicial decision is to bring this about rather than the contrary, as insisted by counsel for defendant in error.

The defect in the warrant is not cured by the provisions of Code 1858, §§ 2863-2879 (Shannon's Code, §§ 4583-4600). These provisions in the main relate to the amendment of summonses or other proceedings in civil cases. The legislative intent expressed in them is that no process, pleading, or other proceeding in the action shall be quashed for a formal defect, and in certain cases for those relating to matters of substance, where application to amend is seasonably made. There was no intention to make defective proceedings valid and effective for all purposes. This would amount to the abolition of all laws prescribing forms and rules of proceedings in courts for the purpose of securing orderly and correct administration of justice.

The contention of the defendant in error that the defect in the warrant was cured by the oral statement of the cause of action made upon the trial before the justice of the peace and in the circuit court is also untenable. The proceedings before the justice of the peace could not in any way affect the trial in the circuit court, and need not be further noticed.

The statement of counsel on the trial in the circuit court, however full and explicit of the cause of action, cannot be considered as amending the warrant. Amendments to legal proceedings cannot be made by oral statements. Nor did the defendant waive the defect by going to trial without making a motion to quash the warrant. It is well settled that in an original action brought in the circuit court, if the declaration fail to state a cause of action, the defendant after verdict may move in arrest of judgment, although he may have filed any number of pleas, provided the defect is not supplied

by new matter plead by him. If the rule was otherwise, judgment could not be arrested in any case. This is evident from the mere statement of the proposition.

The defendant in error relies upon the case of *Utiley v. Railroad Co.*, 106 Tenn. 246, 61 S. W. 84, to sustain her insistence that the oral statement of the cause of action cured the defects in the warrant. It does not do so. The question involved in that case was not one of pleading, but of evidence. The counsel for the plaintiff at the instance of the trial judge stated the grounds of the suit against the defendant, and the attorney for the latter stated the defense that would be relied upon in such manner as to admit the case made by the plaintiff. In other words, the defense was stated in the form of a plea of confession and avoidance. Acting upon the admission, the plaintiff did not fully prove his case, and, upon the conclusion of his evidence, the defendant demurred thereto. This court held that the defendant was bound by the admission, and that the demurrer should not have been sustained. Thus it will be seen that *Utiley v. Railroad Co.* presented a question entirely different from that here involved. We are therefore of the opinion that under the long-settled practice of this state, established and consistently adhered to by judicial decision and in the provisions of the Code regulating the practice before justices of the peace, that a justice's warrant must contain a brief statement of the cause of action sufficient to give the defendant reasonable notice of what he is called upon to answer, and that, where the warrant fails to contain such statement, it is void, and upon the trial, on appeal to the circuit court of the state, in absence of an amendment made at the proper time, a motion made in arrest of judgment should be sustained and the suit dismissed.

The warrant of the defendant in error does not comply with this rule. It merely notifies the defendant therein to appear and answer the plaintiff "in a plea of damages under \$500.00." This does not give the defendant any information of the nature of the suit brought against it. It could as well be damages for breach of contract, a personal injury, or a trespass committed upon the personal or real property of the plaintiff. Under it evidence could be offered before the justice of the peace to support one cause of action, and in the circuit court on appeal to support another, and in neither court could the trial judge determine whether the proof offered was relevant to the real cause of action. It fails to state a cause of action and the judgment upon the verdict of the jury was properly arrested for that reason.

The plaintiff could have amended her warrant, but made no application to do so. The defendant was not called upon to point out the defect by motion to quash or otherwise. The parties were dealing at arms' length. There was no surprise, and no one was mis-

led. The defendant had as much right to make the motion in arrest of judgment as it would have had in an original action begun in the circuit court in a case where it had pleaded to a defective declaration after verdict against it. There was no error in the judgment of the circuit court, and that of the Court of Civil Appeals reversing it is erroneous, and must be reversed.

MERCANTILE BANK OF MEMPHIS v. BUSBY et al.

(Supreme Court of Tennessee. Sept. 30, 1908.)

1. BILLS AND NOTES (§ 394*)—PARTIES—JOINT MAKERS.

A stockholder of a corporation who, with other stockholders, indorsed a note before delivery, given to raise money for it and for their own benefit, and who understood that the note bound all the indorsing stockholders equally, was liable as a joint maker, and not entitled to notice of dishonor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1004; Dec. Dig. § 394.*]

2. BILLS AND NOTES (§ 241*)—PARTIES—INDORSERS.

Negotiable Instruments Act, § 63 (Laws 1890, p. 152, c. 94), providing that a person placing his signature on an instrument otherwise than as a maker, drawer, or acceptor is deemed an indorser, and section 64 providing that where a person, not otherwise a party, places his signature in blank on an instrument before delivery, he is liable as indorser, merely create a prima facie liability as indorser, and the real contract can be shown, as between the immediate parties, it is not necessary that the indorsement should be accompanied by appropriate words in writing to show an intent to be bound in some other capacity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 542-559; Dec. Dig. § 241.*]

3. BILLS AND NOTES (§ 394*)—NOTICE OF DISHONOR—PERSONS ENTITLED TO.

Under Negotiable Instruments Act, § 115 (Laws 1890, p. 159, c. 94), providing that notice of dishonor is not required to be given an indorser where the instrument was made for his accommodation, a stockholder of a corporation who indorsed a note before delivery, given to raise money for it, and in reality for the benefit of himself and the other indorsers, was not entitled to notice of dishonor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1004; Dec. Dig. § 394.*]

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Bill by the Mercantile Bank of Memphis against B. I. Busby, C. B. Blackburn, and others. Decree for complainant, and defendant Blackburn appeals. Affirmed.

Turley & Turley, for complainant. Caruthers Ewing, C. J. McSpadden, Cary & Rogers, and Lehman, Gates & Lehman, for defendants.

McALISTER, J. The original bill herein was filed on the 23d of May, 1906, against B. I. Busby, C. D. Williford, C. B. Blackburn, and H. L. Williford, on the following note:

"\$9,000. Memphis, Tenn. Sep. 2, 1905.

"Six months after date I promise to pay to the order of myself Nine Thousand Dollars at Mercantile Bank, value received.

"B. I. Busby."

The note had the following names indorsed on the back thereof in the following order, viz.:

"B. I. Busby.

"B. I. Busby Co., by B. I. Busby, Pres.

"C. B. Blackburn, Laconia, Ark.

"H. L. Williford.

"Pay American Exchange National Bank, New York, N. Y. or order.

"Mercantile Bank of Memphis, Tenn., W. A. Smith, Cashier, C. H. Raine, Pres."

There was a credit of \$1,000 on this note dated April 5, 1905, and this suit was brought to recover the balance due, with interest.

The bill showed that the note was presented for payment at the Mercantile Bank, where it was payable on March 2, 1906, and payment refused, whereupon notice of nonpayment was given to the various parties. The notice to C. B. Blackburn was deposited in the post office at Memphis, Tenn., on March 2, 1906, addressed to E. B. Blackburn, Laconia, Ark. On June 28, 1906, the defendant C. B. Blackburn filed an answer denying his liability as indorser on said note for the reason that notice was not given him of the protest of said note for nonpayment, and also setting up other defenses in his answer, which it is unnecessary to mention. It was averred in his answer that the protest was invalid, and that due notice had not been given him. Defendant Blackburn insisted that he had not resided at Laconia, Ark., for five or six years, but that he had been a resident of Doran, Phillips county, Ark. The answer averred that the notice of protest was addressed to him at Laconia, Ark., and that the first notice he had thereof was "some weeks thereafter when the same was found by respondent at the house where respondent's wife lives in the city of Memphis, and where respondent stays when in said city." The answer further avers that said notice was mailed "to respondent from Laconia on March 2, 1906, by a relative living at Laconia." The answer denied that complainant was the legal holder of the note or was entitled to maintain an action thereon. On the 12th of July, 1906, by permission of the court an amended bill was filed, wherein it was alleged that:

"The B. I. Busby Co. was a Tennessee corporation, in which B. I. Busby, C. D. Williford, C. B. Blackburn, and H. L. Williford were all largely interested. That such parties desired to raise money for it and for their own benefit. With this in view the note in question was made in the form in which it appears. All of the indorsements thereof were made before the note was attempted to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be used, and, after being so completely executed, the same was discounted by complainants. The money so borrowed went into the business of B. I. Busby Co., in which the various parties were interested."

The theory of the amended bill is that each and all of the parties to said note are equally bound thereof, and that no protest was necessary and no notice of nonpayment had to be given. On August 27, 1906, C. B. Blackburn filed an answer to the amended bill wherein he admitted that he had been a stockholder in the B. I. Busby Company, but claimed that he was not otherwise interested therein, and insisted he was an accommodation indorser on said note. The answer denied that C. B. Blackburn had ever waived protest and notice, or admitted liability on the note after it fell due.

The Willifords also filed their answers to the bill in which they claimed to be accommodation indorsers on said note. Proof was taken, and on the hearing the chancellor decreed:

"That the \$9,000 note is unpaid, except that \$1,000 was paid thereon on April 5, 1906, and that another payment of \$2,301.16 was made thereon September 5, 1907, which payments are admitted by complainant. This last payment was a collection made of the Columbia Star Milling Co. v. B. I. Busby, before mentioned. Thereupon it is held and decreed as follows:

"(1) That the \$9,000 note before mentioned was given for a debt or obligation and for the benefit of the B. I. Busby Co., a corporation in which the said B. I. Busby, C. D. Williford, C. B. Blackburn, and H. L. Williford were stockholders.

"(2) That B. I. Busby, C. D. Williford, C. B. Blackburn, and H. L. Williford were all in law joint makers of said \$9,000 note and all liable therefor, and no protest of same was necessary.

"(3) That the negotiable instruments law of Tennessee did not change or affect the liability of the parties to the \$9,000 note, but all the parties are liable thereunder as above stated."

It was therefore held and decreed that the Mercantile Bank of Memphis have and recover of B. I. Busby, B. I. Busby & Co., C. B. Blackburn, and H. L. Williford the sum of \$6,359.75, said amount being the principal and interest now due on the \$9,000 note as aforesaid. The judgment was against all of said parties jointly and against each of them severally. It should have been stated that no decree was pronounced against C. D. Williford for the reason he had been adjudged a bankrupt in the District Court of the United States for the Southern District of New York, and discharged from all debts due by him on April 26, 1907, and that thereby he was discharged from all liability on the \$9,000 note in suit.

The defendant Blackburn appealed from the decree of the chancellor, and has assign-

ed numerous errors, most of which are based on the action of the chancellor in sustaining the exception of the complainant to certain questions and answers in the deposition of C. B. Blackburn. The main assignment of error, however, is that the chancellor erred in rendering a decree for complainants against the defendant Blackburn and in refusing to dismiss the bill as to him.

The main inquiry presented on the record is whether or not the defendant Blackburn was a joint maker of the note in question, or whether he was an accommodation indorser in the sense of the law merchant. A history of the note in suit will throw much light on this question. The record discloses that the predecessor of the B. I. Busby corporation was the B. I. Busby Company. This company was a firm composed of C. D. Williford and B. I. Busby. As already stated, it was succeeded by the B. I. Busby Company, corporation, chartered in February, 1904. The stockholders and their holdings were as follows:

C. B. Blackburn.....	\$5,000 00
B. I. Busby.....	2,500 00
C. D. Williford.....	2,500 00
H. L. Williford.....	9,100 00

It appears that the B. I. Busby Company as a firm owed a \$12,000 note to the Mercantile Bank which was indorsed by the Agar Packing Company. The corporation B. I. Busby Company took the stock of goods that Busby and Williford had, drays, mules, accounts, etc., and assumed this indebtedness of the firm. It appears that, when the corporation took over the assets and assumed the debts of the firm, the indebtedness was explained to the stockholders of the corporation. It appears that the note in question was gradually reduced by payments made by the corporation and renewals to \$9,000. It appears that at a directors' meeting of the B. I. Busby corporation, November 12, 1904, B. I. Busby, C. B. Blackburn, H. L. Williford, C. D. Williford, and J. S. Hampton were present. The president explained the note of \$12,000 indorsed by the Agar packing Company, stating that it was simply the renewal of one he had formerly carried with the same indorsement, and that it was for borrowed money from the Mercantile Bank. He stated that it could not be expected that the Agar Packing Company, would again indorse this paper. It thus appears that C. B. Blackburn, the defendant, was present at the directors' meeting when the nature of this obligation was explained. It appears that another directors' meeting was held January 14, 1905, at which meeting C. B. Blackburn was present. The president stated that he did not want to again ask the Agar Packing Company to indorse this paper. Blackburn in his testimony does not deny that he was present and knew of this announcement. We think from Mr. Blackburn's cross-examination it is evident that he understood that all the notes which had been given in re-

newal from time to time of the original Aggar Packing Company notes, and which were indorsed by the various stockholders of the B. I. Busby Company, corporation, bound all the indorsing stockholders equally. This is our conclusion of the nature of this transaction from an examination of the record. Under the authorities in this state prior to the passage of the negotiable instruments law in 1899, the parties being liable on said note as joint makers were, of course, not entitled to notice of protest and nonpayment. *Bank v. Jefferson*, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100; *Assurance Society v. Edmonds*, 95 Tenn. 53, 31 S. W. 168; *Logan v. Ogden*, 101 Tenn. 392, 47 S. W. 489; *Bank v. Lumber Co.*, 100 Tenn. 479, 47 S. W. 85. In this view of the case, it is an immaterial consideration that the notice of protest was sent to C. B. Blackburn at Laconia, Ark. It is insisted, however, on behalf of the defendant, that this rule has been changed by our negotiable instruments act of 1899 (Laws 1899, p. 152, c. 94), and now a party to an instrument who is not a maker, drawer, or an acceptor is an indorser, and therefore entitled to notice of dishonor. The contention is that when a person's name appears on the back of a note, whether as a regular indorser or as an irregular indorser, he is to be held strictly as an indorser and in no other capacity, unless he clearly indicate by appropriate words written on the note his intention to be bound in some other capacity. The particular sections of the negotiable instruments act relied on are as follows:

"Sec. 63. A person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

"Sec. 64. Where a person not otherwise a party to an instrument places thereon his signature in blank, before delivery, he is liable as indorser in accordance with the following rules:

"(1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties.

"(2) If the instrument is payable to the order of the maker or drawer or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"(3) If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee."

It is argued that, under the express language of section 63 of the negotiable instruments act, C. B. Blackburn must be deemed to be an indorser of the note in question because there were no written words attached to the indorsement indicating his intention to be bound in some other capacity. It is said this result inevitably follows "unless he clearly indicates by appropriate words," etc.

It is insisted that this construction is re-

inforced by the language of the succeeding section 64.

Counsel cites *Thorp v. White*, 188 Mass. 333, 74 N. E. 592, also the case of *Downey v. O'Keefe* (decided in 1905) 26 R. L. 571, 39 Atl. 929.

On the other hand, it is insisted on behalf of the complainant that the negotiable instruments act merely defined what kind of instrument creates a prima facie liability as indorser, and that the real contract can be shown now just as it could have been shown before the act was passed.

In *Bunker on the Negotiable Instruments Law*, the author, after referring to section 66 of the negotiable instruments law of Michigan (Public Act 1905, p. 399, No. 265), which is the same as section 64 of the Tennessee act on the same subject, says:

"This section was construed by the Supreme Court of New York in *Kohn v. Consolidated Butter & Eggs Co.*, 30 Misc. Rep. 725, 63 N. Y. Supp. 265. But the case was outside of the statute, in that it was alleged that the maker made and delivered the note to the payee and that thereafter the other defendants indorsed the note."

McAdam, Judge, said:

"The true intention of indorsers as between themselves can always be shown by oral evidence. To go further, and decide that the statute intended to create an incontestible liability against irregular indorsement would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especially in a provision enacted in the interests of law reform."

The case of *Corn v. Levy*, 97 App. Div. 48, 89 N. Y. Supp. 658, is cited for the proposition that in the state of New York liability created by the negotiable instruments law is simply prima facie.

That was an action upon a promissory note brought against the executors of the first accommodation indorser by the second accommodation indorser who had been compelled to pay a judgment recovered against her upon the note by the payee named therein. The complainant alleged the making and delivery of a note to Kate A. Weichel, which before its delivery to her was first indorsed by the defendant's testator, and then by the plaintiff for the accommodation of the maker. It then alleged presentment, nonpayment, and notice thereof to each of the indorsers; next that thereafter the payee sued the plaintiff as indorser of the note, notice of which action was given to the defendants, and a judgment therein was recovered against the plaintiff for the amount of the note, interest, and costs, which was paid by her. The sum so paid she seeks to recover from the defendants on the indorsement by their testator. Said the court:

"It was formerly the rule in this state that, in the absence of any further agreement, such an indorser would not be liable to the payee of the note. To establish its liability,

it had to be shown that he had indorsed the note for the purpose of giving the maker credit with the payee. *Phelps v. Vischer*, 50 N. Y. 69, 10 Am. Rep. 433. The same would formerly have applied to the plaintiff, whose liability would spring entirely from a special agreement on her part (beyond that which the law implied upon the mere fact of the indorsement) that such indorsement was for the purpose of giving the maker credit with the payee. * * *

Section 114 of the negotiable instruments law of 1897 (Laws 1897, p. 734, c. 612) provides that, where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser to the payee, and to all subsequent parties, if the instrument is payable to a third person. Before that provision was enacted, a third party could not be charged as an indorser of a promissory note before delivery, unless the complainant alleged that the indorsement was made in order to give the maker credit with the payee, or that the party indorsed the note as surety for the maker. The omission of such an allegation was held to be a fatal defect in an action to charge such an indorser. The necessity of an averment to that effect appears no longer to exist. However, in view of the plain language of section 114 of the negotiable instrument law, it seems to require nothing more than the simple fact of the indorsement to render the defendant *prima facie* liable in such a case. *McMoran v. Lange*, 25 App. Div. 11, 49 N. Y. Supp. 310.

The cases of *Thorpe v. White* and *Downey v. O'Keefe* are cited by counsel for appellant as announcing a contrary rule. In *Thorpe v. White* (June 19, 1905) 188 Mass. 333, 74 N. E. 592, it appeared:

"The defendant Hannah C. Hand irregularly became a party to the promissory note set forth in the bill of complainant, as before delivery she signed her name in blank on the back of an instrument of which the defendant White was the maker and the plaintiff the payee."

Du Bois v. Mason, 127 Mass. 37, 38, s. c. 34 Am. Rep. 335.

The court said:

"According to the law relating to negotiable promissory notes before Statutes 1898 (Laws 1898, p. 502, c. 533) took effect she was liable as a promisor between herself and the plaintiff, although entitled to notice as if she were an indorser when the note was not paid at maturity by the maker [citing cases]. But, after the negotiable instruments act became operative, the distinction was abolished, and the effect of her signature was to make her an indorser as to all parties."

In *Downey v. O'Keefe* (January 18, 1905) 26 R. I. 571, 59 Atl. 929, the court said:

"Action on a note by Michael R. Downey against Joseph O'Keefe and another. The note was as follows:

"\$275.00 Providence, March 18, 1899.

"Six months after date we promise to pay to the order of Michael R. Downey Two Hundred and Seventy-five Dollars at his office, No. 712 Banigan Building, with interest at 5% per month, value received.

"Joseph O'Keefe,

"Dennis J. O'Conner."

"Upon the back was the signature of John McCann. It was shown in evidence that the note was signed by the makers and delivered to one Hart, the agent of the plaintiff, who took it to McCann, and procured his indorsement. The executor of McCann resisted the suit, and prays for a new trial on the ground that his testator was a mere accommodation indorser, and did not sign until after the delivery of the instrument. * * * It has been uniformly held in Rhode Island until the passage of the negotiable instrument act (Pub. Laws 1898-99, p. 222, c. 674), which does not apply to instruments before July 1, 1899, that one who indorses a note payable to another before its issue is liable to the payee as a joint maker [citing authorities]. It makes no difference whether the signature is actually indorsed upon the note before or after it comes into the possession of the payee, if it is part of the agreement that the note shall be so indorsed to be acceptable [citing authorities]."

We do not think these cases necessarily decide that under the negotiable instrument law an instrument under circumstances like these renders the party absolutely liable as indorser, since no special agreement was shown.

We are of opinion that the real contract between the parties can be shown now as fully as it could have been shown before the passage of the negotiable instrument act, and that, as between the immediate parties, it is not necessary that the indorsement should be accompanied by appropriate words in writing, showing an intention to be bound in some other capacity.

As to innocent holders for value, the rule, of course, would be otherwise, and the statute would apply.

So far from an intention manifested by the Legislature to destroy this well-established rule we think section 63 of said act, providing that the person is to be deemed an indorser unless by appropriate words he is bound in some other capacity, is but a legislative recognition of the rule prevailing at the date of the passage of the act.

There is another reason why notice of dishonor of the note in suit was not necessary to be given the defendant C. B. Blackburn. Section 115 of the negotiable instruments act provides that:

"Notice of dishonor is not required to be given to an endorser in either of the following cases:

"1st. Where the drawee is a fictitious person or a person not having capacity to con-

tract, and the endorser was aware of the fact at the time he endorsed the instrument;

"2d. Where the endorser is the person to whom the instrument is presented for payment;

"3d. Where the instrument was made or accepted for his accommodation."

In our opinion the facts disclosed in this record show that this note was in reality executed for the benefit of every person whose name appears on it. As already stated, it is established in proof that this was an obligation of the B. I. Busby corporation, and that these parties were all stockholders and directors, and that the note was executed for the purpose of renewing an outstanding indebtedness of the corporation. It is in proof that the B. I. Busby corporation received all the assets and assumed all the liabilities of the firm of B. I. Busby & Co. Our conclusion on this branch of the case is that C. B. Blackburn was not entitled to notice of dishonor, since he was a joint maker and equally interested in the note with his co-makers and indorsers. We have also considered the questions made on the alleged alteration of the note, its cancellation, etc., but do not find these assignments of error well taken. It results that the decree of the chancellor must be in all respects affirmed.

AMERICAN STEAM LAUNDRY CO. v. HAMBURG BREMEN FIRE INS. CO.

(Supreme Court of Tennessee. Oct. 31, 1908.)

1. INSURANCE (§ 328*)—FORFEITURE OF POLICY—CHARGE OF INTEREST.

One owning a laundry business conducted under the name of a company as a trade-name, insured the property, the policy providing that it should be void if there was any change in the interest, title, or possession of the property, and thereafter sold the business to others, who continued it under the same name, the policy not being transferred to them, and the insurer having no notice of the sale. *Held*, that the sale forfeited the policy; the contract being personal with the owner.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 794, 795, 805-809; Dec. Dig. § 328.*]

2. INSURANCE (§ 215*) — "FIRE INSURANCE POLICY"—NATURE OF CONTRACT.

A fire insurance policy is a personal contract for the indemnity of insured, and does not follow the property on its sale, in the absence of an agreement for the transfer of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 485; Dec. Dig. § 215.*]

For other definitions, see Words and Phrases, vol. 3, p. 2818.]

3. INSURANCE (§ 378*)—FORFEITURE OF POLICY—CHANGE IN OWNERSHIP—CONSENT OF COMPANY—EVIDENCE.

Where the insurer's agent knew that some changes had been made in the insured property, but did not know whether they were changes in interest or physical changes in its operation,

and was then trying to cancel the policy, he did not assent to any change in ownership.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 378.*]

4. INSURANCE (§ 378*)—BROKERS—NOTICE TO AGENT.

A broker who effects insurance, without being employed by the insurer, but for a commission upon the premium secured for such risks as the insurer chooses to accept, is not an agent of the insurer so that notice to him would bind the insurer, and hence notice of the transfer of insured property to brokers who effected the insurance and divided the commissions with the insurer's agent would not bind the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 374; Dec. Dig. § 378.*]

Appeal from Chancery Court, Knox County; Joseph W. Sneed, Chancellor.

Suit by the American Steam Laundry Company against the Hamburg Bremen Fire Insurance Company. From a decree for plaintiff, defendant appeals. Reversed, and bill dismissed.

Cornick, Wright & Frantz, for appellant. W. S. Roberts and Geo. W. Fox, for appellee.

NEIL, J. On the 24th of August, 1906, the defendant insurance company issued a policy of \$1,200 for one year, payable to the "American Steam Laundry Company," insuring certain laundry machines and other machines contained in a building described in the policy. The American Steam Laundry Company was not a corporation, but the term designated a laundry business carried on by one Coram Acuff; the name being used by him simply as a trade-name. Subsequently he sold a half interest to one Wiley, and the latter sold his interest to S. P. Armstrong. After this Coram Acuff sold his remaining interest to C. E. Fox, and these two formed a new copartnership, but still used the name the "American Steam Laundry Company." The policy was not transferred, nor was the consent of the insurance company obtained. The property was simply transferred. However, when the transfer of the latter was made, it was mentioned that the property was under insurance, and the purchasers say they regarded this insurance as an asset of the firm.

The policy contained this provision upon the subject of transfer of interest:

"This entire policy, unless otherwise provided by agreement endorsed hereon, or added hereto, shall be void if * * * any change other than by the death of the insurer take place in the interest, title or possession of the subject of insurance," etc.

The insurance was effected through one Toms, who was an employé of Doll, Mynderse & Brownlee. These latter were not the agents of the insurance company that effected the insurance, but were agents of other companies. The risk was tendered to them, but they did not have any company that was willing to take laundry property, so it was

carried to J. E. Lutz & Co., who were agents for the defendant insurance company, and that company took the risk; Doll, Mynderse & Brownlee acting only as brokers in the transaction, and J. E. Lutz & Co. dividing the commission with them.

The negotiation of this insurance took place between Mr. Toms, the employé of Doll, Mynderse & Brownlee, on the one hand, and Coram Acuff on the other. J. E. Lutz & Co. did not at any time know that Acuff had sold his interest in the property, or that Fox and Armstrong had acquired his interest. It is true that a few days before the fire Mr. Toms applied to J. E. Lutz & Co. for a renewal of the policy; the policy which is in suit in the present case having nearly reached its expiration. Lutz & Co. issued the renewal policy, but some days thereafter recalled it. They did not at that time know that Armstrong & Fox had any interest in the property. They were informed that there had been some changes, so they say, but they did not know what changes they were, whether physical changes merely or some other kind. The renewal policy is not in question here. It was taken up. It appears that Lutz & Co. understood themselves as directing Mr. Toms to take up the whole insurance, but he did not so understand them, and only took up the renewal policy.

The question arises only on the original policy, and is this: Are Fox & Armstrong entitled to recover under the facts stated?

They insist that they are entitled to recover because not only was the insurance issued in the name of the "American Steam Laundry Company," but the new firm continued to operate the business under the same name. Moreover, it is insisted that the insurance company paid no attention to the personnel of the man or men running the business, but simply insured under the trade-name, and therefore no real change of risk resulted by the change of the personnel of the men operating under the name.

We think this is a mistaken view. The original transaction was with Coram Acuff, and must be treated as a transaction with him, although he used merely a trade-name instead of his own name. The property having passed to other persons without obtaining the consent of the insurance company, and the transfer of the policy, the property was no longer protected. A fire insurance policy is a contract of personal indemnity made with the individual protected, and does not go with the property as an incident thereto to any person who may buy that property. If it goes at all, it goes as a matter of contract for the transfer of the policy. *Quarles v. Clayton*, 87 Tenn. 308, 10 S. W. 505, 3 L. R. A. 170; *Bennett v. Featherstone*, 110 Tenn. 27, 71 S. W. 589.

In the first of these cases the court said:

"By all the authorities a contract of fire insurance is a personal contract, and assures the interest alone of the assured in the prop-

erty in the absence of some agreement or trust to the contrary; these provisions having been upheld by the courts as reasonable conditions limiting and restricting the liability of the insurer. That they are reasonable is obvious when we consider that the contract is one for the personal indemnity of the assured against a loss affecting the interest in the property covered by the policy. The insurer contracts with reference to the character of the assured for integrity and prudence. He might be very willing to agree to make good the loss of one for the destruction of property owned by him, while he would be unwilling to insure the same property if owned by another.

"Again the contract undertakes to make good any loss which that assured may sustain, and from this it follows that, if the assured has parted with his interest before the loss, he cannot ask to be indemnified because he has sustained no loss."

The opinion continues on page 314 of 87 Tenn., page 507 of 10 S. W. (3 L. R. A. 170):

"The contract is not therefore one which attaches to or follows the property, being one for the personal indemnity of the assured, and, when the insurer does not assent to the assignment of the policy to the grantee of the property, neither the assured nor his assignees of the property can recover upon the policy."

To the same effect, see *Insurance Co. v. Manning* (C. C. A.) 160 Fed. 385; also the following text-book authorities:

1 Cooley's Briefs on the Law of Insurance, p. 211 et seq.:

"In view of the principle heretofore discussed that the insured must have an insurable interest at the time the loss occurs, it may readily be inferred that the termination of the insurable interest of the person insured in the subject of the insurance terminates the policy. This is true irrespective of any provision of the policy providing for forfeiture in case of alienation or other change of interest"—citing cases from the federal courts and the courts of Iowa, Maine, Maryland, Massachusetts, Missouri, New York, Ohio, Pennsylvania, and Louisiana. It is further said upon page 203 of the same volume: "An absolute transfer of the title of the insured in the subject of the insurance divests him of his entire insurable interest and terminates the policy"—citing cases from the federal courts and the courts of Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, New York, Ohio, and Pennsylvania. In volume 2, of the same author, at page 1732, it is said that a sale of a part interest in property by an insured to a third person will not terminate a contract of insurance in the absence of a condition against alienation. But, continuing on page 1733, the author says: "On the other hand, a condition against any sale, transfer, or change in title or interest is violated by a transfer of a part interest in the insured premises"—citing cases

from Michigan and Texas. See, also, to the same effect, 1 May on Insurance, p. 542; 1 Samson's Digest of Laws of Insurance, p. 95; 3 Joyce on Insurance, §§ 3289, 3290. In Clement on Insurance, p. 517, it is said: "The contract of fire insurance is one of indemnity to the person to be insured, and does not extend to another person or interest without language in or on the policy consenting to same, or covering or including in the description the insured, or the property"—citing numerous cases from various jurisdictions in support of the text.

We do not think it material that the trade-name continued the same. The individuals owning the business were different; just as different as if a different name had been used. The principle above referred to therefore has full operation, regardless of the persistence of the same trade-name.

It is claimed that the company had notice of the change of ownership through the brokers who wrote the insurance. Upon the question of notice: J. E. Lutz & Co. were the agents who wrote the insurance. They were the only agents of the insurance company in the Knoxville territory, and the complainant had notice of this agency, by reason of the fact that they signed the policy as agents of the company. Messrs. Doll, Mynderse & Brownlee were in the general insurance and real estate business. As already stated, the application for insurance having been made to them, and they having no companies who would take the risk, they procured the policy to be issued by J. E. Lutz & Co. The only thing in the record tending to show any notice to them appears in the following excerpt taken from J. E. Lutz' deposition: "Q. Did you, or your firm, or your company, so far as you know, ever have any notice of any change of ownership in the property of complainants after the policy was written, and before the fire, and, if so, state fully what notice you had? A. The only intimation we had was when I went to Doll, Mynderse & Brownlee and asked them for the return of the policy, as we wanted to cancel it. He merely said he would have the policy taken up, and, while I did not state to him my reason for asking him for the return of the policy, he said there had been some changes, but I did not inquire whether physical or otherwise." This was within two weeks of the fire.

It will thus be seen that, so far as the agent of the company is concerned, the only notice he had was some months after the change of ownership, and within two weeks of the fire. He undertook to take up and cancel the policy, and was told at the time that there had been some changes, but was not informed as to whether there was a change in the title or ownership, or whether the changes were physical changes in the property. Certainly he did not assent to the changes whatever they were, since he was

endeavoring at that time to cancel the policy now in suit.

There is some question as to whether the brokers had notice, but we think that it is perfectly clear from the evidence that Mr. Toms, who was the employé of Doll, Mynderse & Brownlee, did have a general knowledge of the fact that Fox and Armstrong were the owners of the property, and that this knowledge came to him shortly after they purchased. However, this would not affect the insurance company, since Doll, Mynderse & Brownlee were merely brokers. A case in point and conclusive of the question, when taken in connection with the case immediately following in the same volume, is that of Royal Insurance Co. v. McCrea, Maury & Co., 8 Lea, 531, 41 Am. Rep. 656. The holding of the court in the case last referred to is set out in the syllabus, as follows: "If the general agent of a foreign insurance company who delivers and countersigns a policy, and whose duty it is to endorse on the policy existing or subsequent insurance, has knowledge of such insurance, and is ready to make the endorsement, but postpones doing so to suit his own convenience, when the assured offers to produce the policies for the purpose, and in the meantime the property is destroyed by fire, a condition of the policy requiring such insurance to be endorsed on the policy will be considered as waived, notwithstanding another condition contained in it that the use of general terms or anything less than a distinct specific agreement, clearly expressed and endorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein." In the next case, referring to the former, the court said: "The principal defense, both in this court and the court below, was that of over insurance upon substantially the same proof as in the foregoing case, of the policies issued, their dates, and amounts, and proceedings had thereon. The reply to this defense was not the same as in the previous case, for, although the policy was obtained by the assured through Peck & Cahill, these persons were not the agents of the Royal Insurance Company, and only acted as insurance brokers. A broker who effects insurance under no employment by the insurer, but for a commission upon the premium received for such risks as he procures to be offered and the insurer chooses to accept, is not the agent of the insurer in such sense as to bind the insurer by notice to the agent. Devens v. Mechanics' & Tr. Co., 33 N. Y. 168." Royal Insurance Co. v. McCrea, Maury & Co., 8 Lea, 531, 532, 41 Am. Rep. 656.

Again this court adverted to the subject in Martin v. Insurance Co., 106 Tenn. 523, 528, 61 S. W. 1024, 1025, and quoted with approval the following from Hermann v. Insurance Co., 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197, viz.: "But the authority of a

broker employed to procure insurance for his principal, such broker not being a general agent to place and manage insurance on his principal's property, terminates with the procurement of the policy. It cannot in reason be held to continue after the insurance has been procured and the policy had been delivered to the principal. An agent to procure a contract has no power to discharge it implied from the original authority merely. If he possesses that power, it arises from some actual or apparent authority superadded to the mere power to enter into the contract." *Grace v. Am. Central Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Adams v. Fire Insurance Co. (C. C.)* 17 Fed. 630; *Kehler v. N. O. Insurance Co. (C. C.)* 23 Fed. 709; *Wight v. Royal Insurance Co. (C. C.)* 53 Fed. 340; *Ostrander, Fire Insurance Cos.* § 16; 1 *Joyce on Insurance*, §§ 636, 637; 2 *Joyce on Insurance*, §§ 1655-1666; *White v. Insurance Co.*, 120 Mass. 330; *Mechem on Agency*; § 931.

We are of opinion therefore that the plaintiff is not entitled to recover. The chancellor held otherwise, and his decree is therefore reversed, and the bill dismissed, with costs.

UNITED STATES FIDELITY & GUARANTY CO. v. RAINEY et al.

(Supreme Court of Tennessee. March 7, 1908.)

1. CREDITORS' SUIT (§ 28*)—PRESENTATION OF CLAIMS—TIME FOR FILING.

A creditor may file a petition setting up a claim in a creditors' suit and share in the fund at any time before it has been finally distributed, but he cannot come in at a subsequent term, after a decree has been rendered settling all the controverted questions, for the purpose of reopening the case, and having the questions reheard.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. §§ 115, 116; Dec. Dig. § 28.*]

2. APPEAL AND ERROR (§ 545*)—RECORD—PETITIONS DENIED—FILING IN LOWER COURT—NECESSITY FOR BILL OF EXCEPTIONS.

To make a petition the filing of which was disallowed in the lower court a part of the record on appeal, it must be embodied in the transcript by a sufficient bill of exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2416; Dec. Dig. § 545.*]

3. APPEAL AND ERROR (§ 518*)—RECORD—PETITION DENIED FILING IN LOWER COURT—PRESENTATION IN DECREE.

Petitions the filing of which were disallowed in the chancery court may be sufficiently embodied in a decree to be presented to the Supreme Court, but the decree must fully recite the nature of the petitions with their material averments, together with the relief sought and the action of the chancellor thereon, and the mere recital that they were filed is not sufficient.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2342; Dec. Dig. § 518.*]

4. APPEAL AND ERROR (§ 518*)—RECORD—PETITIONS FILED AFTER DECREE WITHOUT ORDER OF CHANCELLOR.

Petitions filed in a creditors' suit after final decree and at a subsequent term, without an order of the chancellor, did not thereby become part of the record, especially where the chancellor had declined permission to file them.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2342; Dec. Dig. § 518.*]

5. APPEAL AND ERROR (§ 776*)—DISMISSAL—OFFER OF JUDGMENT—PAYMENT INTO COURT OF AMOUNT ADMITTED TO BE DUE.

A party may end litigation in the Supreme Court by agreeing in open court to suffer judgment to be pronounced against him for his opponent's claim, with interest and costs, and he need not pay the money into court.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 776.*]

6. APPEAL AND ERROR (§ 780*)—PARTIES—ONE OR MORE SUING ON BEHALF OF OTHERS—DISMISSAL.

That an appeal in a creditors' suit may not be dismissed because the defendants of record are being sued as the representatives of a particular class of creditors, the bill must show that they were made defendants as representatives of a particular class, especially where the decree granting the appeal shows that they prayed the appeal on their individual accounts.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 780.*]

7. BONDS (§ 35*)—OMISSION OF OR EXCESS OF STATUTORY REQUIREMENTS—VALIDITY AS COMMON LAW BOND.

Where a guaranty company voluntarily and for a valid consideration became surety on a public officer's bond, which was not conditioned according to the statute, omitting one prescribed condition and embracing other conditions not required, its bond was nevertheless a good common-law bond, and enforceable to the full extent of the penalty imposed.

[Ed. Note.—For other cases, see *Bonds*, Cent. Dig. § 340; Dec. Dig. § 35.*]

8. OFFICERS (§ 37*)—BONDS—CONDITIONS.

A condition in a public officer's bonds that he will faithfully perform all the duties of his office is a guaranty of the personal honesty of the officer, furnishing indemnity against his defalcations.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 54-59; Dec. Dig. § 37.*]

9. STATES (§ 110*)—PRIORITY OF STATE AS CREDITOR.

The prerogative right of the sovereign to priority of payment of demands due it in its sovereign capacity was a part of the common law transmitted to Tennessee from North Carolina.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 108; Dec. Dig. § 110.*]

10. STATES (§ 110*)—PRIORITY OF STATE AS CREDITOR.

The state is entitled to priority over other creditors of a defaulting public officer in the collection of its delinquent revenue on his bond.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 108; Dec. Dig. § 110.*]

11. COUNTIES (§ 130½*)—PRIORITY AS CREDITOR.

Counties are not entitled to priority over the creditors of a defaulting public officer in the collection of claims on his bond.

[Ed. Note.—For other cases, see *Counties*, Dec. Dig. § 130½.*]

12. MUNICIPAL CORPORATIONS (§ 255½*) — PRIORITY AS CREDITOR.

Cities are not entitled to priority over other creditors of a defaulting public officer in the collection of claims on his bond.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 255½.*]

13. INTEREST (§ 39*)—FUNDS IN LITIGATION—LIABILITY UNDER BOND.

Where a surety was liable on a public officer's bond to many creditors, whose claims had not been adjudicated, and filed a bill to have its liability established, it was chargeable with interest on the amount due from the date of the decree adjudging liability, and not from the date of filing the bill.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 84; Dec. Dig. § 39.*]

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Bill, in the nature of a creditor's bill, by the United States Fidelity & Guaranty Company against Walter S. Rainey and certain of his creditors as representatives of all his creditors to ascertain complainant's liability as surety on the named defendant's official bonds. There was a decree sustaining the bill as a general creditor's bill, ordering publication of notice to creditors to file their claims, and referring the matter to the clerk and master to take proof and report the sums due. Exceptions to the report were overruled by the clerk, but on appeal the decree of the chancellor modified the report giving priority to certain creditors. At a term after the decree was rendered, but before distribution of the fund one of the creditors presented a petition setting up a claim, and was denied the right to file it. Various creditors appeal, and bring error. Reversed and remanded for the statement of another account.

Clarence T. Boyd and E. L. McNelly, for appellant. P. D. Maddin, Sam. N. Harwood, McAllister & Smith, Brown & Akers, P. M. Estes, and Thos. B. Johnson, for appellees.

McALISTER, J. The present litigation was evolved from the defalcation of Walter S. Rainey, clerk of the First and Second circuit courts of Davidson county.

It appears from the record that, when Walter S. Rainey entered upon his duties as clerk of the First and Second circuit courts, he executed three official bonds, one for \$5,000 known as the "revenue bond," a second for \$10,000, known as the "official bond," and a third for \$5,000, known as the "special" or "receiver's" bond, conditioned to cover property or funds which might at any time come to the hands of such clerk as special commissioner and receiver by appointment of the court.

The United States Fidelity & Guaranty Company became surety on each of these official bonds. About January 5, 1901, and before the expiration of his term, the said Rainey was removed from office, and it was

ascertained that the liabilities of the office were from \$15,000 to \$25,000 in excess of the assets, which indebtedness fell upon his surety the guaranty company.

The present bill was filed April 5, 1901, by the United States Fidelity & Guaranty Company against Walter S. Rainey and 27 creditors for the purpose of ascertaining the company's liability as surety on said official bonds.

The suit is in the nature of a creditors' bill, and was brought against various creditors of Rainey who might be interested in any fund or funds which may have been paid into the hands of said Rainey as clerk, and for which he was liable on his official bond.

It appears that a few creditors were named as defendants for the purpose of representing all other creditors similarly situated: all the creditors amounting probably to 650 and being too numerous to bring before the court.

It is shown that Rainey was indebted to these various creditors in sums ranging from 10 cents up to \$6,000, and it is said that, in order to avoid bringing this large number of persons before the court, 27 individuals were selected, and made parties defendant to represent all the other classes.

Complainant states that it is ready and willing to pay whatever sum may be necessary under said bonds as soon as the proper amount of each bond can be determined, and asked for a complete account of the office and the exact amount due from complainant by reason of said suretyship.

The prayer of the bill is: That complainant be allowed to file this bill as a general creditors' bill in behalf of itself and all other creditors of the said Walter S. Rainey, clerk of the said two circuit courts.

That a general reference to the clerk and master be ordered to take proof and report the cash balance due from each and every case in the circuit courts when said Rainey was removed from office, the source from which the fund arose, and the bond under which he and his surety were to be liable therefor.

That all other liabilities of the office be ascertained and the bond under which he and his sureties would be liable therefor.

That all parties be restrained by injunction from prosecuting suits to recover any amount due from complainant as surety, except in this case, and that all parties having suits pending against said office be required to file their claims and prosecute the same herein.

That all necessary references be had to ascertain the total liabilities of defendant Rainey's office, the total assets, the names of the parties entitled to participation in the assets, the amount of their claims, the proper pro rata to be paid on claims, and all other necessary matters.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On June 4, 1904, a decree was pronounced by the chancellor sustaining the bill as a general creditor's bill, and ordering publication for creditors to file their respective claims against said Rainey, clerk, on or before the expiration of 60 days from the date of this decree.

Publication was accordingly made in pursuance of the direction of said decree. Answers were filed by the state, county, and city by Len K. Hart and W. B. Clark, county trustees, averring that said Rainey was indebted to said authorities for a large amount of state, county, and municipal taxes which he had failed to pay over.

It appears that several other persons filed answers setting up claims against said Rainey, but most of the defendants named in the bill failed to answer, and orders pro confesso were taken at the rules against 15 out of the 27 creditors named as defendants named. Other creditors from time to time filed petitions presenting claims which they asked to be allowed.

In obedience to the order of reference the clerk and master took proof, and on April 6, 1905, filed his report, in which he set out the official bonds of said Rainey, and also schedules showing all obligations of the office.

The total liabilities of the circuit court aggregated \$25,000, summarized as follows:

(1) State tax on litigation.....	\$ 118 19
(2) County tax on litigation.....	118 38
(3) State taxes for redemption of property	2,845 24
(4) County and school taxes for redemption of property (Davidson county)	3,262 10
(5) City tax (due Nashville)....	8,702 01
(6) Due sundry persons.....	948 59
(7) Due sundry persons, tax paid twice	23 24
(8) Due David Crutchfield, fees...	284 05
(9) Due Len K. Hart, trustee, fees	1,238 68
(10) Due W. B. Clark, trustee, fees	104 28
(11) Due sundry officers, costs.....	335 53
(12) Due sundry witnesses, costs...	323 78
(13) Due sundry judgments, etc....	6,636 16

Total \$25,000 23

The clerk and master also reported a claim in favor of Nolen and Slemons for the sum of \$35, which was a deposit paid into the circuit court in the case of Lewis Peel v. Nashville Railway & Light Company.

The master also reported a deposit in the case of Mayor and City Council of Nashville v. Louisville Property Company for the sum of \$6,100.

The master also reported the conditions of the several official bonds as follows:

Bond No. 1 for \$5,000, known as the "revenue bond," was conditioned as follows:

"Now, therefore, should the above bound Walter S. Rainey truly and faithfully perform all the duties of the office of circuit court clerk for the term of his office according to the requirements of law, and shall faithfully collect and pay over within the

time and in the manner prescribed by law, to the Treasurer of the state of Tennessee, or to the proper officer designated by the laws of Tennessee to receive the same, all state taxes by him collected, or that ought to be collected, and also all fines and forfeitures which may or ought to be collected by him, during the said term of office, then this obligation to be void, otherwise to remain in full force and effect."

Bond No. 2, for \$10,000 as clerk of the circuit court, was conditioned as follows:

"To be void on condition, the said Walter S. Rainey this day inducted into the office of circuit court clerk of Davidson county, safely kept and preserved the records of said court, and faithfully discharged the duties of his office."

Bond No. 3, for \$5,000, known as the "receiver's bond," was conditioned as follows:

"To be void on condition that Walter S. Rainey, this day inducted into the office of circuit court clerk of Davidson county, Tennessee, does account for all the property or funds which may at any time come into his hands as special commissioner and receiver by appointment of the court or judge thereof."

Exceptions were filed on behalf of the mayor and city council of Nashville to the report of the master, for the reason that the state was given priority over the city in the satisfaction of its claim for taxes on said official bonds, and claiming that the city was entitled to share equally with the state and county in the penalties of said bonds for the collection of its taxes, and other claims.

Other exceptions were filed on behalf of the city which it is not material to notice.

Exceptions were also filed on behalf of the county of Davidson, which raised substantially the same questions as to priority made by the mayor and city council of Nashville.

Exceptions were also filed by the United States Fidelity & Guaranty Company, and by P. M. Estis and Len K. Hart.

These exceptions were all overruled by the clerk, but on appeal the chancellor modified the clerk's report as follows:

"As to the revenue bond, the court held that items 1, 2, and 3 of the report, including state and county taxes on litigation, and state taxes for the redemption of property, aggregating \$3,081.82, should be paid out of bond No. 1, which should then be canceled, and that the entire penalty of bond No. 2, the original official bond for \$10,000, was insufficient to meet all claims reported under it, and adjudged that the surety company was liable for the entire penalty of bond No. 2, and that same should be applied, first, to the payment of county and school taxes due Davidson county, Tenn., \$2,845; next, to the payment of city taxes due the mayor

and city council of Nashville, \$8,762.01, less certain claims therein explained."

The result of the decree is that the first three items of the report, aggregating \$3,081.82, are to be paid in full, and charged against the \$5,000 revenue bond, which is then to be canceled, and that items 4 and 5 for county and school tax for redemption of property and city taxes due Nashville, amounting to \$12,024.11, are to be paid out of the \$10,000 bond, and that the remaining items, 6 to 13, shall be paid ratably out of the balance, but, as items 4 and 5 far more than exceed the sum of the \$10,000 bond, it leaves nothing to be paid on the remaining items.

The material change made by the chancellor in the clerk's report was that he adjudged priority to the county and city for the amount of their taxes, aggregating a little over \$12,000, and he released the surety company from the balance on the revenue bond, amounting to \$1,919, after charging it with the sum of \$3,081.

This decree was rendered January 25, 1906.

It appears that on May 21, 1906, the Louisville Property Company presented a petition in said cause, which was before the fund had been distributed under the decree of the chancellor, but at a term subsequent to the rendition of the final decree.

The petitioner presented a claim for \$6,100, which had been paid by the city of Nashville into the hands of Walter S. Rainey, clerk.

The fund, as shown in the petition, arose out of condemnation proceedings by the city against the Louisville Property Company.

It was averred that the property condemned by the city was assessed at \$6,100 by the jury of view, and, this amount not being satisfactory to the Louisville Property Company, it demanded a trial by jury for the assessment of the damages. The city thereupon paid the amount assessed by the jury of view into the circuit court; but, before the case was finally tried, the defalcation of Rainey occurred.

The claim in which the Louisville Property Company was interested had been reported by the clerk at \$6,100, but it was classified by the clerk under class 13—"due sundry judgments," etc.—and it was not reported as a claim in favor of the Louisville Property Company.

The chancellor, however, declined to permit the petition of the Louisville Property Company to be filed in said cause, indorsing his action thereon as follows:

"Application to file this petition and to intervene was not made in due season, and now comes too late. The court refuses the application on these and other grounds. May 21, 1906."

The following assignments of error were

filed on behalf of the Louisville Property Company, namely:

(1) It was error for the chancellor to refuse to allow the Louisville Property Company to file its petition, and set up its claim as a creditor of Walter S. Rainey in this case.

(2) The chancellor was in error in refusing to allow the Louisville Property Company to file its amended petition setting up its claim as a creditor of Walter S. Rainey.

A preliminary question, however, arises on the appeal of the Louisville Property Company, and that is whether said company is properly in the Supreme Court. We think it quite clear that this company had a right, before the final distribution of the funds by the chancellor in the court below, to become a party to said cause, and present its claim.

It is true the petition of said company was not filed until the term following that, in which the final decree was pronounced adjudicating the claim of creditors, and the liability of the guaranty company upon the official bonds executed by it as surety of Walter S. Rainey. However, when this petition was filed, the cause was still in the chancery court, no appeal having been prayed or prosecuted by any creditor, and, as already stated, no part of the fund had been distributed.

The chancellor in our opinion was in error in holding that the petition had not been filed in time. Hurley and Paul, Administrators, v. Jas. M. Murrell's Heirs and Creditors, 2 Tenn. Ch. 620; Latta v. Summerow, 4 Lea, 486; Hearn v. Roberts, 9 Lea, 308; Prewett v. Goodlett, 98 Tenn. 97, 38 S. W. 434; Olcott v. Headrick, 141 U. S. 548, 12 Sup. Ct. 81, 35 L. Ed. 851; Akers v. West, 1 Baxt. 21; 2 Daniels' Chancery Practice, § 1215; Matter of Howard, 9 Wall. 175, 19 L. Ed. 634; Johnson v. Waters, 111 U. S. 674, 4 Sup. Ct. 619, 27 L. Ed. 547.

We think it quite clear under these authorities that in a suit for the administration of an insolvent estate, or for the purpose of subjecting funds under a general creditors' bill, any owner of a claim is entitled to present it, and share in the fund at any time before it has been finally distributed.

But the question remains whether the petition of the Louisville Property Company is properly before this court.

It is conceded that no formal bill of exceptions authenticated by the chancellor is found in the record preserving the petition of the Louisville Property Company. It does appear that counsel for that company prepared and tendered to the court a bill of exceptions embodying the original and amended petition, and requested the signature of the chancellor, but he declined to sign it on the ground, as set forth in the decree, "that all of the proceedings heretofore had in this cause on said petition, and the action of the

court thereon, and the exceptions of the Louisville Property Company to the action of the court, all fully appear in the record and on the minutes of the court."

It is said that the original petition was regularly marked "Filed," as also the petition to rehear, and as well the amended petition of the company. It appears that these several petitions were marked "Filed" when they were presented, without an order of the chancellor; and it is now argued that they thereby became parts of the record as if they had been directed to be filed by the chancellor.

It is said that the court simply refused the prayer of the petition, but did not order the petitions to be stricken from the files.

Attention is also called to the fact that the first petition bears the chancellor's signature in refusing its prayer. It is said that the decree of June 5th, which was duly signed by the chancellor, allows the petition to rehear, and, in connection therewith, a substituted petition asking leave of the court to be made a party thereto was filed.

This substituted petition was also marked "Filed." The chancellor declined to allow the amended petition to be filed upon the ground that the application was filed at a term of the court subsequent to the one at which the decree was rendered; thus recognizing, says counsel, that the petition was a part of the records of the court.

It is further said that, when the court granted the appeal in this case, it especially recognized and referred to the petition of the Louisville Property Company to the same extent as would have been done by a bill of exceptions.

The decree referred to recites:

"When the court is pleased to grant the Louisville Property Company an appeal from the decrees heretofore rendered, which refused the Louisville Property Company the right to come in and be made a party to this cause on its petition filed herewith on June 5th, 1906, otherwise as shown by this record."

Now, the argument of counsel is that the marking of the petitions "Filed," and the recital of these petitions in the several decrees of the court, recognize them, and make them a part of the record in the case.

We are unable to agree with counsel in this contention. Under the recognized practice, in order to make a petition, the filing of which has been disallowed in the lower court, a part of the record on appeal, it must be embodied in the transcript by bill of exceptions duly signed and authenticated by the chancellor.

It is true the matters in the petition may be sufficiently embodied in a decree to be presented to this court, but in such cases the decree must fully recite the nature and character of the petition with its material averments, together with the relief sought, and

the action of the chancellor thereon. *Nance v. Chesney*, 101 Tenn. 466, 47 S. W. 690.

The fact that the original and amended petitions were filed in the cause without an order of the chancellor did not make them a part of the record, especially in view of the action of the chancellor in declining to permit them to be filed. Nor did the mere recital in the decrees of the filing of an original and amended petition by the Louisville Property Company, without more, make said petitions a part of the record herein.

An examination of the petition of the Louisville Property Company will show that the object of petitioner was to re-open at a subsequent term of the court a decree that had been pronounced at a former term, wherein the liability of the guaranty company on the respective bonds executed by it as well as the order of priority of the creditor had been adjudicated, and to relitigate all of those questions. We do not understand the rule allowing a creditor to file his petition and participate in the assets of an insolvent administration at any time before a final distribution of the assets authorizes such a creditor to come in at a subsequent term, after a decree has been pronounced settling all of the controverted questions, for the purpose of reopening the case, and having all of said questions reheard and reviewed.

In *Allen & Hill v. Shanks*, 90 Tenn. 359, 16 S. W. 715, it was said:

"Even an interlocutory decree adjudges rights and settles principles. It is not subject to revision at a subsequent term. * * * But the general rule may be stated to be that if it settles a principle, or adjudges a right, or determines an issue, that in such case it is not open for revision at a subsequent term."

In *Forbes v. Memphis R. R. Co.*, Fed. Cas. No. 4,926, 2 Woods, 334, it is said:

"It is true that the complainants filed the bill in this case on behalf of themselves and of all others being stockholders, creditors, or bondholders of the corporation defendant who might desire, or be entitled, to intervene. But it was never contemplated, nor is it the proper practice, that the persons embraced in that category should intervene to set aside the proceedings, or to interpose obstacles to the progress of the suit. The complainants, by suing as representatives, open the door to all other parties named to come in, and take the benefit of the proceedings and decree, not to oppose and nullify them. In a suit so instituted parties may come in and prove their claims or status, and participate in all the dividends and benefits to be derived from the suit. Rival creditors by proceedings before a master may control the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object and purpose of the suit to obtain an

administration of the company's assets and property. To be allowed to intervene as general defendants and contestants is another and different thing."

It appearing, moreover, that the petition of the Louisville Property Company was not preserved by a bill of exceptions, nor by decree of the court, it cannot be considered by this court on appeal.

The next question to be considered arises on the appeal of Nolen and Slemons. As already stated, Nolen and Slemons were creditors of Walter S. Rainey, and were made defendants to the bill of the guaranty company, and presented in the court below a claim for \$35, which represented a deposit paid into the hands of the circuit court clerk in the case of Lewis Peel v. Nashville Railway & Light Company. That claim was allowed by the clerk and master in the schedule of liabilities reported by him, and this allowance was confirmed by the chancellor; but, on account of the priorities adjudged by the chancellor, this claim would only receive a pro rata of 7 cents on the dollar, and for this reason Nolen and Slemons prayed and perfected an appeal to this court, and have assigned errors. The assignments of error made on behalf of Nolen and Slemons are directed mainly to the preference given by the chancellor in favor of the state, county of Davidson, and the city of Nashville on the several bonds executed by the guaranty company.

Error was also assigned on the action of the chancellor in adjudging that the surplus of the \$5,000 revenue bond could not be subjected to the payment of the claims of the creditors, and in not adjudging interest against the guaranty company on the \$5,000 revenue bond, and the \$10,000 clerk's bond from the date of the filing of the bill.

Error was also assigned on the action of the chancellor in not adjudging that the two sets of bonds were liable for all the obligations of Rainey as clerk of both the circuit court and the Second circuit court.

It further appears that, before the cause was reached for hearing on the docket of this court, counsel for the guaranty company paid into the registry of this court a check for \$35, with interest from January 25, 1906, the date of the decree, and also offered to pay such costs as this court should deem proper, and thereupon moved to dismiss the appeal of Nolen and Slemons.

This motion is resisted by Nolen and Slemons on the ground, first, that the amount tendered to the clerk was inadequate. It is said the correct amount of their debt was originally \$35, with interest from the filing of the bill April 1, 1901, amounting to \$14.35, making a total of their indebtedness \$49.35, which was in excess of the amount tendered. In other words, the insistence is that the amount tendered to the clerk was not sufficient; but this court is of opinion that

a tender was not necessary to be made, since counsel for the guaranty company in open court and on the brief agrees to pay or to suffer a decree in favor of Nolen and Slemons for the full amount of their debt, with interest, and also to pay any costs incurred by that firm in the prosecution of its appeal.

A debtor may in this court suffer judgment to be pronounced against him for the amount claimed by his adversary, and ordinarily this ends the litigation without the payment of the money into court. It is not necessary to stop litigation that a litigant shall pay the amount of his adversary's claim, but it is sufficient if he suffers judgment for the claim which his adversary is prosecuting, including the costs incurred in the suit. So that no tender at all was necessary in this case, since the guaranty company, through its counsel, has agreed that Nolen and Slemons may have a decree against it for the full amount of his claim, with interest and costs.

The second ground on which Nolen and Slemons resist the motion of the Guaranty Company to dismiss their appeal is that said firm was selected by the complainants below as defendants to represent a certain class of creditors, and that the appeal by Nolen and Slemons was not simply on their own account, but also on behalf of all other creditors represented by them. The entry of appeal was limited to Nolen's and Slemons' claim. It is admitted by learned counsel that ordinarily the payment of the claim of a litigant will end the litigation; but it is said that Nolen and Slemons were designated by the complainants to represent a class, and they are waging a contest in this court on behalf of those creditors as well as themselves, and especially to see that the penalty of the \$10,000 bond is prorated to all the creditors, instead of being appropriated exclusively to the payment of the claims of the county and city.

It is further said that no interest was awarded to the creditors represented by Nolen and Slemons, and they are insisting that the guaranty company should be charged with interest at the rate of 6 per cent. per annum on the amount of the two bonds, to wit, \$15,000, which would make \$900 per annum for 6½ years, which would create a fund of about \$6,000 additional to be prorated among these creditors.

It is said that if the motion of the guaranty company to dismiss the appeal of Nolen and Slemons is allowed, the claims of other creditors represented by them will be defeated, except the payment of 7 cents on the dollar allowed by the chancellor in the court below.

An able argument has been submitted by counsel for Nolen and Slemons in opposition to the motion of the guaranty company to dismiss the appeal of the former.

It is insisted that this case is analogous

in principle to those cases in which there are numerous parties constituting a class, and the rights of all are sought to be determined by making a few defendants to represent all.

1 Daniels' Chancery Practice (5th Ed.) 759 (*794), is cited, wherein it is said:

"After a decree has been made of such kind that other persons besides the parties on record are interested in the prosecution of it, neither the plaintiff nor defendant on consent of the other can obtain an order for the dismissal of the bill. Thus where the plaintiff sues on behalf of the same class, although he comes upon his own mere motion and retains the absolute dominion of the suit until decree, and may dismiss the bill at his pleasure, yet after a decree he cannot by his conduct deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it. The reason of the distinction is that, before decree, no other person of the class is bound to rely upon the diligence of him who has instituted his suit, but may file a bill of his own, while, after the decree, no second suit is permitted."

See, also, 1 Daniels' Chancery Practice (5th Ed.) 228-229, 233.

In *Atlas Bank v. Nahant Bank*, 23 Pick. (Mass.) 492, Chief Justice Shaw said:

"Plaintiffs having once instituted the proceedings as a statute remedy for themselves and others, they go on afterwards for the benefit of the parties concerned, and the original plaintiffs have no right to discontinue any more than a petitioning creditor could discontinue the proceedings under a commission of bankruptcy."

In 6 Pomeroy, Eq. Jurisprudence, § 892, the author says:

"In such cases (where one creditor sues on behalf of himself and others who desire to come in) the question may arise as to the power of the creditor who files the bill to control the proceedings. If other creditors have come in, or if an interlocutory judgment has been rendered establishing the rights of the parties, the original complainant cannot of his own motion dismiss the bill. Where other creditors have not come in, however, it has been held that he may dismiss the bill."

In *Schumate, Ex'r, v. Crockett*, 43 W. Va. 91, 27 S. E. 240, it appeared a suit had been brought by one lien creditor on behalf of himself and other creditors similarly situated. There was a reference, a report, and a decree. After this the complainant's debt was paid, and defendant sought thereby to stop the suit. The court said: "The debt of the plaintiff was paid, but the suit was expressly for all lienors, and others had appeared and become parties, and that payment could not defeat the decree, the decree belonging to all, not one of the creditors, and any creditor yet unpaid had a right to en-

force it. He could go on in the name of the original plaintiffs, or, if anybody so asked, the plaintiff's name could be stricken out and another creditor's name substituted, and the result was that the payment of the plaintiff's debt did not stop the suit."

In *Bilmyer v. Sherman*, 23 W. Va. 662, the court said:

"After an order of reference, the plaintiff in such bill ceases to have absolute control of it, and it cannot be dismissed by him without the consent of the other creditors. To hold otherwise would allow the defendant debtor to collude with the nominal plaintiff in controlling the litigation, and in this manner oftentimes greatly hinder, delay, and defraud other lien creditors of their debt. It was held the defendant had no right to have the suit dismissed." *Lewis v. Laidley* (Supreme Court of Appeals W. Va., 1894) 89 W. Va. 422, 19 S. E. 378; *Slusher v. Simpkins* (1897) 101 Ky. 594, 40 S. W. 570, 43 S. W. 692.

"The persons on whose behalf the actual parties to a representative suit act are regarded as quasi parties, and for many purposes they have the rights of actual parties. Thus, if the nominal complainant neglects to proceed, or the suit becomes abated, any member of the class for whom the complainant was acting may have leave to prosecute." 15 Enc. Pl. & Pr. p. 634.

In 15 Enc. Pl. & Pr. p. 637, it is said:

"Where a complainant sues on behalf of himself and all other persons of the same class, although he acts on his own mere action, and retains the absolute dominion of the suit until the decree, and may dismiss the bill at his pleasure, upon obtaining leave of court to do so, yet after a decree has been made of such a kind that other persons besides the parties on the record are interested in the prosecution of it neither the complainant nor the defendant, on the consent of the other, can obtain an order for the dismissal of the bill, if any of the persons for whose common benefit it was recovered see fit to prosecute it."

We are of opinion that the authorities cited by counsel for Nolen and Slemons are not controlling in the present instance.

We do not find after a careful examination of this bill that Nolen and Slemons are made parties defendant as the representative of any particular class of creditors. Such an allegation is an indispensable condition in the application of the principles of law enunciated in the authorities cited. *Brown v. Brown*, 86 Tenn. 310, 6 S. W. 869, 7 S. W. 640; *Lanchester v. Thompson*, 5 Madd. Ch. Rep. 15.

Again, an examination of the decree granting an appeal to Nolen and Slemons will show that an appeal was not prayed by them as the representatives of any class of creditors, but on their individual account.

We are therefore of opinion that, when

counsel for the guaranty company offered to suffer judgment against said company in favor of Nolen and Slemons for the full amount of their account, with interest and costs, this ended the litigation so far as that firm was concerned.

The next matter to be considered is the writ of error sued out by Len K. Hart and W. B. Clark to the decree of the chancellor. The record discloses that these petitioners were both made parties defendant by name to the original bill, and each filed an answer setting up his respective claim; that of Hart amounting to \$1,238.68, and the claim of Clark \$104.28. These claims were allowed by the clerk and master, but petitioners excepted to his report giving priority in the distribution of the funds to the state of Tennessee.

As already seen, these exceptions were overruled by the chancellor, who, in addition, gave priority to the taxes due the county of Davidson, and the city of Nashville.

The errors assigned in this court on behalf of Len K. Hart and W. B. Clark are as follows:

"First. The chancellor was in error in giving preference against the \$10,000 bond to the amount collected by Rainey for redemption of property for county taxes due Davidson county, \$3,262.10.

"Second. The chancellor was in error in giving preference against the \$10,000 bond, to the amount due the mayor and city council of Nashville \$8,762.01.

"Third. The chancellor was in error in not decreeing that the creditors in classes 4 to 14 inclusive, stood upon an equal footing, and should participate ratably in the penalty of the \$10,000 bond.

"Fourth. The chancellor was in error in not adjudging that the surplus of the \$5,000 bond, commonly known as the 'revenue bond,' which, in this case, was also conditioned that Rainey should faithfully discharge all of the duties of his office, should, after paying items 1 and 2, be prorated to items 3 to 13 inclusive.

"Fifth. The chancellor was in error in giving priority to the taxes collected due the state of Tennessee, and in not holding that the state stood upon a par with the remainder of the creditor classes 2 to 13 inclusive.

"Sixth. In not adjudging interest against the United States Fidelity & Guaranty Company from the date of the filing of its bill.

"Seventh. The chancellor was in error in not adjudging that the two sets of bonds were liable for all the obligations of the office, and in not holding that the office bond of \$10,000 as clerk of the Second circuit court was liable also for any obligations as clerk of the First circuit court."

It should be observed that Len K. Hart and W. B. Clark in their petition for writ of error asked this court to allow the writ

of error on behalf of all other creditors of Walter S. Rainey who stand in the same relation to the case that these parties stand. But, for the reasons already stated, this court will only consider such claims as are before it by appeal or writ of error sued out by individual claimants, and not upon the case-made by any other appellant as the supposed representative of a class.

The first question arising on the assignments made by Hart and Clark on their writ of error is in respect of the priorities adjudged by the chancellor in favor of the state, the county, and city on the revenue and official bonds executed by the guaranty company. These bonds were executed in pursuance of the requirements of Acts 1794, cc. 1, 14, found in Shannon's Code, § 402:

"Every clerk of a court before entering upon the duties of his office shall enter into bond with sufficient surety, to the satisfaction of his court, in the sum of \$10,000, payable to the state, and conditioned for the safe keeping of the records, and for the faithful discharge of the duties of his office."

Section 403:

"Also a bond in the sum of \$5,000 conditioned to account for and pay over all moneys arising from taxes on suits, fines, and forfeitures; otherwise the clerk shall be liable to pay a sum equal to treble the taxes, fines, and forfeitures which have come, or ought to come to his hands."

The official bond for \$10,000 is conditioned as follows:

"To be void on condition the said Walter S. Rainey this day inducted into the office of circuit court clerk of Davidson county, safely keep and preserve the records of said court, and faithfully discharge the duties of his office."

An examination of the revenue bond will show that it was not executed in exact conformity with the requirements of the statute. That bond was in the penalty of \$5,000, conditioned as follows:

"Now, therefore, should the above bound Walter S. Rainey truly and faithfully perform all the duties of the office of circuit court clerk for the term of his office according to the requirements of law, and shall faithfully collect and pay over within the time, and in the manner prescribed by law, to the Treasurer of the state of Tennessee, or to the proper officer designated by the laws of Tennessee to receive the same, all state taxes by him collected, or that should be collected, and also all fines and forfeitures which may, or ought to be collected by him during the said term of office, * * * then this obligation to be void, otherwise to remain in full force and effect."

When the conditions of this bond are compared with the conditions prescribed by section 403, Shannon's Code, it will be noticed that the bond does not specifically cover "taxes on suits" as required by the statute.

Again, it will be observed that the bond actually executed is conditioned to pay over all state taxes collected, or that ought to be collected by said clerk, when no such condition is prescribed by the statute for this particular bond.

It will be further seen that the condition of the bond given requires the said Walter S. Rainey to "truly and faithfully perform all the duties of the office of circuit court clerk," etc. But this language is not in the statute. Section 1094, Shannon's Code, provides as follows:

"Whenever any officer required by law to give an official bond, acts under a bond which is not in the penalty, payable or conditioned as prescribed by law, or is otherwise defective, such bond is not void, but stands in the place of the official bond, subject on its condition being broken to all the remedies which the person aggrieved might have maintained on the official bond of such officer, executed, approved, and filed according to law."

It will be observed that under the provisions of the section last cited the defectively executed bond stands in the place of the official bond, and any conditions prescribed by the statute for the official bond which are omitted from the bond actually given will be supplied and read into it. It is to be remarked, however, that the revenue bond actually given in this case not only omitted one of the conditions prescribed by the statute for the official bond, but it superadded other conditions which were not required.

It appears, however, that this bond was voluntarily executed by the guaranty company, and, although not in conformity with the statute, it is a good common-law bond, and the surety is liable according to his undertaking.

Mr. Brandt, in his work on Suretyship and Guaranty (volume 1, § 22) says:

"The general rule is that a bond, whether required by statute or not, is good at common law if entered into voluntarily for a valid consideration, and if it is not repugnant to the law or policy of the law, and the surety on such bond is bound thereby. The voluntary bond of a State Treasurer which is not demandable by law of a county treasurer where there is no law requiring a bond to be given of a deputy collector of customs, where there is no law prescribing a bond to be given of a plaintiff in an attachment suit when no bond is required by law, are all valid, and bind the sureties who sign them." *Thompson v. Buckhannon*, 2 J. J. Marsh. (Ky.) 416; *Hoboken v. Harrison*, 30 N. J. Law, 73; *Cotton's Guardian v. Wolf*, 14 Bush (Ky.) 238; *Tinsley v. Kirby*, 17 S. C. 1; *State v. Sooy*, 38 N. J. Law, 324; *Supervisors of St. Joseph v. Coffenbury*, 1 Mich. 355; *Dignan v. Shields*, 51 Tex. 322.

"Where a bond is required by law to be

given, the voluntary bond of an executor or administrator to the ordinary, which varies from the form prescribed by the statute, of a cashier containing nothing contrary to law, but varying from the statutory form, of a plaintiff in replevin, in which the condition does not conform to the statute, are all valid and binding on the sureties. * * *

A statute required that a bank cashier should give a bond conditioned for the faithful performance of his duties. The cashier gave a bond which provided for past as well as future delinquencies. Held the bond was not void because it contained more than provided by statute. Being a voluntary bond, and for a lawful purpose, it was good at common law." *Ordinary v. Cooley*, 30 N. J. Law, 179; *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 473; *Franklin Bank v. Cooper*, 36 Me. 179.

The same author, at section 24, says:

"The principle that a surety in a voluntary bond made upon good consideration, and which does not contravene the policy of the law, or the prohibition of the statute is liable at common law on such bond, has been applied to a great variety of circumstances. Such a bond is valid even though another bond be required by a statute. Thus, where a statute required a bank cashier to give a bond with two or more sureties, and he gave a bond with only one surety, such surety was held liable. The statute did not say no other bond but the one required should be taken, and was only directory."

Bank of Brighton v. Smith, 5 Allen (Mass.) 413.

The same author (volume 2, § 520) says:

"If a person occupying official position voluntarily gives a bond providing against loss by reason of his acts as to matters concerning which there is no statutory provision, such bond, although not a statutory bond, is, if it is founded on a sufficient consideration, and is not prohibited by statute nor contrary to public policy, valid and binding on the principal, and his surety as a voluntary common-law obligation." *United States v. Mason*, 2 Bond, 183, Fed. Cas. No. 15,737; *Farmers' & Mechanics' Bank v. Polk*, 1 Del. Ch. 167; *Bank of The Northern Liberties v. Cresson*, 12 Serg. & R. (Pa.) 306; *Potter v. State*, 23 Ind. 550; *McWilliams v. Norfleet*, 60 Miss. 987.

Our own authorities are in accord with the text of Mr. Brandt. In *Hibbits v. Canada and Others*, 10 Yerg. 465, it was held:

"An administration bond made payable to the chairman of the county court and his successors in office, instead of the Governor of the state, as required by law, cannot be sued upon by the successor in office, but is a good voluntary bond, and suit may be brought upon it in the name of the original payee or his personal representative, if he be dead." In *Goodrum v. Carroll*, 2 Humph. 490, 37 Am. Dec. 564, it appeared:

"The bond upon which the suit was brought

was executed by the defendants to Wm. Carroll, Governor of Tennessee, and his successors in office in the penal sum of \$10,000, conditioned that T. C. Porter, who had that day been appointed sheriff of Giles county, should faithfully execute and perform the duties of that office."

The court said:

"This was not an office bond, according to the statute, because the penalty is \$10,000 instead of \$12,000, as required by the statute, and because it was not approved and recorded, as the statute directs. It has been decided by this court (10 Yerg. 465), and is admitted, that a bond executed by a public officer and securities, though not good as a statutory bond, may nevertheless be binding as a voluntary obligation upon which an action at common law may be maintained."

Polk v. Plumber, 2 Humph. 500, 37 Am. Dec. 566, is cited by counsel for the guaranty company as authority, to the effect that a bond containing conditions superadded to those prescribed by the statute can only be enforced as a statutory bond, but, as said in Jones v. Wiley, 4 Humph. 148:

"It has been determined that, although the bond may be good as a voluntary bond, it containing no provisions which are improper, illegal, or against public policy, but quite the contrary, still, not having been taken by the proper authority and pursuant to law, it is not good and effectual as an official or statutory bond. * * * There is nothing inconsistent with this view of the matter in the case of Polk v. Plumber, 2 Humph. That case maintains that certain stipulations did not make the bond void as a statutory bond, but are to be treated as surplusage. The bond in that case was held to be statute."

In Boughton v. State, 7 Humph. 193, it appeared:

"That Sam Boughton, sheriff, had made default in paying over to the Treasurer of the state the state revenue of Stewart county collected for the year 1845. In March, 1844, he was elected sheriff of said county, and at the ensuing April term of the county court of said county he gave bond as collector of the state revenue for the years 1844 and 1845, with the plaintiffs in error as his sureties. In October, 1845, he gave another bond with other sureties, conditioned for the faithful collection and payment of the state revenue for the year 1845. The judgment of the circuit court was given upon the bond of April, 1844, for the default in paying over the revenue collected for the year 1845. And the question is whether, as embracing the last year, the bond in question was a good statutory bond, subjecting the obligors to the summary remedy of a judgment by motion."

The court held, after reviewing the statutes, that the bond in question, although a good voluntary common-law bond, was not a good statutory bond so far as regards the sec-

ond year, or that of 1845. Governor v. Allen, 8 Humph. 177; Davis v. Bratton, 10 Humph. 179.

We understand this principle in respect of the obligation of a voluntary bond to have been recognized and reaffirmed in McLean v. State, 8 Heisk. 270-275. In that case the court said:

"Another question is this: The bonds taken in 1868, the first year of the first term, in terms bind the collector and his sureties for the discharge of all duties, and the payment of all moneys collected, or that ought to be collected during the entire term of office, and the bonds of 1870 are in the same terms; and the question is, Are the sureties on the bonds of 1868 liable for the default occurring in 1869 with the sureties upon the bonds executed in the year 1869, or must the judgment for the default of the year 1869 be confined to the bonds of 1869? And the same question arises as to the bonds of 1870 in regard to the default occurring in 1871. This we regard as a question of some difficulty. That the bonds in terms bind the obligors to the extent claimed for the plaintiff is not denied, but the argument for the defense is that the law required bonds to be given annually, and only regarded the first bond to cover the taxes for the first year; and, if the bond of the first year in its terms should annex conditions not required by law, and bind the obligors for the taxes of the second year, that the sureties will only be bound to the extent the law required the bond to go, and not for those conditions not required by law, under the principle of the cases of Polk v. Plumber, 2 Humph. 500, 37 Am. Dec. 566, and Banks v. McDowell, 1 Cold. 84. Even upon the principle of Boughton v. State, 7 Humph. 193, these bonds as to the second year's default are good at common law, and we hold that the distinction between statutory and common law bonds is in this respect now immaterial."

Maddox v. Shacklett (Tenn. Ch.) 36 S. W. 731. In Allison v. State, 8 Heisk. 312, it was held:

"A tax collector's bond, reciting an election for two years, and with condition, 'to pay over all taxes by him collected, or which ought to be by him collected, according to law,' binds his sureties for his whole term of office, not simply for the year in which it is given."

In the course of the opinion in that case Judge Freeman said:

"Now, this bond is not the bond conditioned according to the terms of the statute, is not limited to such taxes as by him are collected, or ought to be collected against the last day of December of that year. If it had been thus, it would have been a statutory bond, and the recital of the term of office would not in any wise add to the period which the bond by its terms then would have covered. We must take this

as a good common-law bond, and not the bond required by the statute, or conditioned as required."

In *Coons v. People*, 76 Ill. 383, it was said: "Where an officer gives a bond under which he is allowed to receive moneys, make sale of land for taxes, and receive commissions, he and his sureties will be estopped from denying the validity of such bond when sued for a breach of its condition. It will be obligatory as a common-law undertaking, unless prohibited by statute, or opposed to public policy."

In *United States v. Hodson*, 10 Wall. 409, (19 L. Ed. 937) it was said:

"But where it [bond] is voluntarily entered into, and the principal enjoys the benefits which it is intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense. In such cases there is neither injustice nor hardship in holding that the contract as made is the measure of the rights of the government and of the liability of the obligors."

In *Bank of Brighton v. Smith*, 5 Allen (Mass.) 415, Bigelow, C. J., said:

"The rule of law is well settled that a bond given for the faithful performance of official duties, or in pursuance of some requirement of law, may be valid and binding on the parties, although not made with the formalities, or executed in the mode provided by the statute under which it purports to have been given. This rule rests on the principle that, although the instrument may not conform to the special provisions of a statute or regulation in compliance with which the parties executed it, nevertheless it is a contract voluntarily entered into upon a sufficient consideration for a purpose not contrary to law, and therefore it is obligatory on the parties to it in like manner as any other contract or agreement is held valid at common law."

It may be observed that the condition contained both in the revenue and official bond of Walter S. Rainey, to the effect that he will truly and faithfully perform all the duties of the office of circuit court clerk, etc., is a guaranty of the personal honesty of such officer, and was intended to furnish indemnity against any defalcations on his part in accounting for revenue paid into his hands. *Fiala v. Almsworth*, 63 Neb. 4, 88 N. W. 135, 93 Am. St. Rep. 420; *American Bank v. Adams*, 12 Pick. (Mass.) 303; *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47.

We are aware that there is another line of cases which hold that bonds executed in the course of judicial proceedings in excess of the conditions prescribed by statute are only enforceable to the extent of the statutory requirements.

In *Banks v. McDowel*, 1 Cold. 85, it was held:

"An administrator in cases of appeal is not required to give security for a debt or judgment against him. The bond should be conditioned to pay costs and damages alone. If the bonds be in terms to pay the amount found due against the estate, such illegal provision or condition will be rejected and the bond held good for the costs and damages." *Sharp v. Pickens*, 4 Cold. 270; *Hutchinson v. Fulghum*, 4 Helsk. 557; *Patterson v. Gordon*, 3 Tenn. Ch. 22; *Denton v. Woods*, 11 Lea, 506.

It may be said generally in all cases that conditions of appeal bonds beyond the requirements of the statute are void, and the bond is enforceable as required by law. *Mason v. Smith*, 11 Lea, 71; *Denton v. Woods*, 11 Lea, 506; *Ranning v. Reeves*, 2 Tenn. Ch. 267.

Where the same rule was applied to attachment bonds: *Mason v. Metcalf*, 4 Baxt. 440; *Mason v. Anderson & Co.*, 12 Helsk. 38.

It may be said in respect of the last class of cases that the bonds were wholly without consideration, since the parties were entitled to an appeal upon executing a bond for costs and damages as required by the statute. Hence there was no consideration for the superadded conditions, and for that reason such bonds were nonenforceable. In the present case, however, there was a consideration for the bonds executed by Rainey and the Fidelity Company as his surety. The revenue for which Rainey defaulted went into his hands upon the faith of bonds executed by him in excess of the requirements of the statute, and the surety company was paid a premium for the indemnity guaranteed by it. The bond executed by Rainey was voluntarily executed, upon sufficient consideration, and is clearly enforceable as a common-law bond to the full amount of the penalty prescribed.

We are therefore of opinion that the guaranty company was liable for the full penalty of this bond, and that the chancellor was in error in ordering it canceled after crediting it with the sum of \$3,081.82, amount of state and county taxes on litigation, and state taxes for the redemption of property.

We next proceed to inquire if the state is entitled to priority in the collection of its delinquent revenue on the bond of the guaranty company. This question, so far as we are advised by any written opinion of this court, is one of first impression in this state. It is certain there is nothing in the Constitution of the state or in any statute which has been called to our attention declaring such priority. There is one instance in which priority in favor of the state is declared, and that is in the distribution of the estates of insolvent decedents.

Section 4090, Shannon's Code, provides:

"In order to ascertain the fund to be dis-

tributed among the creditors, the clerk shall deduct from the whole estate:

"(1) All fees and commissions due in the administration thereof, including the allowance to the administrator or executor.

"(2) Claims for funeral expenses.

"(3) Debts and arrearages due to the state."

This statute was construed in *Field's Ex'r v. Wheatley*, 1 Sneed, 351, to mean debts and arrearages due the government or state, in its sovereign capacity, as revenue, fines, forfeitures, penalties, and the like.

The passage of this statute allowing priority to the state in this instance does not necessarily exclude the existence of the priority as derived from the common law.

It is undeniable that by the common law of England the sovereign, by virtue of his prerogative rights, was entitled to priority of payment of debts due him over debts due his subjects. 8 Bacon's Abridgment, tit. "Prerogative," p. 91; 1 Kent's Commentaries (14th Ed.) *257; Blackstone's Commentaries, book 1, p. 240, foot page 210; Id. book 2, star pages 409, 511, foot page 833 (4th Ed.); *Giles v. Grover*, 9 Bing. 128.

"In nearly all of the states there are statutes giving preference to taxes, rates, and other duties due the state over the debts of the citizens; but in one instance the statute directs that debts due the state shall be paid last. Whether a state, in the absence of positive enactment, is entitled to the priority claimed by the crown under the common law, appears to be not well settled, the prevailing opinion, however, is in favor of such priority." Am. and Eng. Enc. of Law, 479.

In Maryland the state is held entitled to priority of payment of a debt due it out of the assets of the estate of a deceased person as a prerogative right from the common law. *Orem v. Wrightson* (1878) 51 Md. 34, 34 Am. Rep. 286; *State v. Bank of Maryland* (1834) 6 Gill & J. 228, 26 Am. Dec. 561.

In New Jersey it is held that there is no prerogative right derived from the common law to the state for priority in the payment of debts over other creditors. *Middlesex County Board v. State Bank*, 30 N. J. Eq. 311.

The right is also denied in South Carolina. *Klinck v. Keckley* (1835) 2 Hill, Eq. 250; *Baxter v. Baxter*, 23 S. C. 114.

This question arose in the case of *Glynn County v. Brunswick Terminal Company et al.* Supreme Court of Georgia, and is reported in 101 Ga. 244, 28 S. E. 604. Simmons, Chief Justice, said:

"It appears from the record that the treasurer of the county of Glynn deposited a certain amount of money of the county of Glynn in the Brunswick State Bank, and that the Brunswick Terminal Company and others were depositors. The bank failed. A creditors' petition was filed for the purpose of winding up the affairs of the bank

and distributing the assets. The county of Glynn was made a party, and in its intervention claimed a preference over all other depositors in the distribution of the assets.

"On the trial of the case the court ruled that the county had no preference over the other depositors, but must share pro rata with them. To this ruling the county excepted. According to the rulings of the court the state, in a contest of this kind, would be entitled to a preference. These decisions are based upon our adopting act of 1874, wherein the common law of England was made the common law of the state. By that law the King of England, by his prerogative right, had a preference over all his subjects in regard to debts due the crown. This court in the case of *Robinson v. Bank*, 18 Ga. 65, held that the state, on account of its sovereignty, had the same prerogative right in regard to the collection of debts due it as the King of England had with respect to debts due the crown, and ruled in that case that, although the state had a lien junior to that of one of its citizens, the State's lien had preference. This ruling has been followed in other cases, notably that of *Seay v. Bank*, 66 Ga. 609.

"While it may be true that the state, on account of its prerogative right, has this preference, we cannot hold that the same right applies to the counties of the state. If there is such a thing as prerogative right of preference on the part of the state, it cannot be divided among the 137 counties of which it is composed. 8 Bac. Abr. under head of 'Prerogative.' We think it safe to hold that the county has no such prerogative right as the state. Not having this right, in order to obtain a preference over the other depositors, it must show some statutory right. We have no statute which gives a county which is a depositor in a bank a lien or preference over other depositors of the same class. It is true there is a statute giving a county a lien for its taxes in preference to others, but a lien for taxes and a lien upon the assets of an insolvent debtor for money deposited stand upon altogether different footings. The lien of the county for taxes as against the property taxed by it (the lien being given by statute) is one thing, and the claimed right of the county to priority over the other creditors in regard to an indebtedness for money received from the county, whether or not that money has been collected from taxes, is another and altogether different thing. In the one case the statute gives the lien for taxes upon the property of the citizen. In the other there is no statute giving any lien. In the absence of any legal right of preference in such cases, the county must stand upon an equal footing with other depositors."

In 1 Kent's Commentaries (14th Ed.) *248, note "b," it is said:

"In Maryland, by statute passed in 1778, the commencement of a suit by the state against a public debtor created a lien on all the lands of the debtor, and a preference over all other creditors, who had not prior to the commencement of the suit secured a lien by judgment, mortgage or otherwise. *Davidson v. Clayland*, 1 Har. & J. 546. The preference in payment of debts was a breach of government prerogative at common law, and it was introduced as such into Maryland. It is the law still when the property of the debtor remains in hand, and there is no lien standing in the way. *State of Maryland v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561. In Connecticut the state has a priority of claim against the estate of an insolvent debtor, and state sureties paying the debt have the same privilege. *Rev. St. Conn. 1826*, 212. The state's preference rests in this country, upon statutes; and the common law gives none over other creditors. *State v. Harris*, 2 Bailey (S. C.) 598; *Kilnck v. Keckley*, 2 Hill, Eq. (S. C.) 256. The common-law prerogative of the King to be paid in preference to all other creditors, is therefore not universally adopted in this country. It prevails in the government of the United States and in Maryland, North Carolina, Indiana, Connecticut, etc., but not in South Carolina. In Georgia state taxes have preference over all incumbrances whatsoever. *State v. Pemberton*, Dud. 15. In Indiana the state has preference over all other creditors, and real and personal estate is bound on behalf of the state from the teste of the first process. *Rev. St. 1838*, 283."

In *Hoke v. Henderson*, 14 N. C. 23, the right of the sovereign to priority of satisfaction out of the goods of the debtor is recognized, unless the debtor's goods be actually

sold under the subject's process before the sovereign's is delivered.

We are of opinion that the prerogative right of the sovereign to receive payment of fines, forfeitures, taxes, and revenue, and such demands as were due it in its sovereign capacity was a part of the common law transmitted to this state from North Carolina, and that the decree of the chancellor was correct in adjudging priority to the state in the collection of its delinquent revenue on this bond.

We are of opinion, however, that this priority does not extend to the counties and municipalities of the state. In *State v. Bank of Tenn.* 5 Baxt. 1, Marion county asserted a claim to priority for a balance due it on account of a deposit in the bank of Tennessee, but this priority was denied, and it was held that the county stood on an equal footing with other creditors of the bank. *Leeper v. State*, 103 Tenn. 528, 53 S. W. 962, 48 L. R. A. 167.

The decree of the chancellor in allowing priority to the county of Davidson and the city of Nashville in the distribution of this fund was therefore erroneous.

It is next assigned as error that the chancellor failed to allow interest on the amount due from the guaranty company from the date of the filing of its bill.

We are of opinion there was no error in the action of the chancellor. The guaranty company is only chargeable with interest from the date of the decree adjudging liability. *State v. Cole*, 13 Lea, 366; *State ex rel. Walsh v. Blakemore*, 7 Heisk. 657.

It results that the decree of the chancellor must be reversed in the respects mentioned, and the cause remanded for the statement of another account in accordance with the principles herein announced.

ALFRED PHOSPHATE CO. v. DUCK RIVER PHOSPHATE CO. et al.

(Supreme Court of Tennessee. July 25, 1907.)

1. EMINENT DOMAIN (§ 13*)—EXTENT OF POWER—PUBLIC USE—EXTENT OF USE.

Const. art. 1, § 21, prohibiting the taking of property for public use without just compensation, inhibits the taking of property for private use, and requires that it be taken for the use of the public, whose rights must be secured by law, and not merely be dependent on the consent of the owner; and it is not sufficient that the exercise of the right will be for the general benefit or advantage of the public.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 51; Dec. Dig. § 13.*]

2. EMINENT DOMAIN (§ 18*)—EXTENT OF POWER—PUBLIC USE—PRIVATE RAILROAD.

A phosphate mining and manufacturing corporation, organized under Acts 1875, p. 247, c. 142, § 11 (Shannon's Code, § 2333), authorizing it, pursuant to the general law providing for the condemnation of private property for works of internal improvement, to condemn a right of way necessary for conducting its business over the lands of any private person or corporation, which right of way is thereby declared a public road, petitioned for the condemnation of the right of way of a private railroad track owned by another phosphate company, so as to transport its products to a railroad junction, the only traffic which would pass over the road, if condemned, being complainant's private shipments. *Held*, that the condemnation was not for a public use, even though other phosphate companies might ship over the road, and the provision declaring property condemned by such corporations a public road could not change the character of its use; and hence the statute was invalid, as authorizing the condemnation of property for private purposes.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51-54; Dec. Dig. § 13.*]

8. EMINENT DOMAIN (§ 10*)—DELEGATION OF POWER—PRIVATE CORPORATIONS.

The right to condemn property for a public use can be conferred on a private corporation, but if the condemnation is not for a public use, the right cannot be conferred either upon a private or public corporation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. § 10.*]

4. EMINENT DOMAIN (§ 58*) — EXERCISE OF POWER—EXTENT OF APPROPRIATION.

The right of way only of an existing private railroad cannot be condemned without condemning the entire road.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 58.*]

Appeal from Circuit Court, Hickman County; Sam Holding, Judge.

Condemnation proceedings by the Alfred Phosphate Company against the Duck River Phosphate Company and another. From a judgment dismissing the petition, petitioner appeals. *Affirmed*.

Clarence T. Boyd, for appellant. Robin J. Cooper, for appellees.

McALISTER, J. The object of this petition is to condemn certain property belonging to the defendant company in the exercise of the right of eminent domain claimed un-

der the laws of Tennessee. Complainant is a mining and manufacturing corporation, organized under chapter 142, p. 232, Acts 1875, with the powers therein conferred. Among other powers granted, it is provided therein:

"The said corporation shall have the right, in pursuance of the general law authorizing the condemnation of private property for works of internal improvement as set forth in sections 1844 to 1867 inclusive, to condemn a right of way necessary for the transaction of the corporate business, not exceeding thirty feet in width, over the lands of any private person, or corporation, and such right of way is hereby declared to be a public road." Shannon's Code, § 2333.

It is shown in the petition that the Alfred Phosphate Company owns phosphate lands and properties consisting of 300 acres in Hickman county, Tenn.

It is averred in the petition that these lands are very valuable, and from conservative estimates made are supposed to contain 500,000 tons of phosphate rock.

It is shown in the petition that the defendant Duck River Phosphate Company is also engaged in mining phosphate rock in Hickman county; that it was incorporated under the same provisions of the general incorporating act of 1875, with the same powers and privileges already enumerated.

It appears from the petition that the defendant company owns large phosphate mines, and is operating a private railroad from its said mines to the railroad of the Nashville, Chattanooga & St. Louis Railway Company, a distance of about 4½ miles.

It is alleged in the petition that the Nashville, Chattanooga & St. Louis Railway Company owns and operates as a part of its railroad system, a branch or spur track leading out from Centreville, Hickman County, Tenn., to Swan creek, a distance of about 8 miles.

It is then alleged that the defendant Duck River Phosphate Company, a mining and manufacturing corporation, organized and existing under the laws of Tennessee, owns certain phosphate mines and properties adjacent to or near the properties of the Alfred Phosphate Company, and in connection with its mines has built, constructed, and now owns a private railroad of 30 feet in width, more or less, leading from its mines to the terminus or junction of the Nashville, Chattanooga & St. Louis Railway at Swan creek, the said road being about 4½ miles in length.

It is averred that this private railroad of the Duck River Phosphate Company, beginning at Swan creek in said county, and extending west for a distance of about 2 miles, is built along the banks of Duck river, and under a bluff of said river for this entire distance, extending in height some 30 or 40 feet, so that it is impossible to paral-

lel said track or construct a roadway along the banks of said river.

It is further shown that the defendant Tennessee Blue Rock Phosphate Company, a corporation organized and existing under the laws of Tennessee, has leased the mining properties of the Duck River Phosphate Company, including its $4\frac{1}{2}$ miles of railroad, running from its mines to Swan creek, the terminus of the Nashville, Chattanooga & St. Louis Railway, and which is now operating under the same lease, which expires May 28, 1913.

It is then shown that the phosphate lands and properties of petitioner, the Alfred Phosphate Company, are located about 1 mile distant from a point on the line or private railroad of the Duck River Phosphate Company, at or near where said private railroad leaves the banks of Duck river.

It is further alleged that on account of the configuration of the county in this section of Hickman county, and on account of the location of the phosphate properties belonging to the petitioner, it is impossible to construct a roadway or road necessary for carrying and delivering to the Nashville, Chattanooga & St. Louis Railway Company at Swan creek, or any other point on said railway, the phosphate rock of petitioner, and that the only outlet for its mining products is over that portion of defendant's private railroad, along the banks of Duck river to the terminus of the Nashville, Chattanooga & St. Louis Railway Company's line at Swan creek.

It is shown that the petitioner cannot parallel the private railroad track of defendant Duck River Phosphate Company on account of the very high bluff already described, and because there is no space left for the construction of another roadbed or railroad in addition to that already occupied by the railroad of defendant company.

It is averred in the petition that the petitioner has made repeated efforts, and an offer of \$10,000, to purchase from defendant company the joint use or privilege and right to carry its phosphate rock over that portion of its private railroad along the banks of Duck river, which proposition was declined by defendants, who even refused to negotiate with petitioner on this subject.

It is averred that the cash proposition thus made to defendant companies was more than the actual cost of construction of this portion of defendant's private railroad over which it desired to have joint use and control for the carriage of its tonnage or phosphate rock.

Petitioner thereupon filed this petition under its charter and the laws of Tennessee for the condemnation of that portion of the private railroad owned and operated by defendant companies along the banks of Duck river for a distance of about 2 miles or 10,000 feet.

Another fact averred in the petition is that the Nashville, Chattanooga & St. Louis Railway Company laid the rails and spikes on this $4\frac{1}{2}$ miles of roadbed belonging to defendant Duck River Phosphate Company, and in addition has leased to defendants one of its railroad engines for the purpose of hauling cars to and from the mines of the Duck River Phosphate Company to the terminus of said railway company at Swan creek.

It is further averred that under its contract with said phosphate company, the Nashville, Chattanooga & St. Louis Railway Company still owns and controls said railroad and the rails and spikes for the laying of the same.

It is then averred that petitioner does not desire to condemn the road, rails, and spikes or iron on said portion of said track, since these items are not the property of either of the defendants, but belong to the Nashville, Chattanooga & St. Louis Railway Company.

It is alleged in the petition that the object for which it purposes to condemn such right of way was for works of internal improvement necessary for the transaction of its corporate business, and to declare said property a public road in order that other citizens and members of the community and the public might be entitled to its use and enjoyment.

A demurrer was interposed on behalf of the defendant companies to the petition, assigning the following causes:

"(1) The petition seeks to condemn private property for private use in contravention of the Constitution of Tennessee.

"(2) The petitioner is a mining, quarrying, boring, and manufacturing corporation, chartered and organized under chapter 142, Acts of 1875. The objects and purposes of the corporation are purely of a private nature, and the company is organized and conducted for the personal benefit of the stockholders therein, and the act of the Legislature under which it is organized is unconstitutional and void, in so far as it endows this company with the right of condemning the private property of others for the use of said company.

"(3) The petitioner is a private corporation, organized for the individual gain of its members, and charged with no public duties or purposes, and cannot, under the Constitution of Tennessee, have or exercise the right of eminent domain.

"(4) The petition shows that the property described therein is now owned and used for the very purpose and in the manner for which it is sought to be condemned; and, if that use is a public one, petitioner cannot condemn the same without an express grant of authority from the Legislature.

"(5) The petition cannot be maintained, for the reason that it seeks to condemn the land

upon which defendants' railroad is located without condemning the railroad itself, which is a part of the land, and the one cannot be condemned without the other."

The circuit judge sustained the demurrer and dismissed the petition, from which judgment the Alfred Phosphate Company appealed and has assigned errors. The only assignment is that the trial judge was in error in adjudging that petitioner had no right of condemnation under its charter and the laws of Tennessee, and in dismissing the petition with costs.

It is conceded by counsel that, if the present effort is to condemn the property of defendants merely for the private purposes of the petitioner, such condemnation would be unauthorized and in violation of the provisions of the state Constitution regulating the exercise of the power of eminent domain. It is also admitted that, if chapter 142, p. 232, Acts 1875, granting to mining and manufacturing companies the power to condemn a right of way over the lands of any private person or corporation, contemplates a condemnation for the company's private use, the act would be unconstitutional, since the Legislature has no power to authorize the taking of one man's property for the private use of another.

The insistence of counsel is that the object of the condemnation sought is for the public benefit of every citizen or landowner in this particular section of Hickman county, Tenn., and for the public purpose of developing the phosphate industry and resources in this section of said county, and for the purpose of providing a vehicle of transportation for the products of the farm and phosphate mines to the terminus of the Nashville, Chattanooga & St. Louis Railway Company's line at Swan creek.

The Constitution of the state of Tennessee provides:

"Article 1, § 21. That no man's particular services shall be demanded or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor."

This provision of the Constitution has been frequently interpreted by this court to prohibit the taking of private property for a private use.

In *Memphis Freight Co. v. Memphis*, 4 Cold. 420, petitioners were granted a charter, by an act of the Legislature, for the purpose of loading and unloading freight goods, cotton, etc., from boats on the Mississippi river at Memphis, and for the purpose of storing the same. The company was granted the right to build sheds on certain streets in Memphis, and the right to construct railroad tracks from the sheds referred to, to the Mississippi river, and for this latter purpose a petition was filed to condemn a right of way for the tracks. This court said:

"These railways are not designed for public travel, but as a means to enable the company to carry out the objects and purposes of their charter, in the prosecution of their business. The public is not interested in the erection of these railways, except in the facilities that may be afforded in the loading and unloading of boats. It is purely a private enterprise, giving superior advantages to a corporation over those who have not the use of machinery."

It was further said:

"There is nothing in the charter showing it to be for a public use. There is no restriction on their charges for services; no duties are defined; no penalties for a violation of their duties; no regulations of toll. They are left free to act as private persons, in any manner that will best promote their interests."

The right of way sought to be condemned was a private, and not a public use, and that so much of the act as authorized the appropriation of private property under the right of eminent domain was in violation of the Constitution and void. See *Harding v. Goodlett*, 3 Yerg. 52, 24 Am. Dec. 546, *Clack v. White*, 2 Swan, 540, *Rice v. Alley*, 1 Sneed, 51, *Carson v. Moore*, 2 Shannon's Cas. 500, wherein statutes granting the power of eminent domain for private purposes were declared unconstitutional.

The question of what constitutes a public use was considered by this court in *Ryan v. Terminal Co.*, 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303, wherein it was said:

"So it may be said at the present time that anything which will satisfy a reasonable public demand for public facilities for travel, or for the transmission of intelligence or commodities, and of which the general public, under reasonable regulations, will have a definite and fixed use, independent of the will of the party in whom title is vested, would be a public use."

The Tennessee cases on this subject uniformly hold that there can be no exercise of the right of eminent domain under the Constitution unless property taken is to be appropriated to the use of the public, whose rights therein shall be secured by a governmental regulation. There are many cases in other states which hold that this power of eminent domain may be exercised when there is a public necessity, and the public in general will be benefited. It seems that the weight of authority is with the holdings of this court, to the effect that the right exercised must be for a public use, and not simply resulting in a public benefit, utility, or advantage. This distinction is illustrated by the case of *Varner v. Martin*, 21 W. Va. 534:

"(1) The general public must have a definite and fixed use of the property to be condemned; a use independent of the will of a private person or private corporation in

whom the title of the property, when condemned, will be vested; a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the Legislature.

"(2) This public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience.

"(3) It must be impossible, or very difficult, at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property."

The court in that case denied the condemnation of the land, because in its judgment it was for a private use. *McQuillen v. Hatton*, 42 Ohio St. 202; *Jenal v. Green Island Drainage Co.*, 12 Neb. 165, 10 N. W. 547; *Sholl v. German Coal Co.*, 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; *Cozard v. Kanawha Hardwood Co.*, 139 N. C. 283, 51 S. E. 932, 1 L. R. A. (N. S.) 969, 111 Am. St. Rep. 779; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964.

In *Coster v. Tidewater Co.*, 18 N. J. Eq. 54, it appeared:

The tidewater company was incorporated for the purpose of draining the tidewater marshes adjoining Newark Bay and its tributary stream.

It was claimed this was a public purpose; that the revenue for the state would be largely increased from the taxes on said marshes when improved for cultivation; that it would require constant care and attention to keep the drained ditches in repair, giving employment to large numbers of men, and thereby adding to the prosperity of the state; that the marshes in their present condition interfere with the construction of highways, and other like reasons.

The court was of opinion that there was no use or benefit to the public in common; that the persons to be benefited by the proposed improvement were the particular individuals or estates whose lands were to be drained, and it was accordingly held that the use for which the condemnation was sought was private.

The petition for condemnation was dismissed. *Waddell's Appeal*, 84 Pa. 90; *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114; *Amador Queen Mining Co. v. De Witt*, 73 Cal. 482, 15 Pac. 74; *Channel Co. v. R. R.*, 51 Cal. 269.

It must be conceded that the petitioning company is not impressed with a public character, but that it is carrying on a private business for the emolument of its owners and stockholders, that the public has no interest whatever in the operation of this business, and that the only purpose for which a right of way is demanded is to get the products of this private enterprise to market.

In *Cozard v. Kanawha Hardwood Co.*, 139 N. C. 283, 51 S. E. 932, 1 L. R. A. (N. S.) 969, 111 Am. St. Rep. 779, it was held that the right of eminent domain cannot be conferred to secure a right of way for a private railroad to transport timber to market. It was further held that the mere development of a locality by the establishment and maintenance of a private enterprise therein is not a public use for which the right of eminent domain may be exercised. In that case it appeared that defendants were conducting a general lumber business under the firm name of the Kanawha Hardwood Company. Defendants were proceeding to construct a railway over the lands of plaintiff for the purpose of hauling timber and timber products from the lands of defendant firm. The defendants were owners of standing timber, from which no public road was accessible, and to which no water was convenient. The road proposed lead from a railroad station to the said standing timber, which could not be marketed without the construction of a railroad. Defendant firm did not offer to construct said railroad and become liable as common carriers for public transportation, but proposed to use the railroad for their sole and exclusive use in removing their timber and products from their own lands to the railroad station, and thence to the markets. The court held the act of assembly, authorizing the owners of timber lands to condemn a right of way for tramways and railways over the lands of other owners, for the exclusive use of the owners of the timber, unconstitutional and void.

The right of way sought to be condemned in the present case is necessarily for the exclusive use of the Alfred Phosphate Company. This company is not a common carrier, and is in no sense a public service corporation. The line of railroad would extend from the mines of petitioner to the junction of the N. C. & St. L. Railway, and the only tonnage that would pass over this road would be the private traffic of the petitioner.

It is argued, however, that such a railroad would provide an outlet for the products of other phosphate companies situated in that vicinity. But the fact that such a railroad might benefit a limited class would not clothe it about with the character of a public use. This is illustrated by several cases already cited, wherein acts of the Legislature authorized the organization of corporations for the purpose of draining marshes, and conferred upon them the power of eminent domain to condemn rights of way for ditches over the lands of others. It was held that the benefits were limited to the owners of the land, a limited class, and that it was not a public use or purpose. *Coster v. Tidewater Co.*, 18 N. J. Eq. 54.

We understand that under the authorities in Tennessee the public generally must have

a right to the use independent of the permission of the owner, and further that the use of the public must be secured by law. There are no provisions made in the charter for the operation of such a railroad, nor any rates prescribed, nor does it possess any of the attributes of a public service corporation. The company is to be the sole arbiter of its affairs, and is not subject to governmental regulation or control.

But it is said that the charter authorizing the exercise of eminent domain provides that the right of way, when condemned, shall be a public road, and thus the Legislature has impressed a public character upon this property. It is obvious that if this business is purely a private enterprise, a mere legislative declaration that the right of way shall be a public road would not change its character. The question is not whether the corporation sought to be endowed with the right of eminent domain is public or private, but whether the property sought to be condemned is to be used for a public purpose. If it is to be so used, the right of condemnation can be bestowed upon any private corporation; but, if not to be so used, it cannot be conferred either upon a private or public corporation.

Section 11, c. 142, p. 247, Acts 1875, under which the petitioner is seeking to exercise the right of eminent domain in the present case, was before this court at Knoxville. September term, 1906, in the case of Niota Milling Co. v. S. P. Blair, coming from McMinn county. This section was declared unconstitutional, because it undertook to authorize mining and manufacturing corporations to condemn property for private purposes.

It was adjudged therein that, the condemnation being for a private purpose, the legislative declaration that it should be a public road would not render the act valid.

Another insuperable difficulty in the way of petitioner is that it does not seek to condemn the private railroad, which it concedes to be the property of the Nashville, Chattanooga & St. Louis Railway, but it only seeks to appropriate the right of way. This petition admits that the right of way in question is not of sufficient width to build another railroad parallel with the railroad already there, and yet it does not seek to condemn the existing railroad, but only the right of way. This ground of demurrer is also well taken.

Affirmed.

JACKSON v. HOLBROOK.

(Court of Appeals of Kentucky. Nov. 13, 1908.)

COURTS (§ 231*)—APPELLATE JURISDICTION.

Where plaintiff in 1907 built a division fence, and sued the adjoining landowner to recover his share of the price, the judgment was a personal liability only under Ky. St. 1903, § 1784, Act March 20, 1908, providing for a lien on the land of one refusing after notice to build his part of the division fence not applying, so that the action did not involve a lien on real estate, and, the judgment being for \$40.50 only, the Court of Appeals has no jurisdiction on appeal.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 231.*]

Appeal from Circuit Court, Grant County.
"Not to be officially reported."

Action by J. C. Holbrook against Van Jackson. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

Wm. Carnes, for appellant. J. J. Blackburn, for appellee.

CLAY, C. Early in the year 1907 the appellee, J. C. Holbrook, notified the appellant, Van Jackson, to build his part of a division fence. Appellant refused to do so, and thereupon appellee built the fence and sued appellant to recover \$40.50, being appellant's proportion of the cost thereof. The action was brought in the quarterly court, and judgment rendered in favor of appellant. Thereupon an appeal was taken to the circuit court, and judgment rendered against appellant. From that judgment this appeal is prosecuted.

By an act approved March 20, 1908, and constituting chapter 80 of the Acts of 1908, a lien upon the land of one who refuses, after due notice, to build his part of a division fence, is given for the cost thereof to the party erecting the fence. Prior to the enactment of this act, however, no such lien was allowed; section 1784 of the Kentucky Statutes of 1903 imposing only a personal liability. That being the case, neither the title to, nor an interest in, nor a lien upon, real estate is involved in this action; and, as the sum sued for is only \$40.50, it necessarily follows that this court is without jurisdiction.

For the reason given, the appeal is dismissed.

WEBSTER v. STATE BOARD OF HEALTH OF KENTUCKY.

(Court of Appeals of Kentucky. Oct. 30, 1908.)

1. PHYSICIANS AND SURGEONS (§ 2*)—STATUTES REGULATING PRACTICE—REPEAL.

The act of 1893 (Laws 1891-92-93, p. 748, c. 179), relative to empiricism, which forms a part of Ky. St. 1903, c. 85, entitled "Medicine and Surgery," is repealed by Acts 1904, p. 100, c. 34.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 2.*]

2. PHYSICIANS AND SURGEONS (§ 2*)—STATUTES REGULATING PRACTICE—REPEAL.

Under Acts 1904, p. 100, c. 34, authorizing the board of health to admit an applicant to examination for a certificate to practice medicine on his presenting a diploma from a reputable medical college, or furnishing evidence that he was reputably and honorably engaged in the practice of medicine prior to February 23, 1884, one is not entitled to an examination for a certificate, unless he has received a diploma from a medical college, or unless he was reputably and honorably engaged in the practice of medicine continuously from February 23, 1884, until his application for examination.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 2.*]

3. PHYSICIANS AND SURGEONS (§ 2*)—STATUTES REGULATING PRACTICE—VALIDITY.

Acts 1904, p. 100, c. 34, authorizing the state board of health to admit to examination for a certificate to practice medicine any person of good moral character, possessing a diploma from a reputable medical college, or who shows that he was reputably and honorably engaged in practicing prior to a designated date, is a valid exercise of the police power enacted to protect the people of the state from imposition by empirics and quacks.

[Ed. Note.—For other cases, see Physicians and Surgeons, Dec. Dig. § 2.*]

4. MANDAMUS (§ 168*)—COMPELLING ISSUANCE OF CERTIFICATE TO PHYSICIAN—PRESUMPTIONS.

The court in mandamus to compel the state board of health to issue to petitioner a certificate authorizing him to practice medicine cannot, in the absence of any allegation showing that the board acted arbitrarily or unlawfully sought to prevent petitioner from obtaining a certificate, presume against the fairness of the board.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 168.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Mandamus by Moses N. Webster against the State Board of Health of Kentucky to compel the board to issue to plaintiff a certificate authorizing him to practice medicine. From a judgment of dismissal, plaintiff appeals. Affirmed.

E. E. McKay, Moses N. Webster, and D. C. Points, for appellant. Kohn, Baird, Sloss & Kohn, for appellee.

BARKER, J. This action was instituted in the Jefferson circuit court for the purpose of obtaining a writ of mandamus against the State Board of Health requiring it to issue to the plaintiff, Moses N. Webster, a certificate authorizing him to practice medicine in this state. The allegation in the petition upon which the right to the certificate is based is that "he [plaintiff] is a resident citizen of this state of Kentucky, and a physician and versed in the healing art; that for several years prior to February 23, 1884, he was reputably and honorably engaged in the practice of medicine in the state of Kentucky, practicing his profession in the county of Grant and adjoining counties." The petition then alleges that on the 11th day of April,

1907, the plaintiff made application, in writing, to the State Board of Health for a certificate to practice medicine in this state, and that since that time two regular meetings of the board have passed, but it has taken no action on his application; that he has received information that the board does not intend to consider his application, wherefore he prays for the issuance of a writ to compel it to issue him a certificate which will enable him to practice his profession in the commonwealth of Kentucky. A general demurrer was interposed to plaintiff's petition, and sustained, and, having failed to amend, his petition was dismissed, from which judgment this appeal is prosecuted.

The plaintiff at the time he filed his petition was evidently under the impression that section 2613, Ky. St. 1903, was still in force, and overlooked the fact that the act of 1893 (Laws 1891-92-93, p. 748, c. 179), relative to empiricism, which forms a part of chapter 85, Ky. St. 1903, has been repealed by an act on the same subject, which was approved March 18, 1904, and is found in Acts 1904, p. 100, c. 34. We mention this fact, not that it alters appellant's position with reference to his right to a certificate to practice medicine, but simply for the purpose of measuring the allegations of his petition by the requirements of the law as it existed at the time his petition was filed. By the act of 1893 (section 2613, Ky. St. 1903) the State Board of Health was authorized to issue a certificate to practice medicine if it had "satisfactory evidence from the person claiming the same that such person was reputably and honorably engaged in the practice of medicine in this state prior to February twenty-third, one thousand eight hundred and sixty-four." This act was amended in 1894, and the applicant was required to furnish satisfactory evidence that he had been honorably and reputably engaged in the practice of medicine in this state prior to February 23, 1884, and had passed a satisfactory examination before the board. By Acts 1904, p. 100, c. 34, above mentioned, no person is permitted to practice medicine in this state unless he shall first stand a satisfactory examination by the board in the branches of medicine as taught in reputable medical colleges; and the board is authorized, upon application, to admit to examination any person of good moral character who may possess either of the following qualifications: "(1) A diploma from a reputable medical college legally chartered under the laws of this state. (2) A diploma from a reputable and legally chartered medical college of some other state in this Union. (3) Satisfactory evidence from the person claiming the same that such person was reputably and honorably engaged in the practice of medicine in this state prior to February 23, 1884. Applicants may present their credentials by mail or proxy, and shall receive due notice of the place and date of examination."

It will be observed that the plaintiff's petition does not bring him within the purview of the law which he invokes. He does not claim to have made application for an examination as to his qualifications to practice medicine; but applies for a certificate without examination. It will be seen, as said before, that no one is entitled to practice medicine without having passed an examination satisfactory to the State Board of Health as to his qualifications. The mere fact that appellant practiced his profession prior to 1864 does not entitle him to a certificate. If the allegation was sufficiently pleaded, which we shall show it is not, the fact that he had practiced medicine prior to the named period of time would only entitle him to an examination, and not to a certificate, unless his examination showed that he was qualified in the opinion of the board to practice his profession. The petition, however, alleges simply that the plaintiff had for several years prior to 1864 practiced medicine in this state, but it does not allege that he has continuously practiced medicine since that time. Over 40 years have passed since 1864, and it is not alleged that during any of that time appellant has practiced his profession. If we take the mere letter of the statute, the allegation would seemingly be sufficient; but the Legislature did not mean that any person who was practicing the profession of medicine prior to 1864, as in the act of 1893, or prior to 1884, as in the present statute, should be entitled to a certificate if he had not been continuously practicing since that time. The object of the statute is to elevate the practice of medicine, and to raise a high standard of proficiency which the applicant must fully measure up to in order to secure a certificate authorizing him to practice his profession. One who had simply practiced medicine prior to 1864, or prior to 1884, but had not practiced it since, would be in no wise qualified to practice medicine in 1907. Construing the act, then, according to its spirit rather than its letter, in order to authorize the appellant to stand an examination and receive a certificate under the present law, he must either receive a diploma from a reputable medical college legally chartered under the laws of this state or of some other state in this Union, or, in the absence of a diploma, furnish satisfactory evidence that he was reputably and honorably engaged in the practice of medicine in this state continuously from February 23, 1884, until his application is made.

The statute under consideration is a wise and beneficent exercise of the police power of the commonwealth, enacted for the purpose of protecting the people of the state from imposition by empirics and quacks. It does not seek to prevent any honorable man or woman from practicing the profession of medicine. It only requires that they shall show, by a satisfactory examination before the State Board of Health, that they are

qualified. There is no suggestion in the petition that the board is acting arbitrarily, or that it unlawfully seeks to prevent the appellant from obtaining a certificate; and we are not entitled, in the absence of such an allegation, to indulge in any presumption against its fairness. It is the high duty of the board to protect the health and safety of the public by requiring every applicant for a certificate to practice medicine to first show his qualifications. It is not necessary to demonstrate the constitutionality of the act. Such legislation has been uniformly upheld as an exercise of the police power of the state by our own court and other courts throughout the land. *Kentucky Board of Pharmacy v. Cassidy*, 115 Ky. 690, 74 S. W. 730; *Driscoll v. Commonwealth*, 93 Ky. 393, 20 S. W. 431; *Hargan v. Purdy*, 93 Ky. 424, 20 S. W. 432; *Nelson v. State Board of Health*, 108 Ky. 769, 57 S. W. 501, 50 L. R. A. 383; *State v. McCleary*, 109 S. W. 638, 130 Mo. App. 527; *State of Missouri v. Davis*, 194 Mo. 485, 92 S. W. 484, 4 L. R. A. (N. S.) 1023; *Dent v. State of West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623.

Judgment affirmed.

SHARP v. SHARP.

(Court of Appeals of Kentucky. Nov. 13, 1908.)

DIVORCE (§ 37*)—GROUNDS—ABANDONMENT.

Where, in divorce, the wife did not appear, and the husband showed that she had abandoned him, and that they had lived apart for about two years, and that previous to the abandonment he had treated her kindly, provided her with a comfortable support, and had given her no reason to leave, the husband was entitled to a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 107-132; Dec. Dig. § 37.*]

Appeal from Circuit Court, Fayette County.
"Not to be officially reported."

Divorce by James Sharp against Queen Sharp. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

J. W. Schooler, for appellant.

CARROLL, J. This is an action for divorce, brought by appellant, James Sharp, who was plaintiff below, against appellee, Queen Sharp. Summons was duly executed upon the defendant in the county where the action was instituted; but she did not answer, or otherwise enter her appearance. The lower court dismissed the petition upon the ground that the evidence was not sufficient to authorize a judgment granting a divorce.

Two witnesses testified in behalf of plaintiff. They said, in substance, that the defendant abandoned her husband in January, 1906, and that they had lived separate and apart continuously from that time until January, 1908; that previous to the abandonment the plaintiff treated his wife kindly,

provided her with a comfortable support, and did not give her any reason to leave him. We think the evidence was sufficient under the statute to entitle the plaintiff to a divorce. *Burton v. Burton*, 112 S. W. 1102, 33 Ky. Law Rep. —.

Wherefore the judgment is reversed, with directions to enter a judgment granting appellant a divorce from the bonds of matrimony with the appellee.

COLES v. COLES.

(Court of Appeals of Kentucky. Nov. 13, 1908.)

1. EVIDENCE (§ 317*)—HEARSAY.

Evidence in divorce for excessive sexual intercourse amounting to cruelty that the housekeeper of the parties had stated to witnesses that the husband would insist upon the wife submitting herself to him, and said that, if they did not take her from him, he would kill her, was competent only for the purpose of contradicting a denial by the housekeeper that she had made such a statement, and was not competent to show such alleged fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1175; Dec. Dig. § 317.*]

2. DIVORCE (§ 130*)—ACTIONS FOR—EVIDENCE—SUFFICIENCY.

Evidence in divorce for excessive sexual intercourse amounting to cruelty held not to warrant a divorce on that ground.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 130.*]

3. DIVORCE (§ 46*)—DEFENSES.

A wife who abandoned her husband without just cause is not entitled to a divorce either absolute or from bed and board.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 46.*]

4. DIVORCE (§ 249*)—DISPOSITION OF PROPERTY—ACCOUNTING FOR RENTS.

A wife who abandoned her husband without just cause is not entitled to an accounting for rents of their home.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 249.*]

Appeal from Circuit Court, Graves County.

"To be officially reported."

Divorce by Daisy M. Coles against Willard Coles. Judgment for defendant, and plaintiff appeals. Affirmed.

D. G. Park, for appellant. R. G. Robbins, Robbins & Thomas, and W. J. Webb, for appellee.

CLAY, C. In this action the plaintiff, Daisy M. Coles, asks for a divorce from the defendant, Willard Coles. She also seeks alimony for herself and maintenance for her two infant children, who are of tender age. She further asks for a settlement of the property rights between herself and husband involved in a house and lot jointly owned by them, claiming not only one-half of the proceeds of the property, but the reasonable rental value of her one-half interest therein since the date of separation. This property was paid for one-half by the defendant and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

one-half by plaintiff's father. As a ground for divorce, plaintiff alleges that the defendant, Willard Coles, as her husband, has habitually behaved towards her as his wife for more than six months in such a cruel and inhuman manner as to indicate a settled aversion to her and to destroy permanently her peace and happiness. She also alleges that the defendant has so cruelly injured her as to indicate an outrageous disposition and temper in him, and has thereby destroyed her health and endangered her life and caused her great bodily injury, and has rendered her in danger of great bodily injury, and probable danger of her life, in remaining with him. Judgment was entered denying plaintiff the relief sought, and she appeals.

Appellant's contentions are: (1) The judgment should be reversed for the failure of the court to adjudge plaintiff the rents for the use and occupancy by her husband of her undivided one-half interest in the house and lot which they jointly own. (2) The judgment should be reversed because appellant made out her second ground for divorce as alleged in the petition. (3) Even if appellant is not entitled to an absolute divorce, she should be entitled to a divorce a mensa et thoro, with reasonable alimony and maintenance for herself and children.

It is insisted by appellant that her grounds for divorce were made out by proof of abuse in sexual intercourse by the husband which destroyed her health and endangered her life. Appellant relies upon the proposition of law set forth in 14 Cyc., at page 610, where it is said: "Sexual intercourse persisted in by the husband against the will of the wife to the injury of her health is cruelty affording her ground for divorce, if he knows or has reason to know the injury and suffering which his demands will inflict upon her"—citing *Mayhew v. Mayhew*, 61 Conn. 233, 23 Atl. 966, 29 Am. St. Rep. 195; *Youngs v. Youngs*, 33 Ill. App. 223; *Id.*, 130 Ill. 230, 22 N. E. 806, 6 L. R. A. 548, 17 Am. St. Rep. 313. Counsel for appellant insists that, although it is extremely difficult to prove facts constituting the ground of divorce urged, the proof in this case abundantly supports the conclusion that appellee, with knowledge of his wife's condition, persisted in having sexual intercourse with her under such circumstances as endangered her health and life, and it amounted to cruelty on his part. According to the testimony of two physicians and of appellant's mother and father, appellant suffered frequently from severe nervous headaches and from pains in the abdomen in and near the region of the pelvis. The physicians state, however, that in their opinion such conditions were of rheumatic origin. There is

nothing in their testimony to indicate that the conditions were produced by excessive sexual intercourse. The only thing in the record from which excessive sexual intercourse may be inferred is found in the testimony of appellant's parents, who claim that one Mrs. Davis, who was housekeeper at the home of the parties to this action, stated that appellee would frequently come home and insist upon appellant submitting herself to him, and that, if they did not take appellant away from appellee, he would kill her. The witnesses Mr. and Mrs. Melvin were permitted to testify to this fact after Mrs. Davis, upon cross-examination, had denied that she made such statement. Of course, such testimony as this was competent only for the purpose of contradicting Mrs. Davis. It was not substantive testimony against appellee. If such were the law, every person would be at the mercy of any other person who might see fit to make statements concerning him. As Mrs. Davis' statement testified to by the Melvins was competent only for the purpose of contradicting Mrs. Davis, and was not competent for the purpose of showing that appellee persisted in requiring that his wife yield to his demand, it follows that there is absolutely no proof of the ground insisted upon by appellant. We cannot conclude merely from the fact that a woman suffers from a nervous headache and pains in her abdomen and womb that such condition is produced by excessive sexual intercourse. It appears that appellant had borne two children, and had had an attack of scarlet fever. So far as the record shows, it is just as probable that her physical condition was due to these facts as that it was due to the fact that she was a victim of excessive sexual intercourse. Aside from this consideration, the evidence of nearly all the witnesses in this case, except the parents of appellant (and they did not testify to any facts within their own knowledge to the prejudice of appellee), is to the effect that appellee provided bountifully for his wife, and that his treatment of her was uniformly kind and considerate. This testimony tends to repudiate the idea that he was cruel in the particular charged by appellant.

The testimony shows that appellant left the home of appellee. She has failed to show that it was due to any fault on his part. Having abandoned her husband without just cause, so far as the record discloses, she is not entitled to a divorce, either absolute or from bed and board. Nor is she entitled to any rents from the home which she voluntarily abandoned.

For the reasons given, the judgment is affirmed, and appellee will pay the costs.

FUNK'S GUARDIAN et al. v. FUNK.

(Court of Appeals of Kentucky. Nov. 13, 1908.)

1. GUARDIAN AND WARD (§ 133*) — CARE OF WARD'S ESTATE — SUPERVISION BY COURT — STATUTORY PROVISIONS.

Ky. St. 1903, § 2034, provides in what cases disbursements shall be allowed a guardian for the maintenance and education of the ward beyond the income of his estate. Section 2039 gives the courts of chancery power to control the ward's custody, tuition, and management of his estate. Sections 2032 and 2033 give to the guardian possession and management of the ward's estate, with power to provide therefrom for his education and maintenance. *Held* that, while the guardian is charged with the wards' maintenance so far as the estate is sufficient, the final supervision is vested in the court of chancery, and arrangements by the guardian or parent must meet the approval either of the probate court or of the court of chancery, and a mother cannot recover from the principal of the wards' estate in an action at law against the guardian for their support where the guardian lets judgment go by default, but it must be shown what estate the wards have, its kind and productiveness, and the age and sex of the wards, so that the court may decide whether application of the principal of the estate is well founded.

[Ed. Note.—For other cases, see *Guardian and Ward*, Dec. Dig. § 133.*]

2. PARENT AND CHILD (§ 3*)—SUPPORT OF INFANT CHILD—LIABILITY OF PARENT.

While the parent is presumably bound to support his infant children without charge upon their estate, yet, if the parent is poor and their estate more able to justly bear the expense, the parent may recover therefrom for their support.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 52-55; Dec. Dig. § 3.*]

Appeal from Circuit Court, Bullitt County.
"To be officially reported."

Action by Margaret Funk against Viola Funk's guardian and others. Judgment for plaintiff by default, and defendants appeal. Reversed and remanded.

Ben Chapeze and Chapeze, Waide & Zimmerman, for appellants. J. F. Combs, for appellee.

O'REAR, C. J. This suit was brought as a common-law action by appellee, the mother of her infant children, against their statutory guardian to recover \$75 a year for their board and clothing and her services in caring for them. It is alleged that appellee is a widow of very limited means, with barely enough to sustain herself; that the infants are of tender years, incapable of laboring for their support, and too young to be bound as apprentices; that they have estates, though the income therefrom is insufficient to educate and support them. She prayed for a judgment against the guardian for the sum alleged to be reasonable pay for their clothing, nurture, and education for several years previous, to be satisfied out of the estate in the hands of the guardian. A general demurrer to the petition was overruled. The guardian declining to plead, a judgment for the sum sued for was rendered by default. The guardian appeals.

The statute under which the action is said to have been brought is section 2034, Ky. St. 1903, as follows: "No disbursements shall be allowed the guardian for the maintenance and education of the ward beyond the income of the estate, except in the following cases, unless authorized by the deed or will under which the estate is derived. (1) When the ward is of such tender years or infirm health that he can not be bound out as an apprentice, or no suitable person will take him as such. (2) When it is best for the ward that the principal of his personal estate shall be applied for his board and tuition, and the court, upon settlement of the accounts, shall deem such application to have been judicious and properly made. But neither the ward nor his real estate shall be liable for any such disbursement." Section 2039, Ky. St. 1903, provides: "The several courts of chancery shall have power to hear and determine all matters between guardian and ward, require settlements of guardianship accounts, remove a guardian for neglect or breach of trust, control the custody and tuition of the ward and the management and preservation of his estate, and direct the sale of any of his real estate, if necessary to the proper maintenance and education of the ward, or for the payment of his debts." Sections 2032, 2033, Ky. St. 1903, read: "A guardian shall have the custody of his ward, and the possession, care, and management of the ward's estate, real and personal, and out of the estate shall provide for the necessary and proper maintenance and education of the ward." "The father of the minor if living, or if dead, the mother, if suited to the trust shall be allowed by the court to have the custody, control and education of the ward." It is thus shown that the supreme care of the law is the ward's welfare—first, his necessary maintenance; then, his proper education; then, the preservation and proper application of his estate. While it is recognized that the parent or guardian might properly look after the minor's education, and that the guardian is charged, so far as the estate is sufficient, with his maintenance, the final power of supervision and control in all these matters is left with the court of chancery. The sections quoted should be read together. The interests of the infant ward will not be left entirely to his parent or guardian or to their joint action. At last it must meet the approval either of the probate court where the guardian's accounts are to be settled, or of the court of chancery, which may have jurisdiction of the matter. If the guardian and parent could not out of court agree as between themselves as to the application of the ward's estate contrary to the final and supervisory judgment of the proper court before which the accounts may come for settlement, they could not bind it by proceedings in an action at law, where one alleges a state

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of facts to exist upon which an implied or express assumpsit is based against the ward's estate, and the other by confession admits his ward's estate to be liable, whereby it may be sequestered by execution. Nor should the guardian, in case of an honest doubt as to his duty and the ability of the ward's estate to properly maintain and educate the minor, be subjected to the hazard of having his accounts disallowed upon the final settlement. The guardian may sell his ward's personal estate without the intervention of a court (section 2031, Ky. St. 1903), and apply the proceeds as well as the rents from his lands to his maintenance and education, when he cannot be bound as an apprentice. One with whom he places the ward to board, and who furnishes clothing or other proper items of support, may maintain an action at law against the guardian to recover for the things so furnished. But, before a judgment will be rendered in such action, it should be made to appear what estate the ward has, as upon that fact will largely depend the reasonableness of the charge—a fact which cannot be substituted by the admission of the guardian and the judgment of a court of law upon it. The petition should have set out what estate the ward has, its kind and productiveness, the age and sex of the ward, so that the court might have seen whether the allegation was well founded that the application of the principal of the estate was required, in addition to its income to properly maintain and educate them.

This is not a suit to sell the ward's real estate for any of the purposes named. Such a proceeding is regulated by Civ. Code Prac. § 489. While the parent is presumably bound to support his infant children without charge upon their estate, yet if the parent is poor, and the estate of the children more able to justly bear the expense of their maintenance and education, the parent may recover for supporting them. *Chapline v. Moore*, 7 T. B. Mon. 150; *Hughart v. Spratt*, 78 Ky. 313; *Hedges v. Hedges*, 73 S. W. 1112, 24 Ky. Law Rep. 2220; *Harper v. Payne*, 73 S. W. 1123, 24 Ky. Law Rep. 2301.

The judgment is reversed, and cause remanded for proceedings not inconsistent with this opinion.

HIGHLAND REALTY CO. v. GROVES (Court of Appeals of Kentucky. Nov. 17, 1908.)

1. DEEDS (§ 149*)—RESTRICTIONS—VALIDITY.

While conditions imposing a restraint on the free use or alienation of realty are looked on with disfavor, they are upheld when not repugnant to a plain provision of the law and not unreasonable.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 479; Dec. Dig. § 149.*]

2. DEEDS (§ 170*)—RESTRICTIONS—VALIDITY.

Deeds conveying adjacent lots purchased by the same grantee at different times and by in-

dependent transactions are not evidence of one transaction, and neither deed can be enlarged or restricted by what may have been said between the parties anteceding its execution.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 170.*]

3. DEEDS (§ 100*)—CONSTRUCTION—EXTRANE- OUS CIRCUMSTANCES.

It is improper to inquire into the surroundings or extraneous circumstances to aid in the construction of an unambiguous deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 239; Dec. Dig. § 100.*]

4. DEEDS (§ 171*)—RESTRICTIONS—CONSTRU- TION.

Restrictions in conveyances of land by an owner platting a tract into lots and streets, stipulating that the property shall only be used for residence purposes, and no residences costing less than \$3,000 shall be erected, do not permit the erection of a stable alone on a lot, though a stable used in connection with a residence on a lot may fall within the term residence purposes.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 171.*]

5. COVENANTS (§ 69*)—RESTRICTIONS—EN- FORCEMENT.

Where an owner platted land into lots and streets, and sold the lots subject to building restrictions enumerated in the deeds, the covenants ran with the land, and were mutual, inuring to the benefit of all the purchasers.

[Ed. Note.—For other cases, see Covenants, Dec. Dig. § 69.*]

6. DEEDS (§ 171*)—RESTRICTIONS—VALIDITY.

Restrictions in conveyances of lots by an owner platting a tract into lots and streets, stipulating that the property shall only be used for residence purposes, and no residence costing less than a specified sum shall be erected, are not unreasonable, and the courts cannot reject them.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 171.*]

7. DEEDS (§ 171*)—RESTRICTIONS—CONSTRU- TION.

An owner platting a tract into lots and streets conveyed a lot by deed containing building restrictions. Subsequently he conveyed to the same purchaser an adjacent lot by deed, stipulating that the lot should be used for residence purposes, and that no residence costing less than \$3,000 should be erected thereon. Held, that the purchaser could not erect a stable on the adjacent lot, though used in connection with the first lot, on which his residence was located.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 171.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by the Highland Realty Company against Charles I. Groves. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Johnson & Heatt, for appellant. B. C. & J. J. Davis, for appellee.

O'REAR, C. J. The appellant laid out a subdivision on the outskirts of the city of Louisville, beyond the city limits, but practically being a part of the urban territory. It laid out streets, alleys, and courts, and cut up into lots the property so platted.

Many of the lots have been sold to purchasers for residence purposes. The scheme was widely advertised that none but well-appointed residences would be allowed in the subdivision, and that no other class of buildings would be suffered. In the deeds to each lot sold a condition was imposed that the purchaser should not use the lot for any but residence purposes, and expressly forbidding its sale or use for certain other purposes. It was also provided that none but a residence to cost not less than the amount specified in each deed should ever be erected upon the lot. In this way it was believed the desirability of the lots would be enhanced, as all would thereby be insured immunity from the encroachment of an undesirable class of tenements and occupations which are thought to depreciate the selling value of purely residence properties. Appellee purchased one of these lots with a similar restriction contained in the deed as to its use. Subsequently he purchased of the same vendor, the appellant, an adjoining lot, being on the corner of Kenilworth Place and Hampden Court. In the deed to the latter lot was this condition: "Party of the second part, as part of the consideration of this conveyance, hereby binds himself, his heirs and his assigns, not to use the property herein conveyed except for residence purposes, and that any residence erected thereon shall not cost less than three thousand dollars, and shall not be built nearer to Hampden Court than the residence now on said lot No. 18, Block No. 8, and the second party binds himself, his heirs and assigns not to sell or rent said property to persons of African descent, nor to permit same to be used for the sale of malt, spirituous, or vinous liquors for a period of fifty years." At the time appellee purchased the last named lot from appellant it was unimproved. Appellee then resided, and yet resides, on the adjoining lot, which he had previously bought from appellant. There is not a fence or other marked line between the two lots. Appellee began the erection of a stable on the lot last purchased, building it near the pavement line on Kenilworth Place. The dimensions of this lot are 40 feet by 180 feet. Appellant, still owning a number of lots in the same block as well as in adjacent blocks, brought this action in equity against appellee, suing on its own behalf and on the behalf of its vendees who had bought lots adjoining or in the immediate vicinity all upon similar conditions to that imposed in appellee's deed, and many of whom who had built residences on their lots at or above the minimum cost allowed by the deeds, seeking to enjoin the erection of the stable. Upon final hearing the chancellor refused the injunction.

While such conditions as impose a restraint upon the free use or alienation of real estate are looked upon with disfavor by the courts, and are rather strictly construed, inasmuch as they detract from the freest use

of the fee simple, and are annoying to owners and intending purchasers, being somewhat at variance, too, with the system in vogue in this country which regards real estate as an article of commerce, still they are upheld when not repugnant to some plain provision of the law, and are not unreasonable in themselves. *Hutchinson v. Uhrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391; *Blakemore v. Stanley*, 159 Mass. 6, 33 N. E. 689; *Roberts v. Porter*, 100 Ky. 130, 37 S. W. 485; *Washburn on Easements and Servitude*, 58. The question here is the construction of the clause quoted above, containing the condition. It is contended by appellee, and seems to have been the view of the chancellor below, that what was said between the parties upon the occasion when appellee bought the first lot, and the fact that he now owns both lots, using the one first purchased as a residence lot, and the second in connection therewith, that the covenants in the two deeds should be read together. These two deeds in no sense evidence parts of one transaction. The two lots were bought at different times, and in independent transactions. Neither deed can be enlarged or restricted by what may have been said between the parties anteceding its execution. This suit is not for a reformation of the deeds upon the ground of mistake or fraud. Nor does there appear in this record ground for such claim. Each deed must, therefore, be interpreted according to its own terms alone, and, as they are not ambiguous, it is unnecessary and would be improper to inquire into the surroundings or extraneous circumstances for aid in its construction.

Appellee insists that as a stable is not a nuisance per se (*Hyden v. Terry*, 108 S. W. 241, 32 Ky. Law Rep. 1198; *Albany Christian Church v. Wilborn*, 112 Ky. 507, 66 S. W. 285), and as his is a suburban residence, and his profession that of a physician, that a stable under such circumstance is a residence purpose, and the building of the stable is not a violation of the covenant in the deed. If the residence required by the condition in the deed had been first erected, a stable to be used in connection with it might fall within the term "residence purposes." (*Blakemore v. Stanley*, supra), but it can scarcely be maintained that a stable alone fulfills the condition of residence purposes. That which is allowed as an incident of a principal right should follow in order of time, if it is not contemporaneous, else as the grantor here could not ever compel the erection of the dwelling house, the stable alone would be upon the lot, in spite of the condition to the contrary. That such a structure, though not a legal nuisance, might be so objectionable as to offend the taste of the near neighbors and affect the values of adjoining or adjacent properties, is easy to be conceived. It was precisely such conditions that were sought to be avoided by appellant and those who had previously purchased from it. The covenants run with the land, and are mutual, inuring to the benefit

of all appellant's vendees. Nor do they appear to be unreasonable so as to cause their rejection by the courts.

Appellee's contention that he is using the 40-foot lot for residence purposes by building a stable on it to be used in connection with the 100-foot lot on which his residence is located must be rejected. When he covenanted not to use the 40 foot lot for any but residence purposes, it was contemplated by the language that the residence and such incidental use as went with it should all be upon that lot.

Judgment reversed, and cause remanded, with instructions to grant and perpetuate the injunction prayed for.

SUMNER v. GRIFFIN et al.

(Court of Appeals of Kentucky. Nov. 12, 1908.)

1. JUDGMENT (§ 570*)—BAR—DISMISSAL WITHOUT PREJUDICE.

The record of the proceedings, in an action which was dismissed without prejudice, on motion of plaintiff, is not admissible in a subsequent action between the same parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1030; Dec. Dig. § 570.*]

2. JUDGMENT (§ 949*)—PLEADING AS ESTOPPEL—IDENTITY OF CAUSE OF ACTION.

To make a former judgment a bar to a subsequent action, it must appear that the two causes of action were identical, and that the proceedings in the former suit were such as to preclude plaintiff from bringing another action for the same cause; and allegations that the controversy had been litigated in a prior suit between the parties, the record of such suits being only referred to as a part of the answer, are defective in failing to set out the record in the former suit, so as to show that the present cause of action was in issue and was adjudicated therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1800; Dec. Dig. § 949.*]

3. PLEADING (§ 311*)—ALLEGATIONS—REFERENCE TO EXHIBITS.

An exhibit referred to therein will not aid a defective pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 945; Dec. Dig. § 311.*]

4. JUDGMENT (§ 949*)—PLEADING AS ESTOPPEL.

A plea of former adjudication should show the nature and scope of the former decision, and its application to the present controversy, and particularly should show that it was rendered before the institution of the present suit, the relief granted therein, and that it was a final adjudication, but it need not allege that the former judgment is valid, or remains in force, or has not been reversed, vacated, or appealed from; these being presumed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1795-1801; Dec. Dig. § 949.*]

Appeal from Circuit Court, Pulaski County.
"To be officially reported."

Action by Peter Sumner against William Griffin and another. From a judgment on a directed verdict for defendants, plaintiff appeals. Reversed and remanded for new trial.

T. Z. Morrow, for appellant. Virgil P. Smith and O. H. Waddle & Son, for appellees.

HOBSON, J. Peter Sumner brought this suit against William Griffin and Nody Griffin, alleging that he was the owner of a certain tract of land, and that the defendants were without right in possession of a part of the tract, and were unlawfully keeping him out of possession. William Griffin filed an answer, in which he denied that Sumner was the owner of the land, and pleaded that he was the owner, and that he and those under whom he claimed had been in adverse possession of it for 30 years. In another paragraph of the answer he pleaded that the controversy in the action had theretofore been litigated and settled between the parties in two separate suits in the same court, in which the same questions were at issue, and that, by reason of the judgment in those suits, the plaintiff was estopped from the prosecution of this action. The record in those cases was referred to as part of the answer. By consent of parties the affirmative allegations of this paragraph of the answer were traversed of record. After the plaintiff on the trial had introduced evidence which made out for him a prima facie case, the defendant William Griffin was introduced as a witness, and said that Nody Griffin was living on the land under him, and that he had been sued for this land three times by the plaintiff. The clerk of the court was then introduced, and read to the jury a judgment in case 3,801 of Peter Sumner v. William Griffin, which showed that the court, at the conclusion of the evidence, had instructed the jury in that action peremptorily to find for the defendants, and that this was done and the petition dismissed. But no part of the pleadings in that case were read, and nothing was introduced but the judgment, which does not show what was in controversy in that action, or identify the cause of action in any way with the cause of action here sued for. The clerk then read to the jury the proceedings in action 3,954 of Peter Sumner v. William Griffin, which showed that the action was, on motion of plaintiff, dismissed without prejudice. The plaintiff objected to the introduction of each of said records, and, his objection being overruled, excepted. The court thereupon instructed the jury peremptorily to find for the defendants, and the plaintiff appeals.

The court should not have allowed the defendant to read to the jury the proceedings in action 3,954, which was dismissed without prejudice, as that record threw no light upon the controversy. The only other thing read to the jury was the judgment in action 3,801, but this was wholly insufficient to show that the proceedings in that case were a bar to this action. In order to make out a bar the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plaintiff must show by the record and other proof the identity of the cause of action in that case with the thing in controversy in this case, and that the proceedings there were such as to conclude the plaintiff from bringing another action for that cause. On the return of the case the defendant will be allowed to amend his answer. The answer does not show that the cause of action is the same, or state facts sufficient to manifest prima facie that the plaintiff is concluded by the judgment in the actions referred to. The rule is well settled that an exhibit will not help out a defective pleading, and here the records are merely referred to. A copy of them was not filed as an exhibit with the pleading. In 23 Cyc. 1525, the rule is thus stated: "There is no special form for pleading a former adjudication, nor is it required to be pleaded with special strictness; but the plea should show the nature and scope of the former decision, and its applicability to the present controversy as a judicial determination of the points or questions in issue. In particular it should show the date or time of the rendition of the prior decision, or at least that it was given before the institution of the suit at bar, the amount of the recovery or relief granted by the judgment, and that the judgment was a final adjudication, although it is not necessary to allege that the judgment is valid, that it remains in full force, or that it has not been reversed, vacated, or appealed from, as these things are presumed." To the same effect see 9 Ency. Pl. & Pr., 619-621.

The common-law forms for such a plea are given in 3 Chitty on Pleading, side pages 929, 1062. These forms contain the averment that the judgment is in force, but in 1 Chitty on Pleading, side page 371, it is said: "It is usual, also, to allege that the judgment still remains in full force and effect, and that the plaintiff has not obtained execution or satisfaction thereof; but this allegation is unnecessary." In *Kenney v. Howard*, 67 Vt. 380, 31 Atl. 850, the court, holding sufficient such a plea, said: "It is urged that this plea is bad because it does not allege that the judgment of the probate court still remains in full force, and not reversed, satisfied, or made void. Such an allegation is not necessary. If a judgment set out in a plea does not remain in full force, the other party may show it in the replication." So in *Campbell v. Cross*, 39 Ind. 155, the court said: "We think that on principle, as well as authority, a party in pleading a judgment is not bound to allege, in addition to the statement of its recovery or rendition, that it still remains in full force, etc., because when rendered it is presumed to remain in force until the contrary appears. Presumptions of law need not be stated. If a judgment pleaded has been set aside or reversed, the other

party can avail himself of the fact in response to the party pleading the judgment." To the same effect are *Murphy v. Orr*, 32 Ill. 489, *Fenn v. Roach* (Tex. Civ. App.) 75 S. W. 361, 2 *Saunders on Pl. & Ev.*, 254, and 1 *Abbott's Forms*, 333. *Hornick v. Holt-rup*, 76 S. W. 874, 25 Ky. Law Rep. 1030, went off, on the ground that the case was submitted prematurely.

While the plea here was not defective in that it was not averred that the judgment pleaded in bar was in force, it was defective in that it did not set out so much of the record as was necessary to show that the matter here sued for was in issue and was adjudicated in that action on the merits.

Judgment reversed, and cause remanded for a new trial.

OWENSBORO SEATING & CABINET CO v. MILLER.

(Court of Appeals of Kentucky. Nov. 11, 1908.)

1. CORPORATIONS (§ 84*)—STOCK—SUBSCRIPTION—DISCHARGE OF LIABILITY.

Defendant subscribed for shares in a Wisconsin corporation, to be organized with a capital stock of \$250,000, with the understanding that the corporate plant would be located in a certain city, and attended the first meeting of those interested, but left the meeting when he learned that the plant was not to be located in that place, and those remaining adopted a resolution making the capital stock \$250,000, to be divided into 2,500 shares, 1,500 common and 1,000 preferred stock, and at the next meeting, which defendant did not attend, it was agreed to dissolve the Wisconsin corporation and organize a Kentucky corporation in its place, the latter corporation having an authorized capital stock of \$200,000, divided into 2,000 shares, 600 of which might be 7 per cent. preferred stock, with priority of dividends, and the same number 6 per cent. preferred. *Held*, that defendant's liability as a subscriber to the Wisconsin corporation terminated with its dissolution, so that the Kentucky corporation could not enforce his subscription, and he was not estopped from denying his liability thereon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 327; Dec. Dig. § 84.*]

2. CORPORATIONS (§ 197*)—STOCK—SUBSCRIPTIONS—RIGHT OF SUBSCRIBERS.

A mere subscriber for capital stock, before its issue or payment therefor, has no right to vote, and cannot participate in the management of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 747; Dec. Dig. § 197.*]

3. CORPORATIONS (§ 84*)—STOCK—SUBSCRIPTIONS—RELEASE.

A material alteration in a contract of subscription for stock without the consent of the subscriber will release his obligation, so that one subscribing under an understanding as to the amount and nature of the capital stock, the corporate business, or the location of its organization, is not liable upon his subscription if the corporation, when organized, is different in those respects from that contemplated by the contract of subscription, in the absence of facts estopping him from denying his liability.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 296-327; Dec. Dig. § 84.*]

Appeal from Circuit Court, Daviess County.
"To be officially reported."

Action by the Owensboro Seating & Cabinet Company against Elmer Miller. From a judgment for defendant dismissing the petition, plaintiff appeals. Affirmed.

C. W. Wells and Hays & Johnson, for appellant. J. D. Atchison and C. S. Walker, for appellee.

CARROLL, J. The appellant company, plaintiff below, sought to recover of appellee, defendant below, \$2,500 on the following subscription: "We, the undersigned, hereby subscribe for the number of shares of stock in the R. O. Evans Company, and of the kind that is set opposite our names, and we agree to pay for the same twenty-five per cent. cash, balance in one, two and three months, at one hundred dollars per share. This subscription not to be binding unless \$75,000.00 or more is subscribed." In October, 1903, the appellee subscribed for 25 shares of stock, but the subscription does not describe the kind of stock. The R. O. Evans Company at the time appellee subscribed for the stock was a Wisconsin corporation, organized under the laws of that state. In 1904 the Wisconsin corporation was dissolved, and a Kentucky corporation, styled the "R. O. Evans Company" was organized. The articles of incorporation of the Kentucky corporation declared that it was the object and purpose of the corporation to acquire and hold all the property and privileges acquired under the Wisconsin charter, and to operate the plants, mills, and factories of that corporation, carry on the business theretofore done by it, and to assume all of its liabilities and obligations. Subsequently, by amended articles of incorporation, its name was changed to the Owensboro Seating & Cabinet Company. The appellee having refused to pay his subscription, this action was brought against him in September, 1906.

The petition alleged that more than \$75,000 was subscribed for stock in the corporation before the 3d day of November, 1903, and that on that date the appellee and others who had subscribed for stock met for the purpose of organizing the corporation, and did organize it under the laws of the state of Wisconsin, pursuant to the articles of incorporation which had been executed in January, 1903, according to the laws of that state. The answer set up several defenses, among them that the amount of subscriptions required to bind the shareholders was never subscribed; that the subscription sued on was obtained by fraud; that the R. O. Evans Company at the time the subscription was made was an existing corporation, and its dissolution rendered invalid the subscription. At the time the subscription paper was signed by appellee, the R. O. Evans Company was in fact an existing corporation, with an authorized capital stock of \$250,000, and his

subscription was really a purchase of 25 shares of stock, upon the condition that \$75,000 or more should be subscribed. So that the first question to be considered is, Did the dissolution of that corporation discharge appellee from his obligation to pay for the stock? If appellee subscribed for stock in a Wisconsin corporation, and the corporation went out of existence before he was required to pay his subscription, could the Kentucky corporation enforce the subscription? The Wisconsin corporation, to which appellee subscribed, had a large authorized capital stock, but no assets. It had never attempted to transact any business, and was really not organized for the purpose of doing business. It was a foreign corporation, with an authorized capital of \$250,000, to consist of 2,500 shares of the par value of \$100 each. The rights and liabilities of its stockholders were fixed and determined by the laws of the state of Wisconsin. The Kentucky corporation had an authorized capital of \$200,000, divided into 2,000 shares of the par value of \$100 each. Six hundred shares of this stock, at the option of the stockholders, might be 7 per cent. preferred stock, and 600 shares 6 per cent. preferred stock, the holders of the 7 per cent. preferred stock being entitled to priority in the distribution of dividends. The rights and liabilities of its shareholders were determined by the laws of Kentucky.

Appellee's name does not appear as one of the organizers or shareholders in the Kentucky corporation. In fact he never attended but one meeting of the persons interested in these corporations. It seems that appellee subscribed for the stock with the understanding that the plant to be operated by the corporation should be established within the city of Owensboro, and not in the suburb called "Seven Hills"; and that, except for this understanding on his part, he would not have subscribed at all. But at the first meeting of the persons interested in the concern, held on November 3, 1903, at which appellee was present, it was disclosed that the establishment was to be conducted at Seven Hills, and not in the city of Owensboro, and also that an existing plant at Seven Hills was to be bought by the corporation and used in connection with its business; and when appellee learned this, he immediately left the meeting, and never afterwards took any part in the enterprise, nor did he attend any other meeting of stockholders or persons interested in its affairs. After he left the meeting the Wisconsin charter was produced, and a resolution presented and adopted by those present, organizing under it and electing officers. A resolution was also adopted at this meeting providing that the total amount of the capital stock of the corporation should be \$250,000, divided into 2,500 shares of \$100 each, and that 1,500 of these shares should be common stock, and 1,000 preferred stock. The next meeting was held in September,

1904. At this meeting it was resolved: "That it is for the best interests of this incorporation to dissolve as a Wisconsin corporation and surrender its charter and reorganize under the laws of Kentucky, as suggested by the report of the committee just received; and the directors are hereby requested to take such action as may be necessary to bring about such dissolution and reorganization, and to transfer all the assets of the present corporation to the new corporation." Accordingly, the Wisconsin corporation was thereupon dissolved, and the Kentucky corporation organized.

Assuming that appellee's subscription was binding as an obligation upon his part to take and pay for 25 shares of stock in the Wisconsin corporation, the question is, Can the Kentucky corporation, under the facts heretofore stated, enforce this liability? We think not. The agreement on the part of appellee was to subscribe for a specific number of shares in a Wisconsin corporation. When that corporation dissolved and its legal existence was terminated, the liability of appellee as a subscriber to its stock also ended; there being no creditors of that concern seeking relief. No stock was ever issued to appellee, and the mere agreement to subscribe for stock in a corporation does not bind the subscriber to take the same amount of stock in another corporation that may be organized as the successor of the one to whose capital he subscribed. Appellee, as a mere subscriber for stock, had no voice whatever in the management or conduct of the corporation, and could not participate in its affairs. Hence he had no right to a vote, nor anything to say about its management, dissolution, nor reorganization. Nor do we find anything in the record that operates to estop appellee from making the defense that he was not a party to the dissolution of the Wisconsin corporation or the creation of the Kentucky corporation. On the contrary, it is conceded that he was only present at the first meeting of the subscribers of stock in the Wisconsin corporation, and did not thereafter in any manner participate in the subsequent meetings of the shareholders, or consent to the dissolution of the Wisconsin corporation or to the organization of the Kentucky corporation in its place. A contract to subscribe for stock in a corporation is governed by the same principles that apply to other contracts. It is a well-established rule that a material alteration or change in the contract without the consent of the subscriber will release him from his obligations under the contract. A subscriber to the shares of a corporation, where the amount and nature of the capital stock, the business the corporation proposes to engage in, and the situs of its organization are agreed upon, cannot be held liable upon his contract of subscription if, without his consent, or the existence of facts or circumstances that oper-

ate as an estoppel or constitute a waiver upon his part, the corporation organized is different in purpose or character, or has a different capital, or varies in any essential particular from the corporation described in the subscription paper. Thompson on Corporations, §§ 72, 1268; 1 Cook on Corporations, § 197; Clarke & Marshall on Corporations, p. 1495; 10 Cyc. 405; Burrows v. Smith, 10 N. Y. 550; Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 558, 16 S. E. 877; Newport Cotton Mill Co. v. Mims, 103 Tenn. 465, 53 S. W. 736.

Applying this principle to the case at hand, we find no difficulty in reaching the conclusion that material, indeed radical, changes in the subscription contract were made by the associates of the appellee in the enterprise, and that these changes were made without his consent, and that he did not waive his rights to resist the enforcement of his subscription, or do anything to estop him from setting up a defense. Wherefore the judgment of the lower court dismissing the petition of appellant is affirmed.

FELAND v. BERRY.

(Court of Appeals of Kentucky. Nov. 12, 1908.)

1. APPEAL AND ERROR (§ 878*) — CROSS-APPEAL—FAILURE TO PROSECUTE.

Appellee's failure to prosecute a cross-appeal is a waiver of rulings against him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8573; Dec. Dig. § 878.*]

2. LANDLORD AND TENANT (§ 322*)—CROPPING CONTRACT—CONSTRUCTION.

A cropping contract provided that the landlord was to have a 12-acre tobacco barn built, she to pay the cost of the same, the tenant agreeing to attend to the building of the barn, and that all labor should be at a reasonable price. *Held*, that the landlord was bound to furnish on the ground material to build the barn, the tenant being only required to attend to the work of putting up the building, and to procure the workmen to be paid by the landlord, so that the landlord was liable for injury to the tenant's tobacco crop because of her failure to furnish materials for the barn in time to allow its erection before the crop was injured.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 322.*]

3. INDEMNITY (§ 14*)—CONCLUSIVENESS—EVIDENCE.

Where a tenant, with his landlord's consent, sublet half of the tobacco land he had agreed to plant under a cropping contract, in which the landlord agreed to build a tobacco barn to house the tobacco, which she failed to do, resulting in the loss of a large part of the sublessee's tobacco, as well as that of the tenant, and the sublessee recovered judgment against the tenant for the damages sustained, such judgment, while not conclusive against the landlord, was admissible against her to establish the tenant's damages; it further appearing that the tenant employed counsel and made a reasonably efficient and skillful defense in the suit in which the judgment was recovered against him.

[Ed. Note.—For other cases, see Indemnity, Dec. Dig. § 14.*]

4. DAMAGES (§ 23*)—CONTRACT—BREACH.

Where defendant was notified, when a contract was made, that it was made with reference to a subcontract, on defendant's breach plaintiff could recover from defendant damages, caused by his being compelled to break the subcontract, because of defendant's breach of the original contract.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 62; Dec. Dig. § 23.*]

5. LANDLORD AND TENANT (§ 331*)—CROPPING CONTRACT—BREACH—DAMAGES.

Where, when plaintiff made a cropping contract with defendant, and assumed one-half of the expense of supporting both families, who lived together, defendant's family was composed of herself, her husband, and daughter, and the family was increased by defendant's son afterwards becoming a member without plaintiff's consent, plaintiff was entitled to recover for the additional expense imposed on him by being compelled to furnish part of the son's support.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 331.*]

Appeal from Circuit Court, Lincoln County.
"To be officially reported."

Action by R. L. Berry against M. C. Feland. Judgment for plaintiff, and defendant appeals. Affirmed.

P. M. McRoberts and J. W. Alcorn, for appellant. G. B. Saufley, for appellee.

SETTLE, J. The appellant, Mary C. Feland, is the owner of and resides upon a valuable farm in Lincoln county. Her husband being an invalid, appellant, in October, 1905, induced the appellee, R. L. Berry, her son-in-law, then a resident of Bath county, to remove to her farm and cultivate 175 acres thereof in the year 1906, under the following contract: "This contract entered into between Mrs. A. M. Feland, party of the first part, and R. L. Berry, party of the second part, said Mrs. Feland rents to R. L. Berry 175 acres of land more or less to cultivate 100 acres for corn, 50 acres for hemp, and 20 for tobacco, the corn to be well cultivated by party of the first part and one-half of said corn to be put in crib for Mrs. Feland and her half of fodder to be set up and tied, one field of corn known as Pike field, and two more fields on each side of garden, said party of the first part rents said second party 50 acres for hemp, bluegrass sod, known as hill field, said second agrees to cultivate well and deliver Mrs. Feland when it is sold, said R. L. Berry gets three-fifths of money and Mrs. Feland two-fifths; also 20 acres for tobacco, 15 acres in backwoods, and rest 5 in hill field, said R. L. Berry agrees to raise this tobacco and give Mrs. Feland one-half of same in bulk in winter order, said R. L. Berry agrees to furnish all seed, tools, and teams that are necessary to cultivate said crop, Mrs. Feland agrees to graze (in season) six work mules, three horses, and two milch cows free of charge for R. L. Berry, also pay him in money, \$160.00 rent on house and land for tenant, also lets him have a lot for

his stock, known as bull lot. Said R. L. Berry is to live in the house with said Mrs. Feland, and each to furnish one-half of living expenses. R. L. Berry is to keep two hands and Mrs. Feland is to board one for work done for such as cutting wood, working in garden, milking and feeding and attending to her stock. Said R. L. Berry agrees to cut weeds around fencing where he cultivates. This agreement for land is for the year 1906 R. L. Berry has the right to stay with Mrs. Feland until he has time to save his crop. Said Mrs. Feland agrees to have a twelve acre tobacco barn built, she to pay all costs for same, and said R. L. Berry agrees to attend to the building of same, and all labor to be at a reasonable price for same." Pursuant to the above contract appellee took up his residence at the home of appellant and undertook the cultivation of the 175 acres of land as therein provided. At that time appellant's family consisted of herself, husband, and an unmarried daughter. The contract between appellant and appellee required the latter to cultivate 100 acres of the land rented by him in corn, 50 acres in hemp, and 20 in tobacco, the corn and tobacco to be equally divided between appellant and appellee, the former to be paid two-fifths and the latter three-fifths of the hemp. It will be observed that the contract also provides: "Said Mrs. Feland agrees to have a twelve acre tobacco barn built, she to pay all cost for same; said R. L. Berry agrees to attend to the building of same and all labor to be at a reasonable price." It was contemplated by the parties, and meant by the contract, that the barn was to be of sufficient size to store all the tobacco raised on the 20 acres of land, as the first cutting would, after hanging a few days in the barn, so shrink as to allow room for the second or more cuttings when made. When the contract in question was made, appellee informed appellant that he had, subject to her approval, made a contract with D. L. Clark, whereby Clark was to cultivate 10 acres of the 20 acres allotted to tobacco, which appellee agreed he might house in the barn to be erected by appellant, to which she readily assented. Appellant was to receive one-half of the tobacco raised by Clark under the contract with appellee, and Clark the other half, appellee to remain responsible to appellant for the proper cultivation and division of the tobacco by Clark. The 20 acres of land were cultivated in tobacco, one half by appellee, and the other half by Clark; but, as the barn was not completed by appellant by the time the tobacco on the 20 acres was cut and ready to be housed, it was so injured by overripeness, frost, and exposure to the weather that much of appellee's, and practically the whole of Clark's, tobacco was rendered unmarketable and worthless. In January, 1907, appellee was sued by Clark

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for the injury to and destruction of the tobacco raised by the latter on the 10 acres of land, resulting from the failure of the former to furnish him a barn in which to store it. Appellee made defense to the action, but the trial resulted in a verdict and judgment in Clark's behalf for \$500, and this sum, together with \$59 costs adjudged Clark in the action, appellee paid. He thereupon instituted the present action against appellant, seeking to recover of her the \$559 he paid in satisfaction of Clark's judgment, and further damages to the amount of \$560, for the loss of a large part of the tobacco he (appellee) raised upon the 10 acres cultivated by him, all of which damages, it was alleged, resulted to him from a breach of the rent contract, caused by the failure of appellant to build the barn in time to store the tobacco raised by himself and Clark.

In addition to the damages mentioned appellee also sought to recover of appellant in the action \$75 damages for a further breach of the rent contract, alleged to have been committed by her in taking into her house, after appellee removed to her residence her son, A. M. Feland, Jr., and making him a member of her family, the son doing nothing to support himself, or in rendering assistance in running the farm; and this, it was averred, added to appellee's burden by putting him to additional labor and expense, as under his contract with appellant he was compelled to provide "one-half of the living expenses" of the family. It was further averred in the petition that, at the time the rent contract was entered into, appellant agreed that the family, the half of whose support he was required to provide, should be composed of appellee and his wife, appellant, her husband, and unmarried daughter. That appellant then promised him her son should not reside with or become a member of the family, and that in inviting and receiving him into the family she violated that promise and her contract with appellee, and increased the expense of maintaining the family during the son's stay with them at least \$150, one-half of which, \$75, appellee was compelled to pay, and did pay. We omit mention of other items of damages claimed in the petition by appellee, as they were rejected by the lower court, and appellee has not taken a cross-appeal. Appellant's answer controverted the affirmative matter of the petition, and by way of counterclaim sought to recover of appellee damages for certain alleged violations, on his part, of the contract between them; that it is charged that, while under the contract appellant was to pay for the material and work of building the barn, appellee by the contract was required to procure the material, which he failed to do until much of the tobacco produced by him and Clark had been injured and destroyed, although she was all the time ready and able to pay for such material and labor, and that the alleged

negligence of appellee in this particular caused the injury to and loss of the tobacco of appellee and Clark, and of her part of it as well, whereby she was damaged \$700, for which sum she prayed judgment. The other items of damage asserted by the counterclaim were based upon the alleged improper cultivation by appellee of the corn and hemp crops, and these, as we shall presently see, were by the judgment of the lower court allowed appellant.

The averments of the answer and counterclaim were controverted by reply, and upon the issues thus formed the case went to trial before the court, the parties having waived a jury. The court's findings of fact, as shown by the record, were: First, that appellee violated the contract, in that he failed to properly care for the corn and hemp crops; second, that appellant violated the contract, in that she failed to furnish on the ground material for the building of the barn in time, and that the barn was not built because of her fault; third, that A. M. Feland, Jr., became a member of appellant's family, which was not contemplated by the parties at the time the contract was entered into. Resulting from the above conclusions of fact, the court found as a matter of law: First, that appellant was entitled to recover of appellee on her counterclaim \$150; second, that appellee was entitled to recover of appellant the sum of \$559, the amount of the Clark judgment and cost, and the further sum of \$25, on account of additional expense for maintaining A. M. Feland, Jr., as a member of appellant's family. Upon these findings of law and fact judgment was entered in appellee's favor for \$434. Appellant was refused a new trial, hence this appeal.

The failure of appellee to prosecute a cross-appeal makes it unnecessary for us to consider the ruling of the circuit court in allowing appellant \$150 damages for appellee's improper cultivation of the corn and hemp crops. We concur, however, in that court's conclusion that appellant's failure to furnish on the ground material for the building of the barn prevented its erection by appellee in time to house and save the tobacco. The contract declares that, "Mrs. Feland agrees to have a twelve-acre barn built, she to pay all cost for same. * * *". The language quoted imposed no duty upon any person other than appellant to build the barn. By necessary implication she was to furnish the material for the building, and place, or cause it to be placed, where the building was to be erected; that is, on the ground. The next words of the clause relating to the barn, are: "Said R. L. Berry agrees to attend to the building of the same. * * *". There is not here an intimation that appellee was to see to the selection of the material, to bargain for it, or have it carried to the place where the barn was to be erected. But he was required to "attend to the building of same"; that is, to control the

work of erection or construction, after the material was placed on the ground. The remaining words of the clause are: "And all labor to be at a reasonable price." This sentence, in connection with the preceding words "Said R. L. Berry agrees to attend to the building of same," defines appellee's whole duty with respect to the barn. He was simply to attend to the work of putting up the building and to procure the workmen; but, as to the latter service, he was required to get the workmen at reasonable prices, for they were to be paid by appellant, and the contract limited him to the employment of only such labor as could be had at "a reasonable price." If it had been contemplated by the parties to the contract that appellee should bargain for the material for the barn and have it furnished on the ground, that instrument would, we think, have been made to contain a provision restricting him to the payment of reasonable prices in purchasing material, as it restricts him to reasonable prices in procuring workmen for the building of the barn. The absence of such restriction as to the price of material is strongly persuasive that it was the purpose of appellant to retain in her own hands the purchase of all material for the barn. So our conclusion is that, in obligating herself by the contract to "have a barn built," appellant undertook to build the barn and furnish everything to complete it, except that she was relieved of hiring workmen and superintending the building; that part of the work having been imposed by the contract upon appellee, although the workmen were to be paid by her.

Our construction of the contract appears to be sustained by much of the evidence. Appellee does not seem to have been known by the people of Lincoln county, and was apparently without money or credit. Although appellant was to pay all cost of building the barn, it appears from the evidence that she neither furnished, nor offered to furnish, appellee or any other person money with which to buy material or hire workmen. At first she insisted that the material for the barn should be made from timber on her farm, and then abandoned this idea. She seems also to have refused to engage one Barnett, the owner of a sawmill, to saw the lumber, though appellee had made for her a tentative contract with Barnett to do so. Afterwards she changed her mind, and concluded to contract with Barnett, but it was then too late, his mill had been removed from the community. At another time she commenced to get some of the material for the barn from a tract of knob land adjacent to her farm, but found the timber there insufficient in quantity. By neglecting appellee's advice, interfering with his plans to assist her, and otherwise delaying work on the barn, she prevented its completion until the tobacco produced by appellee, from over-ripeness and exposure to inclement weather,

was greatly injured, and that of Clark from the same causes was practically destroyed. Appellee saved a part of his by storing it in stock barns on appellant's farm, but no place could be secured for the tobacco of Clark. There seemed to have been an opportunity afforded appellee at one time to rent a barn in the neighborhood from one Hackly, but it could only be reached by a rough road, hauling the tobacco in its green state over which would have greatly bruised and injured it. Besides, when Hackly offered to rent appellee the barn, Clark's tobacco, which ripened before appellee's, had been substantially all cut, and from over-ripeness and exposure to inclement weather ruined in the field. Moreover, when Hackly's barn could have been rented, it was believed by appellant and appellee that appellant's barn could still be finished in time to store therein the larger part of appellee's crop, as it only lacked a roof, and but for appellant's persistency in trying to get boards from her knob land, where they were not to be had, the roof would have been completed in time to save the greater part of appellee's tobacco. It is useless to consider whether appellee was negligent in failing to rent Hackly's barn, or whether such negligence caused injury to his own tobacco, as the lower court allowed him no damages for injury to or the loss of his tobacco.

It is, however, insisted for appellant that the amount of the judgment obtained by Clark against appellee cannot be recovered by the latter of appellant in this case. We do not think this contention sound. It was, in substance, alleged in the petition, and established by the evidence, that when appellant contracted to build the barn she knew Clark was to cultivate in tobacco 10 of the 20 acres appellee had agreed to produce on her land, and that the barn she was to build was to be used for housing Clark's tobacco as well as appellee's. The petition further alleged that in Clark's action against him appellee "made a reasonably efficient and skillful defense, employed counsel," etc., and that "judgment was duly rendered in favor of Clark for \$500 and \$59 costs, which was paid by Berry." The averments quoted were not denied by appellant's answer. As between Clark and appellee, it was clearly the latter's duty to furnish the former a tobacco barn, and equally clear that appellee could not escape liability for the failure to furnish the barn upon the ground that it was appellant's fault. As between appellee and appellant, the issue was as to whose fault it was, and as to the construction of the contract. Appellee's action against appellant rests upon the rule of contract law that where the defendant in an action for breach of contract is shown to have entered into the contract with knowledge of a special use or subcontract by plaintiff, upon the breach of the original contract the latter will not be confined to nominal damages, but

may recover such damages resulting to him from the breach as may be held to have been reasonably contemplated by the parties in making the contract. In other words, as said in 13 Cyc. 34, 35 (quoting from the leading case of *Hadley v. Braxendale*, 9 Exch. 541): "Where special circumstances have been communicated to a party at the time of the making of the contract, which go to show that the breach will involve special damages, such damages may be recovered, although not the result of an ordinary breach. When a contract is made under special circumstances, and those circumstances are communicated to one of the contracting parties by the other, the damages resulting from the breach of the contract which they would reasonably contemplate are the amount of the injury which would ordinarily follow from a breach under those special circumstances." Again, on page 35 of the same volume, it is said: "When a party makes a contract, and at the time notifies the defendant, that such contract is made with reference to a subcontract already entered into or contemplated, upon a breach he will not be confined to nominal damages, but may recover such damages as necessarily result from the breach."

In the instant case appellant, at the time of the making of the rent contract with appellee, was not only informed of his contemplated subcontract with Clark, and of his need of the barn she agreed to build, but she consented to the contract with Clark. The above doctrine has been approved by this court in numerous cases. *Elizabeth-town, etc., R. R. Co. v. Pottinger*, 10 Bush, 185; *Bluegrass Cordage Co. v. Luthy*, 98 Ky. 588, 33 S. W. 835; *Illinois C. R. R. Co. v. Nelson*, 97 S. W. 757, 30 Ky. Law Rep. 114. Perhaps the latest reaffirmance by the court of the rule in question is stated in *American Bridge Company v. Glenmore Distilleries Co.*, 107 S. W. 279, 32 Ky. Law Rep. 873, where, after citing many authorities from the earliest down, it is said: "And this rule, so far as we know, has never been successfully questioned since." As appellant was not a party to the action of *Clark v. Berry*, it cannot technically be said she was concluded by the judgment therein rendered, either as to the issues involved or the amount recovered, yet that judgment determined the liability of appellee to Clark, and gave him a right of action against appellant; and the proof in this case conclusively shows that the damages he sustained by her breach of the contract between them was certainly as great in amount as the judgment Clark recovered against him. Therefore, if entitled to recover at all, he should have received judgment for the amount the lower court allowed him by way of damages.

We do not think the allowance to appellee of \$25, on account of his maintenance of ap-

pellant's son, was improper. In making him a member of her family appellant violated her contract with appellee. This allowance, properly speaking, was not for the board of her son, which, it is claimed, could not be recovered in the absence of a contract to pay board. In entering into the contract with appellant, appellee assumed the burden of bearing one-half of the expense of supporting the family, to be composed of himself and wife, appellant, her husband and daughter, and the family expenses were increased by the son's becoming a member of the family by the act of appellant, and without appellee's consent, which placed upon him an additional burden, for which appellant should compensate him; and, according to the evidence, the amount allowed him is little enough for the time appellant's son remained with the family.

We must, in an action at law, where the trial is had before the court and without the intervention of a jury, give to the judgment the same weight we would accord to the verdict of a properly instructed jury. Hence the judgment should stand, unless based on substantial error, or unsupported by evidence. We have found no prejudicial error, and there was much evidence to support the trial court's findings. Wherefore the judgment is affirmed.

ROBARDS v. P. BANNON SEWER PIPE CO. et al.

(Court of Appeals of Kentucky. Nov. 17, 1908.)

1. MASTER AND SERVANT (§ 302*)—LIABILITY FOR ACTS OF SERVANT—INJURY TO THIRD PERSON—SCOPE OF SERVANT'S AUTHORITY.

The mere employment of a watchman to guard property did not authorize him to shoot a trespasser who was running away from the premises.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1221; Dec. Dig. § 302.*]

2. PLEADING (§ 254*)—CONSTRUCTION—SUBSTITUTED PLEADING.

Where an amended and substituted petition is filed in lieu of the original petition and its amendment, a purpose is indicated to rely upon the amended and substituted petition as alone stating the cause of action, and whether it is demurrable depends upon its allegations alone; the rule that a pleading and its several amendments are ordinarily to be considered together in determining whether a cause of action is stated not being applicable.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 759; Dec. Dig. § 254.*]

3. MASTER AND SERVANT (§ 302*)—INJURY TO THIRD PERSON—LIABILITY FOR SERVANT'S ACT—SCOPE OF EMPLOYMENT.

A master is liable for the acts of his servant only when the servant acts within the scope of his authority.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1217-1219; Dec. Dig. § 302.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. MASTER AND SERVANT (§ 302*)—SCOPE OF SERVANT'S EMPLOYMENT—CONSENT OF MASTER TO SERVANT'S ACTS—"COURSE OF EMPLOYMENT"—"SCOPE OF AUTHORITY."

The terms "course of employment" and "scope of authority," as applied to a servant's acts, are not susceptible of accurate definition, since what acts are within the scope of the servant's employment so as to render the master liable therefor must be gathered from the surrounding circumstances, the master's liability depending upon his consent, express or implied, to the servant's acts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1218; Dec. Dig. § 302.*]

For other definitions, see Words and Phrases, vol. 2, p. 1671; vol. 7, p. 6356.]

5. MASTER AND SERVANT (§ 302*)—INJURY TO THIRD PERSON — LIABILITY OF MASTER — SCOPE OF SERVANT'S AUTHORITY.

Where authority is conferred to act for another, without special limitation it carries with it by implication, authority to do all things necessary to its execution, and hence where a servant's employment involves the exercise of discretion, or the use of force towards a third person, the exercise of discretion or use of force becomes, as to third persons, the discretion and act of the master, though the servant abused his authority and disregarded the master's private instructions, if he was acting within the general scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221; Dec. Dig. § 302.*]

6. MASTER AND SERVANT (§ 302*)—INJURY TO THIRD PERSON — LIABILITY OF MASTER — SCOPE OF SERVANT'S AUTHORITY.

Where it is doubtful whether a servant injuring a third person was acting within the general scope of his authority, the doubt will be resolved against the master, because he set the servant in motion.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 302.*]

7. MASTER AND SERVANT (§ 332*)—LIABILITY OF MASTER — WATCHMAN SHOOTING THIRD PERSON—SCOPE OF EMPLOYMENT—QUESTION FOR JURY.

If the master employs a watchman and authorizes him to use firearms in his discretion, and he shoots a third person near the premises, he is not as a matter of law acting without the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1275; Dec. Dig. § 332.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by Oscar Robards, by his next friend, W. P. Robards, against the P. Bannon Sewer Pipe Company and another. Demurrers to the petition original and amended and to an amended and substituted petition were sustained, and plaintiff appeals. Reversed and remanded, with directions to overrule the demurrer to the amended and substituted petition.

Popham & Webster, for appellant. Chas. F. Taylor and Kohn, Baird, Sloss & Kohn, for appellees.

CLAY, C. Oscar Robards, suing by his next friend, W. P. Robards, instituted this action against George Vanetta and the P.

Bannon Sewer Pipe Company to recover damages for personal injuries inflicted by George Vanetta while acting as watchman for the P. Bannon Sewer Pipe Company. The trial court sustained the P. Bannon Sewer Pipe Company's demurrer to plaintiff's petition and amended petition, and also to his substituted and amended petition; and the propriety of this ruling is before us for determination.

That portion of the petition necessary to be considered is as follows: "He states that the defendant P. Bannon Sewer Pipe Company is a corporation, created and existing by virtue of law, and as such has power to sue and be sued in its corporate name, to operate a general brickyard and brick manufacturing establishment in the city of Louisville, and to employ night watchmen and other persons to protect its property and conduct its said business. He states that the defendant George Vanetta was at all of the times hereinafter set out in the employ of defendant P. Bannon Sewer Pipe Company as its night watchman in said brick establishment, and as such it was his duty to said company to protect from injury its said properties during the nighttime. He states that on or about the 8th day of December, 1907, this infant plaintiff was passing at and close to said brick establishment in said city, when he approached said establishment, and was then and there mistaken for a wrongdoer, burglar, or other law-breaker by the defendant P. Bannon Sewer Pipe Company by and through its agent and night watchman, defendant George Vanetta, who suspected said infant of attempting to destroy or steal said property. He states that he was at said time and place acting in the peace, was guilty of no wrong or violation of law, and that the defendant P. Bannon Sewer Pipe Company by and through its agent and night watchman, Vanetta, and the defendant Vanetta, severally and jointly, and with gross negligence, culpable carelessness, and recklessness, then and there set upon him, this infant, and he was then and there shot by said Vanetta with a firearm containing lead bullets or other hard substance, from the infliction of said gunshot wounds by said Vanetta this infant plaintiff was caused to and did, does and will in the future, suffer great mental and physical pain, has become and is obligated for great doctor's bills and expenses on account thereof, and his power to earn money has been materially lessened and impaired permanently, by reason of all of which he has been damaged in the sum of at least \$25,000. He states that the defendant Vanetta was at said time and place acting as the night watchman, agent, and employé of his codefendant P. Bannon Sewer Pipe Company, and as such it was his duty to protect the property of said corporation, and was in the course of his employment as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such at the time and place of the disaster and injury to this infant plaintiff hereinbefore set out by the infliction of the gunshot wound hereinbefore described." The demurrer of the P. Bannon Sewer Pipe Company to the petition being sustained, plaintiff amended his petition as follows: "For amendment to his original petition against defendant P. Bannon Sewer Pipe Company, plaintiff says that on the night complained of in his original petition he entered the property of defendant P. Bannon Sewer Pipe Company for the purpose of getting warm; that defendant George Vanetta, agent for defendant P. Bannon Sewer Pipe Company, then in charge of said property, directed plaintiff to leave said property; that as plaintiff was running away from said property defendant P. Bannon Sewer Pipe Company by its said agent in charge thereof negligently shot plaintiff as set out in his original petition." The demurrer of the P. Bannon Sewer Pipe Company being sustained to the petition as amended, the plaintiff filed an amended and substituted petition containing the following allegations: "That defendant P. Bannon Sewer Pipe Company is a corporation, created and existing by virtue of law, and as such has power to sue and be sued in its corporate name, to operate and control a general brickyard and brick manufacturing establishment in the city of Louisville, and to employ night watchmen and other persons to protect its property and conduct its business; that defendant George Vanetta was at all of the times hereinafter set out in the employ of defendant P. Bannon Sewer Pipe Company as its night watchman in said brick establishment, and as such he was authorized by said company to carry firearms to protect said property from injury during the nighttime, and was authorized to use such firearms whenever, in his judgment, it seemed necessary or advisable; that on or about December 8, 1907, while defendant Vanetta was acting as night watchman for defendant P. Bannon Sewer Pipe Company as hereinbefore set out, upon its said premises, and while said Oscar Robards was on or near said premises, with gross negligence he wrongly adjudged that said Oscar Robards was doing or attempting to do wrong to the property of defendant P. Bannon Sewer Pipe Company, and with gross negligence adjudged that it was necessary or advisable to fire at said Oscar Robards to properly protect said property; that thereupon said Vanetta fired lead bullets or other hard substance at said Oscar Robards, wounding and injuring said Oscar Robards, whereby he was and will be caused to suffer great mental and physical pain, has become obligated for doctor's bills and expenses on account of said injuries, and his power to earn money has been materially and permanently lessened and impaired, all to his damage in the sum of \$25,000." We are inclined to the opinion that the court ruled properly in sustaining the demurrer of

the P. Bannon Sewer Pipe Company to plaintiff's original and amended petition, upon the ground that the mere employment of a watchman to guard the property did not involve the authority to shoot the plaintiff under the circumstances described. *Belt R. Co. v. Banicki*, 102 Ill. App. 642.

Counsel for appellee insist that the court's action in sustaining the defendant's demurrer to the amended and substituted petition was also proper, for the reason that the pleadings are to be construed all together and most strongly against the pleader; that under this rule the plaintiff is bound by the allegation that he was actually running away from the property when he was shot by Vanetta. That being the case, it is insisted that under the rule laid down in the case of *Golden v. Newbrand*, 52 Iowa, 59, 2 N. W. 537, 35 Am. Rep. 257, the act of Vanetta was not within the scope of his employment. While it may be the rule that a pleading and the several amendments thereto are ordinarily to be considered all together for the purpose of determining whether or not a cause of action is stated, we are of opinion that, where a party files an amended and substituted petition in lieu of the original petition and its amendment, he thereby indicates a purpose to rely upon the amended and substituted petition as alone setting forth his cause of action. The question whether or not the latter pleading is demurrable depends altogether upon the allegations which it alone contains.

The question, then, is whether or not the allegation that the plaintiff was "on or near said premises," being considered from the standpoint of the weaker term (that is, that he was merely near said premises), is conclusive evidence of the fact that Vanetta at the time of the shooting was not acting within the scope of his employment.

The question of the liability of the master for the acts of his servant depends altogether upon the fact of whether or not the servant was acting within the scope of his employment. The terms "course of employment" and "scope of the authority" are not susceptible of accurate definition. What acts are within the scope of the employment can be determined by no fixed rule; the authority from the master generally being gatherable from the surrounding circumstances. The master is liable only for the authorized acts of the servant, and the root of his liability for the servant's acts is his consent, express or implied, thereto. When the master is to be considered as having authorized the wrongful act of the servant, so as to make him liable for his misconduct, is the point of difficulty. Where authority is conferred to act for another without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and, when it involves the exercise of the discretion of the servant, or the use of force towards or against another, the use

of such discretion or force is a part of the thing authorized, and when exercised becomes, as to third persons, the discretion and act of the master, and this although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment. It is not the test of the master's liability for the wrongful act of the servant from which injury to a third person has resulted that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been held liable for the negligent or tortious act of the servant the servant acted, not only without express authority to do the wrong, but in violation of his duty to the master. It is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another. *Rounds v. Del., Lack. & West. R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597. Furthermore, the law under such circumstances will not undertake to make any nice distinctions fixing with precision the line that separates the act of the servant from the act of the individual. When there is doubt, it will be resolved against the master, upon the ground that he set in motion the servant who committed the wrong. *South Cov. & Cincinnati*

Street Ry. Co. v. Cleveland, 100 S. W. 283, 30 Ky. Law Rep. 1072, 11 L. R. A. (N. S.) 853; *Thompson on Negligence*, §§ 554, 563; *New Ellerslie Fishing Club v. Stewart*, 123 Ky. 8, 93 S. W. 598, 9 L. R. A. (N. S.) 475.

Let us, then, apply these principles to the facts as set out in plaintiff's amended and substituted petition. That pleading alleges that George Vanetta, the watchman who shot plaintiff, was the night watchman of the P. Bannon Sewer Pipe Company, and, as such, he was authorized by said company to carry firearms to protect said property from injury during the nighttime, and was authorized to use said firearms whenever in his judgment it seemed necessary or advisable; that on the occasion in question, and while Vanetta was acting as such night watchman for the P. Bannon Sewer Pipe Company, and while the plaintiff was "on or near said premises," he, with gross negligence, wrongly adjudged that the plaintiff was doing, or attempting to do, wrong to the property of the defendant P. Bannon Sewer Pipe Company, and with gross negligence adjudged it was necessary to fire at said Oscar Robards, in order to protect said property; and that he did actually fire at and wound the plaintiff. Where the master employs a watchman and authorizes him to use firearms in his discretion, we cannot hold as a matter of law that the act of the watchman in shooting a third party who, at the time, was only near the premises, is conclusive evidence of the fact that the watchman was not acting within the scope of his employment. The master cannot escape liability for the acts of his servant when he has given the servant authority to act and the discretion when to act, and the servant negligently acts at a time when such action was not necessary. The statements of this pleading may be overcome when all the surrounding facts and circumstances are made known; but taken by themselves, as we must do for the purposes of the question before us, they show that the act of Vanetta was within the scope of his employment.

For the reasons given, the judgment is reversed and cause remanded, with directions to overrule the demurrer of the P. Bannon Sewer Pipe Company to the amended and substituted petition.

LOUISVILLE & N. R. CO. v. KEIFFER.

(Court of Appeals of Kentucky. Nov. 24, 1908.)

1. MASTER AND SERVANT (§ 227*)—INJURY TO SERVANT—LIABILITY—WHAT LAW GOVERNS.

The rule that the reciprocal rights and duties of the parties and the defenses that may be invoked to escape liability for breach of duty are governed by the laws of the place where the tort occurred applies to the relation of master and servant, and the question what is, and the effect of, contributory negligence or assumption of risk, is determined by the law of the place where the tort occurred.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 669; Dec. Dig. § 227.*]

2. MASTER AND SERVANT (§ 160*)—INJURY TO SERVANT—LIABILITY—WHAT LAW GOVERNS.

The common-law rule exempting a master from liability for injuries to his servant occasioned by a fellow servant's negligence, prevailing at the place where the injury occurred and the cause of action arose, governs, though the rule has been changed by statute at the forum.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 326; Dec. Dig. § 160.*]

3. MASTER AND SERVANT (§ 86*)—INJURY TO SERVANT—LIABILITY—WHAT LAW GOVERNS.

An action brought in Kentucky by a citizen thereof for an injury received in a sister state while engaged in the performance of his duties as a servant for defendant, a citizen of Kentucky, is governed by the laws of the sister state.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 187; Dec. Dig. § 86.*]

4. MASTER AND SERVANT (§ 137*)—INJURY TO SERVANT—NEGLIGENCE.

The breaking of a knuckle on a double-header train is not actionable simply because the train is run as a double-header, and the reason why it is so run is immaterial, in an action by an employé for injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 274; Dec. Dig. § 137.*]

5. NEGLIGENCE (§ 62*)—"PROXIMATE CAUSE."

The "proximate cause" of an accident is the immediate cause, or that without which it would not have happened. It is not the remote cause or the occasion of the accident, and, where the original wrong only becomes injurious because of the intervention of some distinct wrongful act of another, the injury is imputed to the last wrong as the proximate cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76-81; Dec. Dig. § 62.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

6. MASTER AND SERVANT (§ 129*)—INJURY TO SERVANT—NEGLIGENCE—PROXIMATE CAUSE.

A railroad engineer was injured by running into a train from the rear. The train in front was run as a double-header because of the leaky condition of one of the engines, and as it pulled out of a station a knuckle broke. While an emergency knuckle was being put on, the engineer ran into the train. Had proper signals been given him, he would have stopped his train before the collision, provided he did not run at an excessive speed. *Held*, as a matter of law, that the leaky engine was not the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 261-263; Dec. Dig. § 129.*]

7. NEGLIGENCE (§ 140*)—PROXIMATE CAUSE—QUESTION FOR JURY—QUESTION FOR COURT.

Where there is room for a difference of opin-

ion between reasonable men as to what is the proximate cause of an injury, the question is for the jury; but, where there is no room for a difference of opinion, the question, where the facts are undisputed, is for the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 373-381; Dec. Dig. § 140.*]

8. MASTER AND SERVANT (§ 279*)—INJURY TO SERVANT—INCOMPETENCY OF FELLOW SERVANTS—EVIDENCE.

A railroad engineer ran into a standing train from the rear. The flagman of the leading train was negligent in not starting back in time to flag the engineer, and the conductor was also negligent in not sending the flagman back in time. Witnesses testified that the flagman was, in their opinion, not competent; but they did not show in what respects he was incompetent, or that knowledge of the incompetency had been brought home to the company. The flagman had stood his examination and had been in the service of the company for 15 months. *Held*, as a matter of law, not to show the incompetency of the flagman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-974; Dec. Dig. § 279.*]

Nunn, J., dissenting.

Appeal from Circuit Court, Warren County.
"To be officially reported."

Action by L. J. Keiffer against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Benjamin D. Warfield and Sims, Du Bose & Rodes, for appellant, Proctor & Herdman, Wright & McElroy, and Greene & Van Winkle, for appellee.

HOBSON, J. L. J. Keiffer was the engineer on train 111, which left Bowling Green for the South on August 19, 1904. The second and third sections of train 115 had left Bowling Green that afternoon several hours before Keiffer's train. One of the sections had a leaky engine, and by reason thereof this section lost time. At Erin, Tenn., an order was given these two sections to consolidate and run as a double-header from that point to Paris, Tenn. Keiffer there received an order to follow train 115 to Paris; the order informing him of the consolidation of the two sections, but not informing him why it had been done. Train 115 left Erin shortly before 12 o'clock at night, and Keiffer had to wait there until the hill engine returned to pull his train over the hill, as well as for a passenger train which had the right of way. Train 115 ran from Erin to Big Sandy, a distance of 23 miles, without further trouble from the leaky engine after it passed over the hill near Erin. It stopped at Big Sandy to take water. One of the engines took water. It then backed up for the other engine to take water and started out, but as it pulled out a knuckle broke about the twelfth car back from the engine. There were 29 cars in the train. They undertook to mend the knuckle, but could not do it. They then undertook to put in an emergency

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

knuckle, and, while they were doing this, Keiffer's train ran into them from the rear, about 3:30 a. m. He had left Erin about 2:30 a. m., and, according to the time of train 115, it should have been at Paris, and would have been there, perhaps, but for the breaking of the knuckle, which had delayed them at Big Sandy 10 or 15 minutes.

The proof as to the cause of the collision is conflicting. The evidence for Keiffer is, in effect, that the men on train 115 gave him no warning of its presence on the track until he was within a few feet of it, and it was then too late for him to avoid the collision. The evidence for the railroad company is to the effect that Keiffer was running 25 or 30 miles an hour, when, under the rules, he should have been running only 12 miles an hour, and that timely warning of the presence of train 115 on the track was given him, if he had been running at the proper speed. The rules required that train 115 should send a flagman back something over a quarter of a mile, and that he should give warning by placing torpedoes on the track, as well as by a light. This, it is conceded, was not done. The proof for the railroad is that the flagman went back about 200 yards, while Keiffer says he was less than 100 feet from the back of the train. By the collision, Keiffer's engine ran through both cabooses, a car load of flour which was standing in front of them, and knocked the end out of the car beyond the one containing the flour. The engine turned over and caught Keiffer under it. He was badly mashed and bruised, and brought this action to recover for his injuries. On a trial of the case in the circuit court, he recovered a verdict and judgment for \$25,000, and the railroad company appeals.

The action having occurred in the state of Tennessee, the defendant pleaded the law of that state in bar of a recovery. By the law of Tennessee the contributory negligence of the injured employé of a railroad company bars his right of recovery, where it is either the proximate cause of the accident or directly and materially contributes thereto. On the other hand, if the negligence of the injured servant was neither the proximate cause of the accident, nor directly or materially contributed thereto, but only indirectly and remotely contributed to bring about the accident, such negligence would not bar a recovery, but would only mitigate the damages. By the law of Tennessee, also, the men on one train in the service of the railroad are fellow servants of the men on another train, and no recovery can be had by one for an injury due to the negligence of the other. This was so declared by the Supreme Court of Tennessee in *L. & N. R. R. Co. v. Dillard*, 114 Tenn. 240, 86 S. W. 313, 69 L. R. A. 746, 108 Am. St. Rep. 894, and, although that case was decided after this injury occurred, it merely declared the law; the court simply holding that the law as thus declared had always been the law of Tennessee, there

being no statute governing the question. As to what is the law in Tennessee there is no conflict in the evidence; the witnesses introduced both by the plaintiff and the defendant agreeing as to what the law is in that state.

But it is insisted that, as the railroad company is a citizen of Kentucky, and as Keiffer is also a citizen of Kentucky, the courts of this state should administer its own laws as between its own citizens. It is not material where the parties reside. When the injury was done in Tennessee, a cause of action arose there. The rights of the parties as they then were cannot be affected by the fact that the suit was not brought there, but in this state, for the courts of this state, simply enforce the cause of action which plaintiff has. In 2 Wharton on the Conflict of Laws, § 478b, the rule is thus stated: "The reciprocal rights and duties of the parties and the defenses that may be invoked to escape liability for a breach of duty are governed by the law of the place where the tort occurred, rather than by the law of the forum. This principle has been applied, *inter alia*, to the reciprocal rights and duties of master and servant and of carrier and passenger. So the question as to what constitutes, and the effect of, contributory negligence, or assumption of risk, to defeat or limit the right of action for the negligent killing or injury of a person, is to be determined by the law of the place where the tort occurred, and not by the law of the forum. And the common-law rule exempting the master from liability for injuries to his servant by a fellow servant's negligence, prevailing at the place where the injury occurred and the cause of action arose, will govern, although the rule has been changed by statute at the forum." See, also, *Cooley on Torts* (2d Ed.) p. 552; *I. C. R. R. Co. v. Jordan*, 117 Ky. 512, 78 S. W. 426; *L. & N. R. Co. v. Melton*, 105 S. W. 366, 32 Ky. Law Rep. 51, and the cases cited. This court has in a number of cases enforced liability on the part of the master under the laws of a foreign state, although by the laws of this state no right of action existed, upon the ground that, if the act was actionable where it occurred, it was actionable everywhere. Manifestly the converse of the doctrine must be true, and, if the act was not actionable under the common law of the state where it occurred, it is not actionable anywhere. The rule must be the same both for the plaintiff and the defendant, and it is immaterial whether the parties live in this state or elsewhere. The residence of the party in no wise affects the cause of action.

Keiffer, as ground for recovery, insists that the leaky engine was the proximate cause of his injury, and that, the master having furnished an engine which was not reasonably safe, he may recover. He also insists that Veazie, the flagman of train 115, was incompetent, and that he may recover for the incompetency of Veazie, although he

may not recover for his negligence. The circuit court did not submit the latter question to the jury, but he submitted the case to them on the question whether the leaky engine was the proximate cause of Keiffer's injury. The defendant insists that he should have instructed the jury peremptorily to find for it, and this is the only question we find it necessary to consider.

It is manifest from the proof that the leaky engine gave no trouble after the train passed over the hill near Erin, an hour or more before the injury. It is also manifest from the proof that train 115 would not have been at Big Sandy when Keiffer got there but for the breaking of the knuckle. It is further manifest from the proof that, after all this had occurred, if train 115 had given the signals as required by the rules, Keiffer's train would have been stopped before any injury was done. If the defendant's proof is true, ample notice of the presence of train 115 on the track was given to Keiffer, and the accident was due either to his not heeding the signals, or not seeing them in time, or his running into the station at a speed forbidden by the rules, while the proof for him shows that he was complying with the rules, and that the signals were not given in time. However this may be, the proximate cause of the injury was not the leaky engine, nor even the breaking of the knuckle, but it was either the failure of the men on train 115 to give proper signals, or the failure of Keiffer to obey the signals. The accident could not possibly have occurred if Keiffer had been running at the speed required by the rules and the signals had been given as required by them, for manifestly Keiffer could have stopped his train in this event long before he reached the other train. It is said that the leaky engine was the proximate cause of the knuckle breaking, as but for the leaky engine the train would not have been doubled into one section, and, perhaps, the knuckle would not have broken but for the weight of all the cars. No negligence on the part of the defendant is shown in regard to the breaking of the knuckle. Double-headers are run on all railroads, the breaking of a knuckle on a double-header train is not actionable, simply because the train is run as a double-header, and the reason why it is so run is immaterial. The defendant having the right to run a double-header train, its reasons for exercising its right can furnish no cause of action. But aside from this, as we have said, the proximate cause of this accident was either the failure to give Keiffer the proper signals, or his failure to observe them and run at a proper speed. The proximate cause of an accident is the immediate cause, or that without which it would not have happened. It is not the remote cause of the accident, or the occasion of it. In *Coolley on Torts*, § 70, the rule is thus stated: "If the original wrong only becomes injurious in consequence of the inter-

vention of some distinct wrongful act or omission of another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." See, also, *Thompson on Negligence*, § 47; *Shearman and Redfield on Negligence*, § 31; *Setter's Adm'r v. City of Maysville*, 114 Ky. 60, 69 S. W. 1074. It is also true that, where there is room for a difference of opinion between reasonable men as to what is the proximate cause of an injury, the question is for the jury; but where there is no room for difference of opinion, under the rules of law, the question, where the facts are undisputed, is one of law for the court. As a matter of law, it must be held here that the leaky engine was not the proximate cause of Keiffer's injury, for manifestly, if train 115 had stopped as it did because of a flood in front of it, and train 111 had run into it because by negligence either proper signals were not given it, or those given were not heeded, the flood in front would not have been the proximate cause of the collision.

It remains to consider whether the case should have been submitted to the jury on the incompetency of Veazle, the flagman. The plaintiff introduced several witnesses, who testified that they had run with Veazle and had seen him at work, and that in their opinion he was not competent; but none of them showed in what respects he was incompetent, or that knowledge of his incompetency had been in any way brought home to the master, or that any complaint had been made of him which would put the master on notice of his incompetency. It was shown that he had stood the examinations and had been in the service of the railroad as a brakeman for some 15 months. The thing that he was required to do was to go back behind his train a certain distance and there flag train 111. What actually happened, according to all the proof, was that he did not start back until they heard train 111 coming, and, before he had gotten half as far back as he should have been, according to his own evidence, train 111 passed him. Any man can walk down a railroad track. Any man can carry a lantern, or put a torpedo on the track, or light a fuse. The trouble with Veazle was that he did not start back in time. His failure to start back in time was due to his negligence in discharging his duty. The conductor was also negligent, for he was with the flagman and should have sent him back. To submit the case to the jury on these facts, on the question of Veazle's incompetency, would be to shut our eyes to the truth, and to call negligence incompetency. That the train crew of 115 were negligent is conceded in the evidence. There was negligence on the part of the conductor in not sending his flagman out, and there was negligence on the part of the flagman in not going out. There was no proof in the record that Veazle was not thoroughly competent to do everything he was required to do under

the rules at the time. He knew what he ought to do as well as any one, but he simply neglected his duty.

On the whole case, we conclude that the court should have instructed the jury peremptorily to find for the defendant. This conclusion makes it unnecessary for us to consider the other questions discussed by counsel.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

NUNN, J., dissents. SETTLE, J., not sitting.

JONES et al. v. GATLIFF et al.

(Court of Appeals of Kentucky. Nov. 12, 1908.)

1. WITNESSES (§ 144*)—COMPETENCY—TRANS-ACTION WITH DECEDENT.

A grantor, seeking to cancel his deed, cannot testify to anything that took place between him and the grantee, since deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 633; Dec. Dig. § 144.*]

2. DEEDS (§ 17*)—CONSIDERATION.

A deed of land, given in settlement of a claim of title to a greater tract, has a sufficient consideration, though the claim prove not as good as supposed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 26, 27, 31; Dec. Dig. § 17.*]

3. CHAMPERTY AND MAINTENANCE (§ 7*) — DEED OF LAND IN POSSESSION OF THIRD PERSON.

A deed is void, under the champerty statute, to the extent only of land inclosed and occupied by a third person, who had settled there as a mere intruder, so that his possession was limited to his close.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. § 54; Dec. Dig. § 7.*]

Appeal from Circuit Court, Whitley County.

"Not to be officially reported."

Suit by John L. Jones and others against A. Gatliff and another. From the judgment, plaintiffs appeal. Reversed and remanded, with directions.

L. L. Peace and R. L. Pope, for appellants.
E. L. Stephens, for appellees.

HOBSON, J. On May 12, 1902, Dr. A. Gatliff, who owned a large body of land in Whitley county, under what is known as the "Clapp patent," dated in 1872, conveyed by special warranty deed to F. M. Jones, in consideration of \$1, and the further consideration that Jones relinquished all his right to what was known as the "John Bryant survey," the following tract of land, as described in the deed: "A certain parcel of land on Poplar creek, Whitley county, Ky., beginning on white oak near the William Jones original line on the south side of the mountain on Poplar creek; thence with said Jones line to a white oak a corner of the John Bryant survey thence leaving said

William Jones line running up said ridge with Bryants line to the top of said ridge to a maple and chestnut thence leaving said line and running to a N. E. direction to the top of a mountain to a stake; thence with the top of said mountain to Maine and Jones line thence with same to the beginning so as not to convey any part of the G. W. Jones survey. This deed also contains a one-half interest in and to a survey of land lying on the north side of the Pine Mountain known as the William Jones survey adjoining the land of F. M. Jones, G. W. Jones, A. Gatliff, and others containing about 35 acres more or less." On September 1, 1903, Dr. Gatliff conveyed by a like deed to George Jones a tract adjoining his home farm, containing 95 acres; also a tract containing 100 acres near the top of Pine Mountain. On July 15, 1905, Frank Jones having died, his widow and children executed to Dr. Gatliff a title bond, by which they sold to him for \$10 an acre the tract of land deeded to Frank Jones, he paying at the time \$100 cash, and agreeing to pay the balance when the quantity of the land was ascertained by a survey. On June 28, 1906, they brought this suit against Dr. Gatliff for the specific performance of the contract of purchase, making also John F. Jones a defendant to the action, and alleging that John F. Jones was asserting some kind of claim to the land without right. George Jones, the father of John F. Jones, filed his petition in the action, which was taken as his answer, in which he alleged that he owned about 50 acres of the land referred to. John F. Jones filed an answer, in which he pleaded that he, and those under whom he claimed, had been in the adverse possession of the land for more than 15 years. Dr. Gatliff filed an answer, in which he charged that Frank Jones had obtained the deed from him for the land by fraud, and he prayed that the deed be canceled. Replies were filed to these pleadings and the issues made up. Proof was taken, and on final hearing the circuit court canceled the deed which Dr. Gatliff had made to Frank Jones, and dismissed the plaintiffs' petition. From this judgment they appeal.

The essential facts of the case are about these: Frank and George Jones were brothers. They each claimed some land within the Clapp patent; and, after Dr. Gatliff became the owner of that patent, he undertook to make a settlement with both of them to avoid any litigation, and in this settlement the two deeds above referred to were made, the first being made to Frank Jones, and the second to George Jones something over a year afterwards. Dr. Gatliff was not personally acquainted with the boundary of the land which each of these men claimed, and he did not go upon it. When this controversy arose he found out that a part of the

land which he had deeded to Frank Jones was also embraced in the deed to George Jones. In the meantime he had bought the George Jones land under a contract similar to that which he had made with the heirs of Frank Jones. So really the question here is between the two Joneses. If Dr. Gatliff pays Frank Jones' people for the land, he will not have to pay George Jones for it. The main question, therefore, is, Shall George Jones or the heirs of Frank Jones get the money for this land? As Dr. Gatliff made to each of them a special warranty deed, he is not responsible to either of them if his title fails; and, if he had no title, at the time he made the deed to George Jones, to any part of the land because he had previously conveyed it to Frank Jones, George Jones will simply lose this much of the land by a paramount title, against which Dr. Gatliff did not warrant. The two Joneses lived near by each other. There was no dispute between them as long as Frank lived, and none after his death until the land was sold, and the question who was to get the purchase money, came up. Dr. Gatliff seems to have acted in entire good faith throughout the transaction. His side of the case is this: Frank Jones claimed the Bartley survey, and he made the deed to Frank Jones in settlement of this claim. George Jones claimed the Peace entry, and when this controversy arose, it developed that the Peace entry and the Bartley survey covered the same land; Peace having moved in after Bartley went out. But we do not find any evidence to warrant the cancellation of the deed which Dr. Gatliff made Frank Jones. Dr. Gatliff cannot testify as to anything that took place between him and Frank Jones, and all of his testimony must be excluded. The other testimony shows that Frank Jones was claiming the Bartley survey, and that it was agreed between Dr. Gatliff and Jones that two men, agreed upon by them, should go upon the land and lay off to Jones what land he was entitled to. These two men did go out upon the land, and after they had laid off to Jones the boundary, which he finally agreed to take, the deed was drawn and signed by Dr. Gatliff. There was some consideration for this deed, and upon the whole record we are satisfied that Dr. Gatliff made the deed because he then believed it was cheaper to settle in that way than to litigate with Jones. The two men, who went out upon the land, do not show that any misrepresentation was made, and, after their settlement was carried into a deed, it is too late to assail the deed. Frank and George Jones claimed under the same entry, but under different men. It is not material

now which of them had the better title, or whether either had any title. If their title had been known to be perfect, no settlement would have been made. It was the doubt as to the title that induced the settlement. The evidence is clear that the two men who made it made no effort to learn if Frank Jones' title was valid. Their sole effort was to lay off to him a boundary he would accept, and release all further claim to the land. Their aim was to settle his claims, and this they did. This settlement cannot now be disturbed on the ground that this claim was not as good as it was supposed to be. While the testimony of the two men who laid off the land to Frank Jones varies one from the other in some details, we think it is clear from both that they made the settlement with Frank Jones, and that Dr. Gatliff simply made the deed according to the writing they drew up. John Jones was then living on the land he claims, and this one of them knew, and also knew of the claim of George Jones. Frank Jones is now dead, and the transaction, not having been assailed in his lifetime, cannot now be disturbed on the proof offered.

At the time this deed was made, John F. Jones, holding under his father, George Jones, had actual possession of about 19 acres of the land embraced in it. He was living in the old Bartley or Peace house, and had been living there about 7 years, but previous to his entry the place had been vacant for something over 15 years. The fences had rotted, the chimney to the house had fallen in, and the doors were off when he entered. No title was shown by adverse possession to the land, but to the extent of the 19 acres which he actually held the deed from Dr. Gatliff to Frank Jones was void under the champerty statute; but in other respects that deed is valid, and as to the remainder of the land covered by it, the title of Frank Jones is superior to the title of George Jones. On the return of the case to the circuit court the court will ascertain the quantity of land embraced in the deed from Dr. Gatliff to Frank Jones after excluding that part of the tract which John F. Jones had inclosed and was occupying. He had settled there as a mere intruder. His possession was limited to his close, and to this extent only was Frank Jones' deed champertous. John F. Jones was living there when the title bond here sued on was executed, as was then well known to the parties, and justice will be done by enforcing the contract as to the remainder of the tract.

Judgment reversed, and cause remanded for a judgment as above indicated.

CENTRAL KENTUCKY TRACTION CO. v.
CHAPMAN.

(Court of Appeals of Kentucky. Nov. 12, 1908.)

1. CARRIERS (§ 303*)—INJURY TO PASSENGER
ALIGHTING FROM STREET CAR—DUTY OF EM-
PLOYEES.

If the place where a street car stopped, the crossing of a steam railroad, was a regular stopping place for passengers, or where passengers, with the knowledge of the carrier, were in the habit of entering or leaving its cars, it was the duty of the employes in charge, before starting, to ascertain whether passengers desiring to leave the car had done so; but, if it was not such a place, and the stop was merely to look out for any steam train, then those in charge of the street car had no reason to suppose that a passenger would attempt to leave at that point, and unless they knew a passenger was so attempting to do, they were not negligent in starting without seeing whether she had alighted, and this, though she had, when getting on, notified the conductor that she wished to get off at the street next before the railroad crossing, and the car had not stopped there.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1228½; Dec. Dig. § 303.*]

2. CARRIERS (§ 321*) — STARTING UP STREET
CAR—LOOKING FOR PASSENGERS ALIGHTING
—INSTRUCTIONS.

The addition to a proper instruction as to the duty of persons in charge of a street car relative to seeing, before starting up the car, whether a passenger was alighting, where the stop was merely to see whether a steam train was coming, and not at a place for passengers to get on or off; that if those in charge could with ordinary care have known of the passenger's purpose to alight, they were bound to look out for her safety, as well as if they knew of her purpose—is error, in placing substantially the same duty on the carrier at such a place as at one where passengers had the right to alight.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1332; Dec. Dig. § 321.*]

3. DAMAGES (§ 159*)—PERSONAL INJURY—LOSS
OF TIME—PLEADING.

Loss of time from personal injury is a special damage, which must be specially pleaded, that it may be recovered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 443; Dec. Dig. § 159.*]

4. DAMAGES (§ 159*)—PERSONAL INJURY—PER-
MANENT IMPAIRMENT OF EARNING CAPACITY
—PLEADING.

While permanent impairment of earning capacity from personal injury is an element of general damages, it ought to be pleaded, if recovery for it is sought.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 443; Dec. Dig. § 159.*]

5. DAMAGES (§ 143*) — SPECIAL DAMAGES —
PLEADING.

The allegation of the petition that plaintiff was confined to her room for some time by reason of her injury, if not clearly referable to the nature and extent of the injury, rather than as asserting a claim to special damages from the injury, at least contains an ambiguity, which should be resolved against the pleader.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 410; Dec. Dig. § 143.*]

Appeal from Circuit Court, Woodford County.

"To be officially reported."

Action by Georgia A. Chapman against the Central Kentucky Traction Company. Judge-

ment for plaintiff. Defendant appeals. Reversed and remanded for new trial.

Stoll & Bush, Wallace & Harris, Morton. Webb & Wilson, and W. O. Davis, for appellant. Field McLeod, H. A. Shoberth, and R. B. Franklin, for appellee.

O'REAR, C. J. Mrs. Chapman was a passenger on one of appellant's electric interurban cars from Versailles to Lexington, this state. The cars made stops at certain stations along the line to receive and discharge passengers, and it is said also stops at street corners along the route in the city of Lexington for that purpose, its terminus then being at "Center" on Main street. Appellant's conductor in charge of the car on which appellee was a passenger was notified when she got on that she wished to leave the car at High street in Lexington. The car failed to stop at High street crossing, but proceeded to the next street, which is Water street. The lines of the steam railroad, the Louisville & Nashville and Chesapeake & Ohio, run along the latter street, and at right angles with Broadway, along which appellant's cars run. The car on this occasion stopped at the edge of Water street, it is claimed by appellant, to enable the conductor to go ahead onto the L. & N. tracks to see whether there was a free and safe passage across for his car. When the car made this stop, appellee attempted to alight from it. The car was then started upon the signal of the conductor that the track was clear, when appellee was thrown heavily to the ground, and sustained an injury to her knee. She recovered a substantial verdict for damages in this action.

It is contended by appellant that the stop at Water street was solely a safety stop, and not for the purpose of allowing passengers to get off or on the car; that it was not a regular passenger stop, and that its servants in charge of the car did not know of appellee's intention to leave the car at that point; that, therefore, they were not charged with the duty to look out for her safety in alighting until they knew in any event that she intended then to do so. On the other hand, it is argued that appellant was notified of appellee's desire to get off at High street; and, having carried her beyond her destination, it must have known that she would probably want to leave the car at the next stop. However, this is not an action for damages for carrying the passenger beyond her destination. It is solely for her personal injury negligently inflicted by appellant. Having been wrongfully carried beyond her destination, she was rightfully on the car, and therefore entitled to all the care and protection due a passenger. If Water street was a regular passenger stop, or if passengers were in the habit of entering or leaving appellant's cars at that point with its knowledge, then

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It must be held to have anticipated that appellee, or any other passenger, might elect to leave the car there on this occasion, and in that event must have used the utmost of care for their safety in alighting from the car. If, however, Water street was not a regular or accustomed passenger stop, appellant was not bound to anticipate that appellee would attempt to leave the car there, although she had been carried beyond her destination. As to whether Water street was a regular or accustomed passenger stop was disputed in the evidence. The primary questions for the jury then were, first, was Water street a regular stopping place for passengers, or where passengers, with knowledge of the company, were in the habit of entering or leaving the cars? If it was, then appellant's servants in charge of the car were charged with the duty of looking out for the safety of passengers attempting to alight there when the car stopped, and before starting should have ascertained whether passengers desiring to leave the car had done so. This phase of the question was fairly submitted to the jury in the first instruction given. The second question was, if Water street was not a regular or accustomed passenger stop, but was for purely precautionary purposes, then those in charge of the car had no reason to suppose that passengers would attempt to leave it at that point; and, unless they actually knew then that appellee was so attempting to do, they were not negligent in starting the car without ascertaining whether she had alighted.

In the second instruction, which was doubtless framed to present the second phase of the case, the idea just expressed was submitted, but with the addition that if those in charge of the car could, with ordinary care, have known of appellee's purpose, they were bound to a duty to look out for her safety as well as if they in fact knew of it. This we think was an erroneous conception of the carrier's duty. It placed it on substantially the same footing as to looking out for its passengers at places where they had not the right to leave its cars, and therefore were not expected to attempt to do so, as where they had such right. If a passenger is wrongfully carried beyond his destination, it does not impose a duty on the carrier to provide a safe place for him to alight the first time the car stops, but must carry him safely back to his station, or safely to its next regular stopping place, unless by agreement with the passenger a special stop for his convenience is made in lieu of either of the others.

The petition charged a certain injury, describing it as painful and disabling, so that appellee was confined to her room for several weeks. In the instruction defining the measure of damages, it was allowed that appellee might be compensated, in addition to her suffering endured and reasonably anticipated,

and her impairment to earn money, for her loss of time. Loss of time is classed by the courts and writers as special damages. Like physician's bills, medicine, and other special elements of even proximate results of actionable negligence, they must be specially pleaded in order that they may be recovered for. Permanent impairment of earning capacity is an element of such general damages. But even that ought to be pleaded if a recovery on its account is sought. Much more so is it deemed that items of special damage should be set out, so as to bring notice home to the defendant that compensation is sought on that score, that the defendant may bring its witnesses to rebut the claim if it is so desired. The allegation of the petition that plaintiff was confined to her room for some time by reason of her injury we understand to be referable to the nature and extent of the injury, rather than as asserting a claim to peculiar or special damages resulting from such injury. At any rate its ambiguity should be resolved against the pleader, rather than in her favor, is the safe and established rule of construction. Nor was there evidence of the value of the time lost. The verdict is so considerable that we cannot say the jury may not have included that item in their finding in this case, which, under the state of pleadings and proof, was prejudicial error.

Judgment reversed, and cause remanded for new trial, under proceedings consistent herewith.

CITIZENS' LIFE INS. CO. v. RILEY.

(Court of Appeals of Kentucky. Nov. 13, 1903.)

INSURANCE (§ 640*)—LIFE POLICY—ACTION—DEFENSES—PLEADING.

In an action on a life policy, an answer pleading an estoppel, consisting of insured's attempted repudiation of the policy in a suit on the first premium note for the agent's alleged fraud, held to present a sufficient defense to entitle insurer to a trial on the merits.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 640.*]

Appeal from Circuit Court, Perry County.
"Not to be officially reported."

Action by Rebecca Riley against the Citizens' Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Helm Bruce, for appellant. Wootton & Morgan, for appellee.

CARROLL, J. In May, 1906, for the recited consideration of \$132.50, and the payment of a like sum on the 15th day of May in every year during the continuance of the contract, the appellant company issued a policy on the life of Harvey Riley for the sum of \$5,000. The beneficiary in the policy was the appellee, Rebecca Riley. The insured died in May, 1907, after having paid the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date. & Reporter Indexes

premium due on May 15, 1907. After his death proofs of loss were made out by the appellee and forwarded to the company, and upon its refusal to pay the insurance, this action was brought to recover the amount of the policy. The company filed an answer and an amended answer, to both of which a general demurrer was sustained, and, declining to plead further, judgment went against it for the amount claimed.

It will be observed that the only question we are called upon to consider is whether or not the answer and amended answer presented a defense, or made an issue upon which the appellant company was entitled to offer evidence and ask a trial on the merits. The answer denied that the first annual premium, the payment of which was acknowledged in the policy, was in fact paid, but admitted that the premium due in May, 1907, was paid. Further answering, it said:

"The first premium required by said contract to be paid to the defendant company was \$132.50, and said Riley, in settling for said premium, gave one S. H. Webb, who was then the agent for said company, and had procured said Riley's application, the sum of \$66, and his (Riley's) note for \$66.50, and thereupon this defendant issued and caused to be delivered the policy to said Riley, on the information received by it from Webb that Riley paid the premium; and the defendant company did not itself receive, and has never received, any part of the first premium required by said policy, and upon information and belief that Riley had settled for the premium with the company's agent, the company did issue and cause to be delivered the policy. Subsequent, however, to the issuance of said policy, and after the maturity of the note given by Riley to Webb for part of the first premium, Riley refused to pay the note, and insisted that he had been induced to take said policy by misrepresentations, and accordingly repudiated the policy, and denied wholly his liability upon the note on account of said alleged fraud and misrepresentations. Thereupon the said agent Webb brought suit against Riley upon the note in the Perry quarterly court, in which suit the said Riley filed an answer, in which he alleged that the note had been procured from him by misrepresentations and fraud, which answer Riley also made a counterclaim against Webb, alleging that the note had been given for a premium on a policy of \$5,000 to the Citizens' Life Insurance Company, which is the same policy referred to in the petition in this action, and that the total premium was \$132.50, and that at the time of giving the note he had also paid him \$66 in cash as a balance of the premium, but that he had been induced to sign the contract by misrepresentations and fraud, and by reason thereof said contract was void, and therefore prayed that the plaintiff's petition on said note be dismissed, and that he (Riley) have judgment on his counterclaim

against Webb for \$66, with interest. Said Webb, plaintiff in said suit, replied to said answer, denying the charge of misrepresentation or fraud, and upon the trial of said action and said issues therein, the court, after a verdict by a jury and pursuant thereto, entered a judgment for the defendant, Riley, in said action upon said note, and also a judgment for \$22.50 in his favor on his counterclaim, and for costs. Defendant is informed and believes and alleges that the reason for the jury finding \$22.50 on said counterclaim instead of \$66 was that the jury considered that Riley had received the benefits of insurance up to the time of the finding of the verdict, and that this insurance was worth the difference between the amount of the cash payment, \$66, and the amount of their verdict in favor of Riley, to wit, \$22.50; and thus it is that defendant says that said policy contract was wholly repudiated by said Riley during his lifetime, and that said contract was, in effect, judicially determined to be null and void, and the consideration moving to this defendant under said contract wholly failed long prior to the death of Riley.

"Defendant says that the said Webb, who was its agent when said policy was issued, but had ceased to be its agent before the death of Riley, failed to notify this defendant of said Riley's repudiation of said policy, or of the fact that he was resisting the payment of the premium note, and was seeking to recover back the cash payment on account of said premium, and this defendant remained in entire ignorance of said facts until after the death of Riley. Accordingly, about 32 days before the second premium would have become due on said policy, if it had been in force, the defendant company, in entire ignorance of the fact that Riley had repudiated the policy, or had defeated recovery upon the premium note, or recovered judgment for the cash paid on account of the premium, or any part thereof, and supposing that said policy was in force, sent to the said Riley, as a matter of courtesy, a notice to the effect that his second premium would be due on May 15, 1907. Said Riley received said notice after he had been shot and injured, and was in a serious condition on account thereof, and from which he ultimately died. But, without explaining to the defendant his repudiation of said policy, or any of the facts hereinbefore alleged, he sent to the defendant the amount of the second premium, which amount the said company received while still in complete ignorance as to his repudiation of said policy, or his resistance of the payment upon said premium note, or his recovery of the cash payment made by him. Said second premium was received by defendant on the very day that Riley died, to wit, May 10, 1907. Defendant did not learn of the facts aforesaid as to said Riley's repudiation of said policy, or as to said Riley's action upon said note,

until some time after the death of Riley; and, immediately upon hearing of the same, it began an investigation into them, and thereupon ascertained the facts hereinbefore stated. Whereupon it informed the beneficiary herein that it would not pay said policy, but was ready and willing to return the amount of the second premium, which it had received under the circumstances hereinbefore alleged, so soon as an administrator of the estate of Harvey Riley should be appointed, and this it still avers it is ready, willing, and able to do, although no administrator of said estate has yet been appointed. Defendant says that, by reason of the facts hereinbefore alleged, said policy contract, sued on herein ceased to exist before the death of said Riley, and was not in force at his death or now."

In an amended answer it pleaded that the policy contained the following provision, which was a part of the contract between it and Harvey Riley, to wit, "If any note or other obligation given for the first year's premium or any part thereof on this policy shall not be paid when due, this policy shall be and become null and void, without notice or action of the company, notwithstanding any receipt which may have been given for such premium," and further set out that this condition in the policy was never complied with by Riley, but on the contrary, was broken by his repudiation of the contract in the manner stated in the answer.

Inasmuch as there will probably be a trial on the merits, after other pleadings have been filed and proof taken, we do not think it advisable or proper at this time to go into a discussion of the legal effect of the facts set up in the answer, in estoppel and avoidance of the right of appellee to recover on the policy. What we should now say might be misleading, or at least not applicable to the state of facts presented when the case is heard on its merits.

For the purposes of this opinion, we must accept as true the averments of the answer, and, assuming them to be true, we think the pleading presented a defense that entitled the appellant to a trial on the merits. Wherefore the judgment is reversed, with directions to overrule the demurrer, and for proceedings not inconsistent with this opinion.

BALLOU v. SKIDMORE.

(Court of Appeals of Kentucky. Nov. 13, 1908.)

1. PARTNERSHIP (§ 296*)—DISSOLUTION—AUTHORITY OF PARTNERS.

After the dissolution of a firm, a partner cannot enter the appearance of a copartner not served with summons, in an action against the partners for a personal judgment in severalty. *Id.*

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 670; Dec. Dig. § 296.*]

2. JUDGMENT (§ 519*) — ACTIONS — DIRECT ATTACK.

In an action on a judgment, a defense that the party against whom the judgment was rendered was not in fact before the court is a direct attack on the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 963; Dec. Dig. § 519.*]

3. JUDGMENT (§ 906*)—ACTIONS—DIRECT ATTACK.

Where, in an action on a judgment, directly attacked on the ground that defendant was not before the court, it appeared that defendant owed the amount for which the judgment was rendered, and he made no defense to the claim, the court, under Civ. Code Prac. § 90, properly rendered judgment for the amount due.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1726; Dec. Dig. § 906.*]

4. APPEAL AND ERROR (§ 190*)—RESERVATION OF GROUNDS OF REVIEW.

The court will not reverse a case because the attachment therein was not authorized, there having been no motion to discharge the same.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1216; Dec. Dig. § 190.*]

Appeal from Circuit Court, Harlan County.

"To be officially reported."

Action by Ewell Skidmore against W. R. Ballou. From a judgment for plaintiff, defendant appeals. Affirmed.

Sampson & Sampson, for appellant. H. C. Clay, for appellee.

O'REAR, O. J. Jerome Skidmore, who was a merchant, sued appellant and his former partner, W. R. Maupin, upon an account in the Harlan circuit court, and obtained a judgment. It appears that an attorney filed a joint answer on behalf of the defendants, but it does not appear that appellant, Ballou, otherwise appeared, or was served with summons. This action was brought upon a return of no property, indorsed upon the execution which is sued upon. Attachments in the nature of garnishee process were served upon appellant's debtor, who answered that it owed appellant something less than the amount of the judgment. In this action appellant answered, denying that he had been served with process in the common-law suit, and denying that he entered his appearance to it, or authorized the attorney or his former partner, Maupin, to enter his appearance or to file an answer in his behalf.

In his testimony appellant claimed that the account sued on had been settled by his executing a note for a smaller amount to Jerome Skidmore, which was subsequently paid; also that he and Maupin sold out their partnership business to another firm before the suit in which the first judgment was rendered, the purchasers assuming the payment of the Skidmore debt, to which he assented, accepting their undertaking and discharging Ballou and Maupin. Skidmore denied that the note alluded to had any con-

nection with the debt for which the judgment was rendered; and denied the novation. We think the evidence supports Skidmore's testimony on both these points. We are also satisfied that appellant was not served with summons in the first suit, and did not enter his appearance, or authorize the filing of the answer in his behalf. While it has been declared by some courts, though denied by others, that in an action by a creditor of a copartnership against the several parties to recover personal judgments in severalty against them, one partner might enter the appearance of the others not served, yet the authorities seem to be agreed that no such power exists in one partner after the dissolution of the firm. *Parsons on Partnership*, § 118; *Bates on Partnership*, § 1092. It has also been questioned whether a judgment rendered against one not summoned, but on whose behalf an answer had been filed by an unauthorized attorney (*Durett v. Durett*, 89 S. W. 210, 28 Ky. Law Rep. 275), is not void. In *Holbert v. Montgomery's Adm'r*, 5 Dana, 11, it was held that the appearance by attorney, although the attorney was without authority, was binding upon the party whose appearance was thus had. But this position seems to have been abandoned in *Howse v. Reeves & Co.*, 76 S. W. 513, 25 Ky. Law Rep. 949, and *Francis v. Lilly's Ex'x*, 124 Ky. 230, 98 S. W. 996. In the case at bar we may say that in an action upon a judgment a defense that the party against whom the judgment was rendered was not in fact before the court is a direct attack upon the record, under our practice, as much so as if the suit had been brought by him to vacate it. So treating it, we inquire into the merits of the case, disregarding the first judgment. It appears that appellant did owe, and has not paid, to Jerome Skidmore the amount for which the judgment was rendered. Nor does he now make out a defense to same. *Civ. Code Prac.* § 90, provides that upon issue joined a plaintiff may have the relief to which he may show himself entitled upon a prayer therefor. In our view of the record it was proper that the plaintiff, as assignee of Jerome Skidmore, should recover judgment now and in this action for the unpaid account. While the attachment was not authorized, there was no motion to discharge same, and to reverse the case for that reason alone would involve nothing but the costs.

Judgment affirmed.

BURTON'S ADM'R v. CINCINNATI, N. O. & T. P. RY. CO.

(Court of Appeals of Kentucky. Nov. 17, 1908.)

1. RAILROADS (§ 356*)—PERSONS ON TRACK—TRESPASSERS—LICENSEES.

A person at a place, within private grounds of a railroad, which has been habitually used

by the public generally for many years is a licensee, and not a trespasser.

[Ed. Note.—For other cases, see *Railroads*, *Cent. Dig.* §§ 1228-1234; *Dec. Dig.* § 356.*]

2. TRIAL (§ 296*)—INSTRUCTIONS—ERROR IN INSTRUCTIONS CURED BY OTHER INSTRUCTIONS.

The error in an instruction, in an action against a railroad for the death of a person struck by a train while at a place habitually used by the public and intended for the use of the traveling public, that the company had the exclusive use of its tracks at that place, and any person entering on the track at that place was a trespasser, was not cured by an instruction that the company must keep a lookout and give warning of the approach of trains and keep them under control and use caution to avoid injury to persons on the track.

[Ed. Note.—For other cases, see *Trial*, *Dec. Dig.* § 296.*]

3. RAILROADS (§ 359*)—TRESPASSERS—DUTY TO PROTECT.

A railroad company does not owe a trespasser any duty of lookout or warning. Its only duty is to exercise ordinary care to avoid injuring him, after discovering his peril.

[Ed. Note.—For other cases, see *Railroads*, *Cent. Dig.* §§ 1233, 1239; *Dec. Dig.* § 359.*]

4. RAILROADS (§ 400*)—INJURY TO PERSONS ON TRACK—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action against a railroad for the death of a child struck by a train, evidence held to require the submission to the jury of the issue of negligence.

[Ed. Note.—For other cases, see *Railroads*, *Cent. Dig.* §§ 1365-1367, 1373-1376; *Dec. Dig.* § 400.*]

5. RAILROADS (§ 387*)—INJURY TO PERSON ON TRACK—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Where a railroad company failed in the performance of its duties in operating its trains, and thereby struck a licensee on the track, it was liable, unless the licensee was guilty of contributory negligence.

[Ed. Note.—For other cases, see *Railroads*, *Cent. Dig.* §§ 1296, 1314; *Dec. Dig.* § 387.*]

Appeal from Circuit Court, Pulaski County.
"Not to be officially reported."

Action by W. B. Burton's Adm'r against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and new trial granted.

Campbell & Williams and Virgil P. Smith, for appellant. O. H. Waddle & Son and John Galvin, for appellee.

CARROLL, J. This is an action brought by the appellant, who was the plaintiff below, to recover damages for the death of his intestate, W. B. Burton, alleged to have been caused by the negligence of the appellee company, and its locomotive engineer, in so operating and managing one of its engines and trains as to run the same against and upon him. The answer was a traverse and a plea of contributory negligence, and the charge that the deceased was a trespasser on its tracks and premises at the time he received the injuries complained of. A trial before a

*For other cases see same topic and section NUMBER in *Dec. & Am. Digs.* 1907 to date, & *Reporter Indexes*

jury resulted in a verdict and judgment in favor of the railway company. The errors complained of are that the court erred in giving and refusing instructions, and that the verdict is against the evidence.

The deceased was a boy about 11 years of age. He was struck by one of appellee's engines in the daytime in its yard at Somerset, Ky. His father worked for the company in its roundhouse, located in the yard, and the deceased, who for some months had each day been taking his father's dinner to him, was on his way home from the roundhouse, where he had gone to take his father's dinner, when he was struck. Immediately in front of the passenger depot there are two parallel tracks, the nearest one to the depot being track No. 1. Between track No. 1 and track No. 2, there is a cinder path, the space between the two tracks being about 7 feet. The boy on his way home walked north on the outside of track No. 1, but parallel with it, for some distance, until he came nearly to the depot. He then crossed track No. 1, and continued to walk north toward the depot on the cinder path between the two tracks. About the time he crossed track No. 1 to get on the cinder path a passenger train came in, going south on track No. 2, and stopped in front of the depot. At the time the south-bound train came in, a passenger train was coming north on track No. 1. This is the train that struck the deceased. For some reason, doubtless to be entirely clear of the train on track No. 2, he left the position in which he had been walking in the middle of the cinder path, and stepped over to the end of the ties on track No. 1, and while walking on the end of the ties was struck by the pilot beam of the engine on track No. 1. His back was towards this engine, as he was going in the same direction it was. He was struck immediately in front of the depot, where a large crowd had congregated. The bells on both engines were ringing, and there was the noise and confusion incident to the arrival of two passenger trains at a depot, where a large amount of railroad business was carried on. The engine that hit him was moving, according to the evidence of some witnesses, at the rate of four or five miles an hour, while other witnesses said it was running faster than this. The engineer and fireman were both keeping a lookout, but the engineer did not, and could not, see the boy when he was hit, because he was on the opposite of the engine from him. The fireman, however, saw him, and upon his signal to the engineer that the boy had been struck, the train was soon stopped. Track No. 1 is straight for a distance of 1,000 feet south of where the boy was struck, and a person standing or walking at this place could be seen for this distance by the persons in charge of the engine. There is evidence tending to show that, when the south-bound train on track No. 2 reached a point about opposite where the boy was, he left the middle of the cinder path in which he

had been walking, and stepped over to track No. 1, and had walked about 40 feet on the end of the ties of this track before he was struck. On the other hand, there is evidence that he did not leave the middle of the cinder path or get on the ties of track No. 1 until the engine on this track was within 10 feet of him, and that when he got on this track it was too late to prevent the injury. If the boy had remained in, or continued to walk in, the center of the cinder path, he would have been in a place of safety, and out of the way of harm from either train. It was only when he got on track No. 1 that he was placed in danger. The fireman testifies that he saw the boy walking up in the middle of the cinder path, but did not pay particular attention to him, as persons frequently walked there; that the moment he saw the boy step on track No. 1, he signaled the engineer to stop, but it was then too late.

The cinder path, as well as the tracks in front of the depot at the place where the deceased was walking, had been frequently and habitually used by the public generally for many years; so that he was a licensee, and not a trespasser, although in the private grounds and yard of the company. The boy when struck was immediately in front of the depot, which is some 200 feet long. Passengers in going to and from the depot to track No. 2 are obliged to cross track No. 1, and the cinder path between the two tracks in front of the depot was evidently intended for the use of the traveling public, and it is clear that appellee was not a trespasser. The court, however, instructed the jury that: "The Cincinnati, New Orleans & Texas Pacific Railroad Company have the exclusive use of its track at the point where the deceased was killed, and any person entering upon this track at the point where deceased was killed was a trespasser." In other instructions the court put upon the railroad company the duty of keeping a lookout, of giving warnings of the approach of its trains, and keeping its trains under control, and using caution to avoid injury to persons found on its tracks; but this did not, in our opinion, cure the radical error in the instruction, telling the jury that decedent was a trespasser. In truth the instructions in this particular are not consistent. If the deceased was a trespasser, the company did not owe him any duty of lookout or warning. Its only obligation was to exercise ordinary care to avoid injury to him after his peril was discovered. The question of the duty of railroad companies to persons on its premises and tracks, at a place where the public have a right to be, and its duty to trespassers, is so fully considered in *L. & N. R. R. Co. v. Redmon*, 122 Ky. 385, 91 S. W. 722, C. & O. Ry. Co. v. Barbour, 93 S. W. 24, 29 Ky. Law Rep. 339, C. & O. Ry. Co. v. Nipp's Adm'r. 100 S. W. 246, 30 Ky. Law Rep. 1131, *Gregory v. L. & N. R. R. Co.*, 79 S. W. 238, 25 Ky. Law Rep. 1936, and *I. C. R. R. Co. v.*

Murphy, 123 Ky. 787, 97 S. W. 729, 11 L. R. A. (N. S.) 352, that we do not deem it necessary to extend this opinion in the treatment of these subjects. It is earnestly argued for the appellee company that the jury should have been directed to return a verdict in favor of the defendant. In view of the fact that the case is to be remanded for a new trial, we will not express any opinion as to the weight that should be attached to the evidence. It is sufficient to say that the testimony offered by appellant authorized a submission of the case to the jury. On another trial so much of instruction No. 1 as is quoted herein should be omitted, and there should be added to instruction No. 1, given by the court, these words: "And if you believe that the defendants failed in the performance of either of these duties, then you should find for the plaintiff, unless you believe decedent was guilty of contributory negligence as defined in instruction No. 2."

The judgment is reversed, with directions for a new trial not inconsistent with this opinion.

McCOY et al. v. FRALEY et al.

(Court of Appeals of Kentucky. Nov. 17, 1908.)

1. LOGS AND LOGGING (§ 3*) — SALES OF STANDING TIMBER—EVIDENCE.

Evidence held to show that a contract for the sale of standing timber was executed by the owner.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

2. SALES (§ 200*)—CONTRACTS—PASSING OF TITLE.

In a sale of personalty, where specified acts are to be done to determine the price or the amount sold, the transaction is not complete until the steps determining the price and amount sold have been taken, and until that time the title does not pass.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 525; Dec. Dig. § 200.*]

3. LOGS AND LOGGING (§ 3*) — SALES OF STANDING TIMBER—EQUITABLE INTEREST.

A sale of standing timber, fixing no time for the removal thereof, passes an equitable interest in the real estate.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3.*]

4. LOGS AND LOGGING (§ 3*) — SALES OF STANDING TIMBER—EQUITABLE INTEREST.

Where the vendor of standing timber died before the trees were measured, counted, and marked, the chancellor properly directed his commissioner to go on the land and ascertain the number of trees which passed to the purchaser under the contract.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

Appeal from Circuit Court, Floyd County.
"Not to be officially reported."

Action by Mousie McCoy and others against W. B. Fraley and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. S. Harkins and James Goble, for appellants. Hopkins & Hopkins and May & May, for appellees.

LASSING, J. Appellants filed suit in the Floyd circuit court, wherein they alleged they were the owners of, and in possession of, two tracts of land, upon which appellees were committing trespasses by cutting and threatening to remove certain timber therefrom, and they asked that appellees be enjoined and restrained from entering upon their said land for the purpose of removing the timber. A temporary restraining order was granted. Appellees answered, denying title in appellants, and claimed title in themselves, under a contract executed to appellee W. B. Fraley by Arta Fraley, mother of appellants and appellee W. B. Fraley. They alleged that under said contract they had purchased of Arta Fraley all of the timber of a certain designated size and kind set out in the contract, which they filed with their answer and made a part thereof. The reply denied the execution of the contract under which appellees claimed title to the timber, and denied that the \$200 alleged to have been paid by appellees was paid as a part of the consideration for the timber on the two tracts of land described in the petition. The affirmative matter in the reply was traversed in the rejoinder. Proof was taken upon the questions in issue, and upon final hearing the temporary restraining order was dissolved, and the petition of appellants was dismissed, and appellees were adjudged the owners of all of the timber on said two tracts covered by the contract set up in the pleading. It is not seriously contended that Arta Fraley, the mother of appellants and appellee W. B. Fraley, did not own the timber which appellee W. B. Fraley claims to have bought from her, but the real contention is that the contract under which W. B. Fraley claims to have purchased it was not executed by Arta Fraley, his mother, and that, if she signed anything at all, she signed what she believed to be an agreement that her son W. B. Fraley might haul timber from another tract of land through the lands on which the timber stands which he claims to have bought.

The first question, then, for determination is, Did Arta Fraley execute the contract under which appellees claim title to the timber? The chancellor found that the weight of the testimony was in support of the contention of appellees that she did sell him the timber in question, and evidenced the sale by the contract, which is filed with appellees' answer. From the testimony of all of the witnesses it is plain that the sale of this timber to W. B. Fraley and others had been freely talked about and considered by Arta Fraley. The record before us affords no satisfactory explanation of the payment by W. B. Fraley to his mother of the \$200, if it was not as a

part of the consideration for the sale of this timber. Considering all of the evidence, we are of opinion that the chancellor correctly found that Arta Fraley made the sale of timber to her son W. B. Fraley, which is evidenced by the contract filed with the answer of appellees. The appellee Cline comes into the case by having purchased a one-half interest in the contract of appellee W. B. Fraley.

Having determined that the contract was made, the next question is, What title passed under it? It is admitted that after the execution of the contract, and before any of the trees had been measured, counted, or marked, Arta Fraley died. For appellants it is insisted that the contract, if executed as alleged, was merely the evidence of a sale of personal property; and therefore, as the transaction had not been completed before the death of Arta Fraley, no title passed, and the contract is of no binding force and effect. Numerous authorities are cited to the effect that in a sale of personal property, where certain acts are to be done to determine the price that is to be paid, or the amount of goods that passed by the sale, the transaction is not completed until these necessary steps are taken, and that hence the title to the personality does not vest in the purchaser upon the execution of the contract, but only upon the doing of the acts necessary to determine the amount of the property covered by the sale and the value thereof. The correctness of this principle is not questioned by appellees, but they contend that this sale is to be treated as a sale of an interest in real property. In the case of *King v. Cheatham*, 104 S. W. 751, 31 Ky. Law Rep. 1176, this court said: "A sale of standing timber, not for immediate severance, is a sale of an interest in realty." In *Wiggins v. Jackson*, 73 S. W. 779, 24 Ky. Law Rep. 2189, it is said: "Standing timber is a part of the realty. It was not sold in contemplation of immediate separation from the soil, and therefore is not within the rule announced by this court in *Cain v. McGuire*, 13 B. Mon. 341, and *Ryassee v. Reese*, 4 Metc. 372, 83 Am. Dec. 481." In *Hogg v. Frazier*, 70 S. W. 291, 24 Ky. Law Rep. 930, the principle is thus stated: "The law is well settled in this state that the title to standing timber, in the hands of a purchaser under a written contract indicating no specific time for their removal, passes in the same way as the land itself." In *Dils v. Hatcher*, 69 S. W. 1092, 24 Ky. Law Rep. 826, the court, through Judge White, said: "It is a rule of real property, long established, that growing trees and everything permanently fixed to the soil is realty, and, when the trees are severed, they become personalty. This rule yet prevails, except as it is modified by the equity rule that equity will treat that as done which was intended to be done. We have, bearing in mind these two rules of law,

held that, where growing timber was sold with the purpose of immediate severance from the soil, we would treat it as personalty. It was intended to immediately sever and make personalty, and we would therefore treat the growing timber as having been cut down, and therefore personalty. However, every sale of growing trees is not intended for immediate severance. The contract of sale may, or may not, so provide. Where the time given for severance is indefinite, as in the case of *Asher Lumber Company v. Cornett*, 63 S. W. 974, 23 Ky. Law Rep. 602, or where no time is fixed, the trees are considered as a part of the realty, which they always were. In such cases there is nothing in the contract of sale upon which to base the application of the equitable rule of treating as done that which was intended. There is no expressed intention of immediate severance. * * * In this case, therefore, we are of the opinion that the trees sold were realty, and not personalty." There being no time fixed for the removal of the trees in the contract under consideration, the sale thereof must be treated as passing or conveying an equitable interest in the real estate.

Having determined that the contract was executed by Arta Fraley, and that under it appellees acquired an equitable interest in the land, and Arta Fraley having died before the trees were measured, counted, and marked, the chancellor directed his court commissioner to go upon the land and ascertain the number of trees which passed to appellees under the contract. We think in so doing he adopted the only feasible and practicable method open to him for carrying out the contract which was uncompleted at the death of Arta Fraley. Had the contract called for a sale of the land by the acre, and the payment of the money as soon as the amount thereof had been ascertained, the chancellor would have directed the survey to be made and the number of acres ascertained, and in this way completed the contract. The plan which the court adopted in ascertaining the number of trees which passed under the contract was in no wise prejudicial to appellants.

Perceiving no error in the finding and rulings of the chancellor, the judgment is affirmed.

BURTON-WHAYNE CO. v. FARMERS' & DROVERS' BANK et al.†

(Court of Appeals of Kentucky. Nov. 17, 1908.)

1. ACKNOWLEDGMENT (§ 6*) — DEFECTS — EFFECT.

A deed of a man and wife, acknowledgment of which was not in proper form because taken before a notary public, was good as between the parties and, in connection with the grantee's possession, notice to the world of his ownership.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 53; Dec. Dig. § 6.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For modified opinion, see 114 S. W. 258.

2. DEEDS (§ 88*) — RECORDING — STATUTORY PROVISIONS—DEEDS OF MARRIED WOMEN.

A deed by a man and wife, not filed for record within 8 months, as required by 1 Stanton's Rev. St. c. 24, §§ 15, 23, was void as to the wife.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 228; Dec. Dig. § 88.*]

3. APPEAL AND ERROR (§ 891*)—RECORD—RECORD IN ANOTHER CASE.

In an action involving the title to land, the record of another suit to quiet title, filed with the record on appeal, cannot be considered, where it does not appear that the same premises were involved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3623; Dec. Dig. § 891.*]

4. LIS PENDENS (§ 16*)—NOTICE—FAILURE TO INCORPORATE DATE OF ATTACHMENT.

The purpose of Ky. St. 1903, § 2358a, subd. 2, requiring the date of the attachment to be contained in the body of the lis pendens notice, is to put subsequent purchasers and incumbrancers on notice; and, where the notice filed was correct, except that the date of attachment was not in the body thereof, and the date of filing was certified to by the clerk with his record of the notice, it afforded proper notice to persons filing an attachment on the property 13 days thereafter, so as to prevent the second attachment taking precedence.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 26; Dec. Dig. § 16.*]

5. ADVERSE POSSESSION (§ 112*)—POSSESSION UNDER VOID DEED—PRESUMPTIONS.

Where deeds by husbands and wives, though void as to the wives, because not recorded within 8 months, as required by 1 Stanton's Rev. St. c. 24, §§ 15, 23, were executed more than 50 years ago, if the grantees and those claiming through them have been in adverse possession for 30 years, the presumption is that the title is good by limitation.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 658; Dec. Dig. § 112.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Attachment of land by the Farmers' & Drovers' Bank and others against the Columbia Finance & Trust Company, administrator of S. S. Meddis. Burton-Whayne Company, purchasers at the commissioner's sale, filed exceptions to the report of sale, which were overruled, and it appeals. Reversed and remanded, with directions.

George L. Burton, for appellant. Chas. H. Shield and George Cary Tabb, for appellees.

CLAY, C. This action involves the invalidity of the title to a piece of property, sold under an attachment secured by the appellee against the Columbia Finance & Trust Company, administrator of the estate of S. S. Meddis, deceased, Victor N. Meddis, and George S. Meddis, Jr. Appellant, Burton-Whayne Company, bought the property in question at the commissioner's sale, and filed certain exceptions thereto. These exceptions were overruled, and it appeals.

It appears from the record that about the year 1856 Foster Ray and Francis S. Ray

owned an undivided one-fourth interest in a lot containing some 60 acres, at the northeast corner of Fifteenth or Cherry street and Magnolia avenue. Francis S. Ray died intestate, leaving no children. His only heirs were his brothers and sisters and the children of his deceased brothers and sisters. After Francis S. Ray's death Foster Ray, who owned one-half of an undivided one-fourth of the 60-acre tract, and inherited from his brother Francis S. Ray one-eighth of the latter's one-half of an undivided one-fourth, purchased the interest of Robert C. Ray and wife, Nancy I. Ray, in the 60-acre tract of land, by deed dated February 2, 1856, and recorded in the Jefferson county clerk's office January 9, 1857, in Deed Book 97, page 147. He also purchased the interest of Sarah Helser and her husband, Thomas Helser, by deed dated March 15, 1856, and recorded in the Jefferson county clerk's office January 9, 1856, in Deed Book 97, at page 147. He also purchased the interest of Amanda Ray and her husband, Asher B. Ray, by deed dated April 30, 1856, and recorded January 9, 1856, in the Jefferson county clerk's office, in Deed Book 97, at page 148. In addition to the above interests in the 60-acre tract of land Foster Ray bought the interests of all the other heirs, except the interest of B. F. Ray, Sarah Batsel, Amanda Batsel, Spencer, Sally C. Curd, and Ann Eliza Curd. He thereupon filed against these parties, who had not sold their interest, an action to have the 60 acres of land partitioned among the owners thereof according to their respective interests. The persons who conveyed to Foster Ray were not made parties to this action. All the others interested in the property were made parties. Robert C. Ray owned $\frac{3}{192}$ of the whole tract, Sarah Helser $\frac{3}{192}$, and Amanda Ray $\frac{1}{192}$ of the whole tract. In the partition proceedings Foster Ray was awarded 12.92 acres, and the property involved in this action is a portion of said tract of 12.92 acres.

It is first insisted by counsel for appellant that the title to the property purchased by it is defective because Robert C. Ray's deed to Foster Ray was acknowledged by him before a notary public. While this deed was not acknowledged in proper form, we think it was good between the parties. It at least had the effect of an unacknowledged deed, and, connected with Foster Ray's possession after the division, was notice to the world of his ownership. *Simpson's Ex'x v. Loving, Jackson, etc.*, 3 Bush, 458, 96 Am. Dec. 252.

It is next insisted that the deeds from Asher B. Ray and Amanda Ray and Thomas and Sarah Helser are not valid because they were not filed for record within 8 months, as required by Rev. St. (Stanton's) vol. 1, c. 24, §§ 15, 23. This precise question was be-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fore this court in several instances, and it has been held that such deeds are void as to married women. The effect of this interpretation of the statutes in question was to cause their subsequent repeal by the Legislature. *McGuire v. Bowman, etc.*, 6 Bush, 550; *Butler v. Wheeler, etc.*, 82 Ky. 475; *Dugan v. Corn, Id.* 206.

There was filed with the record in this case the record of an action brought by Lizzie Adams in the Jefferson circuit court against Sarah C. Dycus, J. V. Dycus, and Anne E. Fulcher to quiet her title. Sarah O. Dycus is the same party as Sally C. Curd, given in the list of heirs of Francis S. Ray. In their answer to Lizzie Adams' petition Sarah C. Dycus and others claimed that they had never conveyed their interest in the property in question to the devisees of Foster Ray, but that they still held the interest in said property which they had inherited from Francis S. Ray. Issue was joined on this point, and Lizzie Adams filed a reply, pleading both the 15 and 30 year statutes of limitation. Two witnesses gave their depositions in that case, and the court held that Lizzie Adams had had adverse possession of the property in question for a period of more than 30 years. We are asked to consider here the record of that case. It does not appear, however, that the same lot of ground is involved, and we can not, therefore, consider such evidence.

Appellant's next exception to the report of sale is based upon the fact that the date of the attachment, as required by subdivision 2, § 2358a, Ky. St. 1903, is not contained in the body of the *lis pendens* notice. It appears, however, that in every other respect the notice filed in the county clerk's office was correct. It is also admitted that the date said notice was filed is certified to by the county clerk in connection with his record of said notice. Above the signature of the clerk is the following: "Filed March 15, 1907, at 9:40 o'clock a. m. By C. H. Shield." The attachment was levied March 13, 1907. After the attachment was secured in this action, it appears that Oscar Stutz and others levied on the property in question on March 28, 1907, 13 days after notice of this action had been filed in the county clerk's office. It is therefore contended that, as the *lis pendens* notice did not give the date of the attachment, Stutz's attachment took precedence. We cannot agree with counsel in this contention. The primary purpose of the notice required by section 2358 is to put subsequent purchasers, lessees, and incumbrancers on notice. The question is: Did Oscar Stutz and others file their attachment with notice of the prior attachment? Of this there can be no question. The prior *lis pendens* notice was not only on record, but the date of filing thereof was attached by the county clerk. Under these circum-

stances, therefore, we do not think the attachment filed by Oscar Stutz and others took precedence of the attachment sustained in this action.

For the reason that the deeds from Sarah Heiser and her husband, Thomas Heiser, and from Amanda Ray and Asher B. Ray are void, as to the married women, we are of opinion that the chancellor erred in overruling appellant's exceptions to the commissioner's report of sale. Inasmuch, however, as the deeds were executed more than 50 years ago, and, as the statute of limitations would now bar a recovery by the vendors if, as a matter of fact, the appellees Meddis and those through whom they claim have been in the adverse possession of the property for a period of 30 years (*L. & N. R. Co. v. Thompson*, 105 Ky. 190, 48 S. W. 990; *Rose v. Ware*, 115 Ky. 420, 74 S. W. 188; *Watkins v. Pfeiffer*, 92 S. W. 562, 29 Ky. Law Rep. 97), the presumption is that the title to the property is good by limitation. In view of this fact we have concluded to remand the case, with directions to the chancellor to hear proof upon the question of adverse possession. If such adverse possession is shown, the chancellor will overrule appellant's exceptions to the report of sale.

Judgment reversed for proceedings consistent with this opinion.

MATTINGLY et al. v. EVERSOLE et al.

(Court of Appeals of Kentucky. Nov. 17, 1908.)

1. PLEADING (§ 149*) — CROSS-COMPLAINT — STATUTORY PROVISIONS.

Under Civ. Code Prac. § 96, declaring that a cross-petition shall not be allowed to a defendant, except upon a cause of action which affects or is affected by the original cause of action, a cross-petition setting up an independent cause of action against persons not parties to the original suit is bad.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 301; Dec. Dig. § 149.*]

2. PLEADING (§ 406*)—OBJECTIONS—WAIVER.

A cross-petition, setting up an independent cause of action against persons not parties to the original suit, is not a misjoinder of actions, objection to which would be waived by filing an answer to the cross-petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1370; Dec. Dig. § 406.*]

3. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR—PRACTICE.

Though it is the better practice to move to strike a cross-petition setting up an independent cause of action against persons not parties to the original suit, instead of demurring, the error in failing to resort to the proper practice was not material, where the right conclusion was reached.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1040.*]

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

The Kentucky Coal Lands Company brought a suit against W. H. and James

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Mattingly to quiet title, to which the Mattinglys filed an answer, counterclaim, and cross-petition, and by such cross-petition made A. B. Eversole and others parties. Eversole and others demurred to the cross-petition, and it was dismissed, and the Mattinglys appeal. Affirmed.

Cleon K. Calvert, for appellants. Jas. H. Jeffries, for appellees.

CARROLL, J. The Kentucky Coal Lands Company brought a suit against the appellants, W. H. and James Mattingly, alleging that it was the owner and in possession of a tract of land containing some 700 acres, upon which the Mattinglys were trespassing. It asked that they be enjoined from entering upon the land or asserting title or claim thereto, and that its title be quieted. To this petition the Mattinglys filed an answer, counterclaim, and cross-petition. In this pleading they asserted that they and some of the cross-defendants were the owners of a portion of the land described in the petition. In another paragraph they averred that the appellees, whom they also made defendants to their cross-petition, had without right entered upon the land, to which they set up ownership in their answer, and cut down and carried away timber therefrom of the value of \$258, for which sum they asked a judgment against them on their cross-petition. The cross-defendants, who are the appellees here, filed an answer to the cross-petition against them. Afterwards the answer was withdrawn, and a general demurrer filed to the cross-petition, which was sustained, and the cross-petition was dismissed. From the judgment dismissing the cross-petition this appeal is prosecuted. At the same term the court further adjudged that the Mattinglys were the owners and entitled to the possession of the land to which they asserted title in their answer.

The record presents a simple question of law. That is, whether or not the appellants had the right under the Code to make their answer in the suit of the Kentucky Coal Lands Company a cross-petition against the appellees and obtain the relief therein sought. The Civil Code of Practice provides that an answer may contain a cross-petition, which is defined in section 96 to be "the commencement of an action by a defendant against a codefendant, or a person who is not a party to the action, or against both; or by a plaintiff against a coplaintiff, or a person who is not a party to the action, or against both; and is not allowed to a defendant except upon a cause of action which affects or is affected by the original cause of action, nor to a plaintiff except upon a cause of action which affects or is affected by a set-off or counterclaim." So that, unless the cause of action asserted in the cross-petition against the cross-defendants was "upon a cause of action which affects or is

affected by the original cause of action," the ruling of the lower court in dismissing it was proper. The original cause of action was against the Mattinglys to quiet the title of the Kentucky Coal Lands Company to the land described in its petition, and to prevent the Mattinglys trespassing on said land. The complaint of the Mattinglys against the appellees was concerning a matter entirely between the Mattinglys and the cross-defendants. The Kentucky Coal Lands Company had no concern in the controversy between the Mattinglys and the cross-defendant, nor did the controversy between these parties have any connection with the cause of action set out in the petition. It was not necessary to a complete adjudication of the matters in issue between the Kentucky Coal Lands Company and the Mattinglys that the Eversoles should be made parties. If, in place of failing, the Kentucky Coal Lands Company had succeeded in establishing its title to all the land described in the petition, it is manifest that the decision in its favor would have defeated the cross-petition of the Mattinglys, because the effect of it would have been to determine that the Mattinglys had no interest in the land they sought to recover damages from the Eversoles for trespassing upon. On the other hand, if the Mattinglys succeeded, as they did, in establishing their right to the land upon which they claimed the Eversoles had been trespassing, the Kentucky Coal Lands Company could not have any concern in the litigation between the Mattinglys and the Eversoles. So that in no state of case was the original cause of action affected by the complaint set up in the cross-petition.

In 5 Encyclopædia of Pleading & Practice, p. 641, it is said, supported by ample authority, that: "The new facts which it is proper for a defendant to introduce into a pending litigation by means of a cross-bill are such, and such only, as it is necessary for the court to have before it in deciding the questions raised in the original suit to enable it to do full and complete justice to all the parties before it in respect to the cause of action on which the complainant rests his right to aid or relief. If a defendant in filing a cross-bill attempts to go beyond this, and to introduce new and distinct matter not essential to the proper determination of the matter put in litigation by the original bill, although he may show a perfect cause against either the complainant or one or more of his codefendants, his pleading will not be a cross-bill but an original bill. And no decree can be rendered on such matters."

In Newman's Pleading & Practice, p. 612 in speaking of cross-petitions, the author states: "And it must at all times be deemed essential to a cross-bill that it should be confined to the subject-matter of the original bill. Any other departure from it was not admissible. * * * For the cross-bill must relate exclusively to the subject-matter of

the original bill and things connected therewith, and foreign matter cannot be introduced, unless under special circumstances." The rule of practice here announced is fully supported in the following authorities: In *Wells v. Boyd*, 1 Duv. 367, a case very much like the one before us, Preston brought an action against Boyd upon a note. Boyd answered, and alleged that the note was executed as part of the purchase price of a jack, which he bought from Preston, and that one Wells and Preston, at the time of the execution of the note, executed to him a writing, in which they warranted the jack to be a good foal getter. In considering the right of Boyd to make his answer a cross-petition against Wells, the court said: "The subject-matter of this action is the right of the plaintiff, Preston, to collect from the defendant Boyd the amount of money which by his note he promised to pay, and that right was not and cannot be affected by any right Boyd had secured to him by reason of the covenant executed to him by Wells. And the two judgments in this case forcibly illustrate the correctness of that conclusion. Preston here recovered the amount of his note against Boyd, notwithstanding the litigation between Boyd and Wells, the subject-matter of his action being entirely unaffected by any cause of action which the defendant Boyd had against Wells; and Boyd got an independent judgment on his cause of action against Wells, showing conclusively that Boyd's cause of action on the covenant of Wells was distinct from and wholly independent of Preston's cause of action against him. He should have brought his original action thereon. The proceeding against Wells cannot therefore be sustained by way of counterclaim, nor by way of cross-petition." In *Royse v. Reynolds*, 10 Bush, 286, it appears that one Fee sought to enjoin Royse from enforcing a judgment against him, upon the ground that he was his surety, and had been released from liability by lapse of time. Royse made his answer a cross-petition against Reynolds, alleging that Reynolds, as sheriff, had failed to return the execution for more than 30 days after the return day thereof, and had failed to sell certain property that had been levied on. The court said: "There is no connection whatever between these causes of action and the subject-matter of Fee's suit, except that Fee was a party defendant in the judgment upon which the execution issued. None of his property had been seized, and he was released, if at all, not by the delay or neglect of the sheriff, but by want of diligence on the part of Royse." In *Crabtree v. Bank's Adm'r*, 1 Metc. 482, Mary Banks recovered a judgment against J. V. Banks, administrator with the will annexed of C. P. Banks, and sought to recover the amount of the judgment from the devisees, to whom she alleged the estate had

come. In this action the administrator, who was made a party defendant, made his answer a cross-petition against the devisees, and prayed judgment against them for a balance found due him upon settlement as administrator several years before. To this cross-petition the devisees answered, endeavoring to surcharge the settlement of the administrator. The court said: "In this case the cause of action stated in the cross-petition did not affect the subject-matter of the action in the name of Mary Banks against the devisees of C. P. Banks. The two causes of action were separate and distinct. There was no connection between them, and they should not have been blended in the same action. If J. V. Banks had a demand against the devisees of C. P. Banks, he could have asserted it in his separate action, and it was his duty to do so. And, upon the other hand, if the devisees desired to surcharge the settlement made by the administrator with the will annexed, they could have brought their action for that purpose, or have relied upon the same matter, in any action which he might bring against them for the recovery of the alleged balance found in his favor upon the settlement aforesaid."

Counsel for appellants insists that by filing an answer to the cross-petition the appellees waived their right to object to it, although the answer was afterwards withdrawn and a demurrer entered and sustained. This argument is based upon the theory that the cause of action set up in the cross-petition amounted to a misjoinder of actions, and therefore this error was waived by filing an answer; but there was no misjoinder of actions. The cross-petition did not amount to this. It simply set up a new and independent cause of action against persons who were not parties to the original suit. It would have been better practice to have moved to strike from the pleading so much of it as asserted a cross-petition; but the error in failing to resort to the proper practice is not material, as the right conclusion was reached.

The judgment is affirmed.

PADUCAH TRACTION CO. v. BAKER.

(Court of Appeals of Kentucky. Nov. 13, 1908.)

1. CARRIERS (§ 314*)—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—COMPLAINT.

A complaint for injuries to a street railway passenger may charge that the accident was due to the negligence of the motorman, or to defects in the car, and is not confined to one ground of negligence.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 314.*]

2. CARRIERS (§ 316*)—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—PRESUMPTIONS AND BURDEN OF PROOF—RES IPSA LOQUITUR.

In a personal injury action, if the cause of injury is not within the reasonable knowl-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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edge of plaintiff, he may go to the jury, especially in an action against a carrier, upon evidence of negligence and injury, without being required to specify the particular cause, under the doctrine of *res ipsa loquitur*.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1283, 1286; Dec. Dig. § 316.*]

3. CARRIERS (§ 316*)—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—EVIDENCE—*RES IPSA LOQUITUR*.

The sudden starting of a street car with a jerk of sufficient violence to throw to the ground a passenger, who had placed her foot on the running board to alight at the crossing which the car was slowly approaching, justifies an inference of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1286; Dec. Dig. § 316.*]

4. NEGLIGENCE (§ 121*)—PRESUMPTIONS AND BURDEN OF PROOF—*RES IPSA LOQUITUR*—REBUTTAL.

An inference of negligence arising under the doctrine of *res ipsa loquitur* is rebuttable, as is any other legal presumption.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 121.*]

5. APPEAL AND ERROR (§ 1003*)—REVIEW—QUESTIONS OF FACT.

A verdict will not be disturbed on review, unless flagrantly against the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by Rosa A. Baker against the Paducah Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wheeler, Hughes & Berry, for appellant. Crice & Ross, for appellee.

CARROLL, J. For personal injuries alleged to have been sustained by the negligence of the defendant company and its agents, by reason of which she was violently thrown or fell to the street from the car upon which she was a passenger, appellee brought this action. A trial before a jury resulted in a verdict in her favor, and the judgment on this verdict we are asked to reverse.

The petition stated appellee's cause of action as follows: "She states that, when the car on which she was a passenger arrived within about one-half a block of her destination, the conductor thereon rang the bell, notifying the motorman in charge that a passenger wished to leave the car at the corner of Eleventh and Madison streets. She avers that, when the car had approached to within a short distance of the corner of said streets, it began to slacken its speed, and continued to go less rapidly until it had crossed the street and reached the point where it usually stopped for the discharge of passengers. That while the car was going at this rate of speed, and just before it reached the point where the plaintiff was to alight, the conductor on the car came around where

she was sitting, and took her umbrella from her and raised it, stepping out on the step to assist her off, and just at this time, and immediately before the car reached its usual and customary stopping place on this corner, and the place where the plaintiff desired to alight, the car was going at a slow rate of speed. She arose for the purpose of stepping off the car when it had stopped, and while she was in a standing position on the car, and before she had made any attempt to alight, the conductor, who was standing on the steps, extended his hand to assist her from the car, when the car started up suddenly with a jerk and threw her to the ground with great force and violence. Plaintiff says that the sudden starting of the car with a jerk as aforesaid was caused by reason of the gross negligence and wanton carelessness of defendant's agents and servants who were in charge of said car, or because of the gross negligence and wanton carelessness of the defendant in operating this car, while it and the machinery and appliances connected therewith were in a dangerous and defective condition, which dangerous and defective condition existed at the time, and was well known to the defendant, its agents, and servants in charge thereof, or could have been known by the exercise of ordinary care and prudence. Plaintiff avers that the accident aforesaid, and the injuries resulting therefrom, were caused by reason of one or both of the acts of negligence just indicated, but she cannot state positively which." Appellee was the only witness who testified in her behalf concerning the nature and cause of the accident that resulted in her injuries. She testified that, when she had placed her foot on the running board of the car for the purpose of getting off at the crossing which the car was slowly approaching, and while being assisted by the conductor, the car gave a lurch and threw her off. She did not state what caused the car to suddenly start forward. There was no evidence whatever that the car or any of the machinery or appliances connected therewith were in an unsafe or defective condition, nor was there any evidence that the motorman was negligent. The evidence for appellant conduced to show that the car did not suddenly, or with a lurch or jerk, start, but that the appellee stepped on the footboard, running lengthwise of the car to enable passengers to get on and off, while the car was in motion; that the footboard was wet from the falling rain, and her foot slipped, and she fell to the ground without any negligence or carelessness on the part of the company or any of its employees.

With the evidence in this condition, the court instructed the jury that: "It was the duty of the defendant to exercise the utmost care, which careful and prudent persons are accustomed to exercise when engaged in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

like business and under like or similar circumstances of this case, to have its said car and the machinery and appliances thereto attached, in a reasonably safe condition; and it was the duty of the defendant's employes in charge of said car, and in the operation and management of same, to exercise a like degree of such care to safely carry the plaintiff to the place where she wanted to leave or get off said car, and to stop same at said place long enough to allow plaintiff a reasonable opportunity to get off of said car in safety. And if you shall believe from the evidence that the defendant's employes in charge of said car failed to exercise such care, and that, while plaintiff was preparing to leave or get off of said car, with notice or knowledge to the employes in charge of said car, before the same had been stopped, and while said car was being slackened up for the purpose of being stopped, the employes in charge of said car suddenly and with a jerk started said car, or if you shall believe from the evidence in this case that the machinery and appliances of said car were defective and unsafe, and defendant knew this, or by the exercise of ordinary care could have known it, and by reason of such defective and unsafe machinery and appliances said car was caused to suddenly start with a jerk, and by reason of either of these things, and as a direct and proximate cause of either, plaintiff was thrown to the ground and injured, then defendant was guilty of negligence, and the law in this case is for the plaintiff, and you should so find."

Appellant complains of so much of this instruction as submitted to the jury the question as to the unsafe or defective condition of the car, its machinery or appliances, upon the ground that, although the petition alleged that the car, its machinery, or appliances were unsafe, dangerous, and defective, there was no evidence offered or heard in support of this allegation. It contends that by incorporating this idea in the instruction the court submitted an issue, not involved in the case, that was calculated to mislead the jury and was prejudicial to its substantial rights. In answer to this counsel for appellee argues that all that appellee could say was that the car was negligently started with a violent jerk when she was in the act of getting off. Whether the sudden lurch of the car was caused by the negligence of the persons in charge of it, or by reason of defects in the machinery or appliances of the car, that prevented the motorman from controlling it, she did not know and could not state. That she did not see the motorman at the time, and could not say that he was negligent, or that the sudden start was caused by reason of the brake being in such defective condition that it slipped, or was jarred loose, or on account of some other defective appliance of the car. A sharp issue was made by the evidence of the company and the appellee as to whether or not the car increased

its speed while she was in the act of alighting. This was the vital point in the case, and the question is, Must the appellee fail because she could not in her evidence specify in what particular the negligence complained of consisted? To put it in another way, Must a passenger, under circumstances similar to those proven in this case, be able to state or prove by witnesses the cause that produced the acts alleged to be negligent, or falling in this, go out of court?

The plaintiff in an action like this has the right to state, in as many different ways as the facts will justify, the negligence that caused the injuries complained of. He is not confined to one act of negligence on the part of the defendant, but may state separate and distinct concurring acts that produced the accident, and may recover upon sufficient proof to support one or more of them. To illustrate: The plaintiff in this case had the right to charge generally that her injuries were caused by the negligence of the persons in charge of the car, or because the car or some of its appliances or fixtures were in a defective, unsafe, and dangerous condition, or because the tracks or appliances used in connection therewith were out of repair, or in an unsafe condition, or she might have pointed out with particularity the several acts of negligence that contributed to bring about the injury complained of. *Gaines & Co. v. Johnson*, 105 S. W. 381, 32 Ky. Law Rep. 58. There is no question that the plaintiff stated a good cause of action in her petition, nor is there any doubt that she had the right to charge that the accident was due to the negligence of the motorman or to defects in the car. There is great force in the argument that appellee could not in her evidence state accurately, or indeed at all, what caused the car to start, or whether it was negligence on the part of the motorman, or negligence in the company in failing to have the car in such condition as that the motorman might control its movements. She knew the car started suddenly and with a lurch. Why it did so she could not state, because she did not know. If, as a matter of fact it did suddenly start, after it had slowed up for the purpose of permitting appellee to alight, it is clear that either the motorman was guilty of negligence, or that the car or some of its appliances were so defective that he could not control it. There was no direct evidence of defective appliances, nor indeed was there any direct evidence of negligence on the part of the motorman, or that any person or thing caused the car to suddenly start forward, as shown by the evidence of appellee. Under this state of facts, if the argument of counsel for appellant is sound, the court should have peremptorily instructed the jury to find a verdict in favor of the company. If there was no evidence to show defective appliances, neither was there any to show negligence on the part of the persons in charge of the car. If it was

error to submit to the jury the question of defective appliances, it was equally error to submit the question of negligence of the motorman. So that, carried to its logical conclusion, the result would be that in cases of this character, unless the plaintiff was able to introduce direct evidence of negligence on the part of the persons in charge of the car, or evidence of defective appliances, there would be a failure of proof. But the argument of counsel is not sound. It often happens that a passenger or a common carrier, who is injured by its negligence, is not able to point out the particular person or thing that caused the negligence, or describe in what it consisted, as the passenger does not know, and may not have any means of knowing. But, it does not follow from this that the passenger may not make out his cause of action, or a case that would authorize a submission of the issue to the jury.

It is the general rule that the plaintiff, in actions to recover damages for personal injuries, as well as in other cases, has the burden of proof, and must introduce evidence in support of the cause of action set out in his petition; but, if the cause that produced the negligence and consequent injury is not within the reasonable reach or knowledge of the plaintiff, then he may, especially in actions against carriers, go to the jury upon evidence of negligence and resulting injury without being required to specify the particular cause of the negligence. And this, by the application of the well-recognized rule of *res ipsa loquitur*, which means, "the thing speaks for itself." Accepting the statements of appellee as true, it is manifest that the car suddenly started, although the appellee could not state what caused it to start. That it was started, either by the negligence of the motorman, or by the company in failing to have the car properly equipped, is equally plain. Whether it was due to one of these causes or the other, or both of them jointly, is not material, so far as the appellee is concerned, as in either event she was entitled, upon her own showing, to recover for the injuries sustained by the negligent starting. Her evidence established the two essential things necessary to recover—injury to herself without her fault, and that negligence upon the part of the carrier caused it.

The scope of the doctrine of *res ipsa loquitur*, and its ready application to the facts of this case, is well illustrated in the statement of the rule in *Shearman & Redfield on Negligence*, § 59, where it is said: "The accident, the injury, and the circumstances under which they occur, are in some cases sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault. Proof of an injury occurring as the proximate result of an act of the defendant, which may not usually, if done with due care, have injured any one, is enough to

make out a presumption of negligence. Where a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who had the management of it used proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from a want of care. So, also, where it is shown that the accident is such as that its real cause may be the negligence of the defendant, and whether it is so or not is within the knowledge of the defendant, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant."

The text is fully supported in *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630. *Griffen* was injured in an elevator accident. The court in that case said: "The death of the plaintiff's intestate was caused by the fall of the counter-balance weights. Those weights were held in a frame, to which was attached a rope or cable, passing around a drum. The weights fell down from the frame, and the rope was thrown off the drum. That no such accident could ordinarily have occurred had the elevator machinery been in proper condition and properly equipped seems to me very plain. The court was therefore justified in permitting the jury to infer negligence from the accident construing, as I do, the term 'accident' to include, not only the injury, but the attending circumstances."

And so in *Breen v. N. Y. Central R. R. Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450, the court said: "There must be reasonable evidence of negligence; but, when the thing causing the injury is shown to be under the control of the defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in the absence of the explanation of the defendant, afford sufficient evidence that the accident arose from a want of care on his part." In *Howser v. Cumberland & Pa. R. Co.*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332, the plaintiff was injured by being struck by cross-ties that fell from a moving car, although the plaintiff was unable to state what caused the cross-ties to fall. The court said: "While the general rule undoubtedly is that the burden of proof that the injury resulted from the negligence on the part of the defendant is upon the plaintiff, yet, in some cases the very nature of the accident may in itself, and through the presumption it carried, supply the requisite proof."

In *Consolidated Traction Company v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 132, the facts are almost identical with those in this

case. The only witness who testified in behalf of plaintiff in her suit against the company to recover damages for personal injuries was herself. She said that: "She was a passenger in a street car operated by the traction company and running upon Orange street, in the city of Newark; that she notified the conductor of the car that she desired to alight therefrom at Fifth street (which crossed Orange street); that when the car approached Fifth street the conductor called out the name of that street; that she got up from her seat, while the car was still in motion, and walked to the rear door of the car, which was open, and when she arrived at the door and was just coming out of it, she was thrown into the street by a movement of the car which she called a 'lurch' or a 'jerk,' and described as of sufficient force to 'throw her right off.' The fall produced serious injury." After the motion for a peremptory was overruled, the company gave evidence tending to show that Mrs. Thalheimer fell upon the street after she had safely alighted from the car. In denying the motion for a new trial the court said: "Our review is limited to the consideration of the question whether Mrs. Thalheimer's evidence, if credence were given to it, was sufficient to establish the liability of the traction company to answer for her injury. The contention that the evidence in question was insufficient to show a breach of the duty which the traction company, as a carrier of passengers, owed to Mrs. Thalheimer cannot, in my judgment prevail. As street cars run upon rails fixed and leveled in the highway, and not permitting lateral motion, and are provided with brakes which, when applied quickly or when, after being applied, are released quickly before the momentum of the car has been overcome, produce known mechanical effects upon persons on the car, the occurrence of a lurch or jerk of the violence described fairly justifies an inference that either the tracks were improperly laid or were out of order, or the brakes were improperly handled. At all events the fact that such a lurch or jerk occurred as would have been unlikely to occur if proper care had been exercised brings the case within the maxim '*res ipsa loquitur*.'"

In a full note to Huey v. Gahlenbeck, 121 Pa. 238, 15 Atl. 520, 6 Am. St. Rep. 790, supported by ample authority, the editor states "that, as a general proposition, a party who charges negligence as a ground of an action must prove it; yet that an accident may be of such a nature as to raise a presumption of negligence is fully sustained by authority. The doctrine is maintained that proof of the occurrence of an accident, which under ordinary circumstances would not have happened if due care had been exercised, raises a presumption of evidence, and the burden

of proof is thus raised upon the part of the defendant to rebut the presumption. Or, as expressed in an English case, where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management of it used proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." In 29 Cyc. 590, and 21 Am. & Eng. Ency. of Law, 512, numerous cases are cited in line with the foregoing authorities.

The case before us furnishes a fine example for the application of the principle announced in the foregoing authorities. The thing that caused the injury was under the exclusive control of the railway company. It owed a duty to the appellee as a passenger to use due care to avoid injury to her; and the accident was of such a nature that according to her statement it could not have happened in the absence of negligence in the operation or construction of the car. We therefore conclude that it was proper to submit to the jury the question of defective appliances together with the negligence of the motorman, upon the theory that the jury had the right to infer from the plaintiff's evidence that the defendant company was negligent; and, as the plaintiff could not particularize the negligence, as it might have resulted from one or both of the causes stated in the petition, it was not error to permit the jury to infer whether the sudden starting of the car was due to one or both of these causes. Nor is the fact that the defendant, in cases of this character, may introduce direct evidence conducing to establish that there was no negligence in the operation of the car, or defect in the appliances or fixtures, sufficient to warrant the court in taking the case from the jury, as the jury might infer, notwithstanding this evidence, that there was negligence on the part of the carrier. This inference is of course rebuttable, as is any other legal presumption, and the evidence offered in rebuttal might be so conclusive or overwhelming as to authorize the court to set aside a verdict for the plaintiff.

It is strongly urged that the injury to plaintiff was due to the fact that her foot slipped, and not to any negligence in the operation or construction of the car, and that the verdict is against the evidence, and this may be conceded. But the jury, as has been often and over again said, saw the witnesses, heard them testify, and accepted the evidence of the appellee in preference to that offered in behalf of the company, and we cannot say that the verdict is so flagrantly against the evidence as to authorize us for this reason to disturb it.

The judgment is affirmed.

UNION CENT. LIFE INS. CO. OF CINCINNATI v. DUKES et al.

(Court of Appeals of Kentucky. Nov. 18, 1908.)

1. EVIDENCE (§ 35*)—JUDICIAL NOTICE—LAWS OF SISTER STATES.

The courts of Kentucky do not take judicial notice of the law of a sister state; such law being a fact to be shown by proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 51; Dec. Dig. § 35;* Appeal and Error, Cent. Dig. § 2959.]

2. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTIONS—ABSENCE OF BILL OF EXCEPTIONS.

In the absence of a bill of exceptions showing what proof was made in the lower court, it will be presumed on appeal that the proof heard justified the conclusion reached.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

3. APPEAL AND ERROR (§ 548*) — REVIEW — STIPULATIONS OF COUNSEL.

A stipulation that either party might submit to the court statutes and decisions to show the laws of other states, and that copies of the statutes and decisions so submitted might be attached in lieu of the original to the record for use in any court, does not warrant the court on appeal in looking to such statute and decisions as may be cited in argument, where there is no bill of exceptions to show what statutes and decisions were submitted below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2433; Dec. Dig. § 548.*]

4. APPEAL AND ERROR (§ 883*) — ESTOPPEL — ERROR INVITED.

Where the parties to an action consent that the court shall consider statutes and decisions adduced and give judgment thereon, neither can on appeal complain of the mode in which proof was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. § 883.*]

Appeal from the Circuit Court, Simpson County.

"To be officially reported."

Action by Marshall B. Dukes and others against the Union Central Life Insurance Company of Cincinnati. Judgment for plaintiffs, and defendant appeals. Affirmed.

George C. Harris and Maxwell & Ramsey, for appellant. Roark & Finn, for appellees.

HOBSON, J. The Union Central Life Insurance Company on October 9, 1894, issued a policy insuring the life of Dona I. Dukes, in the sum of \$7,000. It was provided in the policy that, in case of default in the payment of any premium after the third, the policy would be continued in force for the full amount, as a paid-up nonparticipating policy for such a time as its reserve value would carry it according to the American Experience Table of Mortality, with 4 per cent. interest. Mrs. Dukes made the payments on the policy until October 7, 1900, and for that premium she executed her note due 11 months after date. She failed to pay the note or any subsequent premium, and died on March 26, 1904. This suit was brought by the beneficiaries in the policy on

January 29, 1907, to recover on it; they alleging that the reserve value of the policy continued it in force for a period of more than five years, or until after October 15, 1905. The defendant by its answer set up the fact that the policy also contained these provisions:

"After three years' premium shall have been paid on this policy, except in case of failure to pay at maturity a note given for premium or for a loan upon the security of this policy, the company will, upon legal surrender of this contract before default in the payment of any premium, issue a paid-up nonparticipating policy payable as herein provided, for the amount as named in table A on the following page.

"In case of default in payment of any premium after the third, except in case of failure to pay at maturity a note given for premium or for a loan upon the security of this policy, no surrender for a paid-up policy having been made as above provided, this policy will be continued in force only as a paid-up nonparticipating term policy for such time only as one annual premium on this policy is contained in its reserve value according to the American Experience Table of Mortality, with 4 per cent. interest. If the death of the insured occurs while the aforesaid term policy is in force there shall be deducted from the amount insured a sum equal to the regular annual premiums, with interest that would have accrued had this policy been kept in force; said deduction not to exceed three annual premiums with interest."

"The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes or interest upon notes given to the company for any premium on or before the days upon which they become due shall avoid and nullify this policy without action on the part of this company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency."

"No suit to recover under this policy shall be brought after one year from the death of the insured."

The note which Mrs. Dukes executed contained these words: "Said policy, including all conditions therein for surrender or continuance as a paid-up term policy, shall, without notice to any party or parties interested therein, be null and void on the failure to pay this note at maturity, with interest at eight per cent. per annum, payable annually. In case this note is not paid at maturity, the full amount of premiums shall be considered earned as premiums, during its currency, and the note payable without reviving the policy or any of its provisions."

The defendant alleged: That Mrs. Dukes, at the time of her application for the policy and of its delivery to her, was a citizen and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

resident of Texas; that the contract of insurance was consummated by delivery within the state of Texas, and all transactions between the parties relating thereto took place in Texas; that the policy by its terms provided it should be an Ohio contract; that the beneficiaries lived either in Texas or Oklahoma; and that under the laws of both Texas and Ohio the policy was void upon the nonpayment of the note, and no suit could be brought upon it after one year from the death of the insured. A reply was filed to the answer which controverted its allegations as to what the laws of Texas and Ohio are. After the issues had been made up, the case was submitted to the court upon the following agreement: "It is agreed by the plaintiff and the defendant that, in addition to the facts which are admitted and in evidence in this case by the pleadings and exhibits, on the 15th day of October, 1901, the ages of the infant plaintiffs were as follows: James M. Dukes, 15 years old; Elizabeth N., 13 years old; Jonathan Dukes, 11 years old; David N., 8 years old; and the other plaintiffs or beneficiaries under the policy were adults. It is further stipulated that either of the parties may submit to the court in argument such statutes and decisions as they may desire for the purpose of establishing the issues raised by the pleadings in respect to certain of the laws of Texas and Ohio, and that such statutes and decisions may be deemed in evidence subject to competency and relevancy; copies of the same to be attached in lieu of the original for the purpose of the record, in both the trial of the case in this court or any other court." The circuit court entered judgment for the plaintiffs, and the defendant appeals.

There is no bill of exceptions in the record, and no motion for a new trial was entered in the circuit court. The courts of Kentucky do not take judicial notice of the laws of a sister state. What is the law of Ohio or Texas is a fact to be shown to the court by the proof. When a case comes to this court, the question before us is: Did the circuit court rule properly on the facts before him? What evidence the circuit court had before him as to the laws of Texas or Ohio we cannot know, as there is no bill of exceptions to show what was read or considered in that court. It is insisted that it must be presumed, in the absence of evidence that the contract is valid under the law of the place where it was made, because it is not presumed that the parties made an illegal contract. This is true, but we must also presume that the circuit court decided properly on the case, as it was presented to him, in the absence of any showing as to what he had before him. The presumption is that the circuit court decided correctly. To overcome this presumption, the appellant must bring to this court what was before the circuit court, and, if he fails to show by the

record that he has done this, the presumption in favor of the judgment of the circuit court is not overcome. In other words, in the absence of a bill of exceptions showing what proof was made in the circuit court, we must assume that the proof heard by the circuit court justified the conclusion that the court reached, and that the laws of Texas and Ohio, as shown by the evidence before him, are such as to warrant the judgment which he entered. The question does not turn on who had the burden of proof. It turns on the presumption that the circuit court had before him facts sufficient to warrant his conclusion. The laws of Texas and Ohio may in fact be wholly otherwise. On this question we express no opinion, for we can only consider the case on the record before us. The question before us is, not what is the law of Texas and Ohio, but what did the proof in the circuit court show it to be, and on this question the presumption is that the proof before the circuit court warranted his conclusion, in the absence of a bill of exceptions showing what he had before him.

The stipulation which we have quoted does not warrant us in looking for ourselves to such statutes and decisions as may be cited in argument in this court, for the stipulation plainly provides that copies of the statutes or decisions which were introduced in the Franklin circuit court are to be attached in lieu of the originals for the purpose of the record in that or any other court, and there is nothing in the record to show us what the circuit judge had before him. The plaintiff alleged that the reserve value of the policy was \$1,196.44, and evidently this would have carried the policy until long after Mrs. Duke's died.

It is not material for us to consider whether the contract is governed by the law of Texas or the law of Ohio, for in either event we must assume that the proof heard in the circuit court sustains the judgment. It is also immaterial what would be the rights of the parties under the laws of Kentucky. It is not a Kentucky contract, and is governed by the *lex loci contractus*. The defendant pleaded this law. The plaintiff took issue on it. The court decided the issue, and we have not before us the evidence on which he based his judgment. The regular way of proving the law of another state is by the evidence of a witness learned therein, but the parties may consent that the court shall consider such statutes and decisions as they adduce before him and give judgment thereon. When they so consent, neither can, on appeal, complain of the mode in which the case was presented. If we had before us what was before the circuit court, we might then determine whether he ruled correctly on the proof before him; but, in the absence of this from the record, we cannot say that he ruled incorrectly.

Judgment affirmed.

WESTERN & SOUTHERN LIFE INS. CO.
v. QUINN.

(Court of Appeals of Kentucky. Nov. 17, 1906.)

1. INSURANCE (§ 256*)—LIFE INSURANCE—FALSITY OF MATERIAL ANSWERS IN APPLICATION—EFFECT.

Where a question propounded to an applicant for life insurance was material and the answer was untrue, no recovery could be had on the policy, whether the applicant knew it was untrue or not.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 540; Dec. Dig. § 256.*]

2. COMPROMISE AND SETTLEMENT (§ 6*)—REQUISITES.

Where there is a question between parties about which reasonable men may differ as to the outcome, the parties may adjust the difference between themselves by way of a compromise which will be upheld, though it subsequently develops that one of the parties was right and the other wrong.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 40; Dec. Dig. § 6.*]

3. INSURANCE (§ 579*)—COMPROMISE—VALIDITY—CONSIDERATION.

The question of the validity of a life insurance policy, because insured falsely stated in his application that he had not applied to any other insurer for insurance and been rejected, is one about which reasonable men may entertain a substantial doubt, and a compromise of the claim under the policy is not without consideration.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1417; Dec. Dig. § 579.*]

4. INSURANCE (§ 579*)—COMPROMISE—FRAUD—EVIDENCE—SUFFICIENCY.

Evidence held not to show that the compromise of a claim under a life policy was procured by the fraud of insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1418, 1419; Dec. Dig. § 579.*]

5. INSURANCE (§ 579*)—COMPROMISE—ACTION TO SET ASIDE—PETITION—SUFFICIENCY.

The petition in an action by the beneficiary in a life policy to set aside a compromise of the claim on the ground of the fraud of insurer must allege that the beneficiary tendered to insurer the amount received under the compromise.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1418, 1419; Dec. Dig. § 579.*]

6. JUDGMENT (§ 199*)—NOTWITHSTANDING VERDICT—GROUNDS.

Where the petition in an action to set aside a compromise of a life insurance claim, on the ground of the fraud of insurer, failed to allege that the money received under the compromise had been tendered to insurer, the court under Civ. Code Prac. § 386, providing that judgment shall be given for the party whom the pleadings entitle thereto, must give a judgment for insurer, notwithstanding a verdict for plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 367; Dec. Dig. § 199.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"To be officially reported."

Action by Mary Quinn against the Western & Southern Life Insurance Company.. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

James Quarles, for appellant. T. A. McDonald, Wm. McKee Duncan, and C. C. McMahan, for appellee.

BARKER, J. When Michael J. Quinn died in 1906, there was an insurance policy on his life issued by the appellant company for \$1,000, payable to his wife, Mary Quinn. After the death of the insured, the company denied its liability under the policy, because it claimed that in the application for insurance among the questions propounded to the applicant was whether or not he had ever applied to any other company for insurance and been rejected or postponed, to which he answered "No," that this answer was material and was untrue. After interviewing the widow, she and the appellant company agreed upon a compromise of the claim, by which it paid to her the sum of \$750 in full of her claim under the policy in question. The company owed her \$116 on another policy, and this was not in dispute. Thereupon it paid to the appellee the sum of \$866 in full settlement of both of her claims against it, and the following receipt was issued:

"Form 25.

"Claimant's Receipt. \$866.00. Compromise Settlement.

"Louisville, Ky., April 26, 1906.

"Whereas the Western and Southern Life Insurance Company, of Cincinnati, Ohio, issued its policies 32776 and 10289A on the life of Michael J. Quinn, and whereas certain differences and disputes exist as to the liability of said company under said policies: Now, for the purpose of compromising and settling the said disputes and differences, the sum of eight hundred and sixty-six dollars has this day been paid to me, receipt of which I hereby acknowledge in full satisfaction, settlement and discharge of all liability of said company under said policies and the same is now herewith surrendered.

"[Signed] Mary Quinn.

"Witness:

"[Signed] M. J. Brady.

"Alex Altman.

"George A. Bolssard."

After nearly nine months had expired from the date of this receipt, this action was instituted by the widow to recover the balance of \$250 alleged to be owing her under the policy which had been compromised, and alleging that the compromise had been obtained by fraud, misrepresentation, and deceit. The company demurred to the petition because it did not allege the payment, or tender back, to the insurance company of the amount received by the plaintiff under the compromise. This general demurrer was overruled by the court, and then the company answered, denying the fraud. Upon a trial of the case before a jury a verdict

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was returned in favor of the plaintiff for the sum of \$250. Thereupon the defendant entered a motion for a judgment *non obstante veredicto*, which was overruled. It also filed a motion for a new trial, which was overruled.

The evidence showed without question that prior to the application of Michael J. Quinn for the policy in dispute he had applied to another company for insurance, and had been rejected, and that his answer in the application for the policy under discussion, that he had not been rejected, was untrue, but it did not certainly appear that Quinn had been informed of his rejection. Undoubtedly, if the question was material and the answer untrue, no recovery could have been had under the policy, whether the applicant knew it was untrue or not. *Provident Saving Life Association v. Dees*, 120 Ky. 285, 86 S. W. 522; *Provident Saving Life Association v. Whayne*, 93 S. W. 1049, 29 Ky. Law Rep. 160; *Mutual Life Insurance Company v. Thompson*, 94 Ky. 255, 22 S. W. 87; *Union Central Life Insurance Co. v. Lee*, 47 S. W. 614, 20 Ky. Law Rep. 839; *American Aid Society v. Bronger*, 91 Ky. 406, 15 S. W. 1118. Certainly it could not be said that with this fact existing there was not a question of the liability of the company about which reasonable men might differ. This being so, the dispute was one which the parties might compromise. Where such a compromise has taken place, it is immaterial that it should afterwards transpire that one or the other of the parties to the settlement was right. One of the parties to a disputed question of law must always be right; and, if the mere fact that it subsequently developed that one party was right and the other wrong may upset a compromise about it, there could be no basis of compromise of proposed litigation. The rule is that, if there be a question between parties about which reasonable men might well differ as to the outcome, they may adjust it themselves by way of compromise, and this will be upheld by the courts. *Mitchell's Heirs v. Long*, 5 Litt. 72; *American Mutual Aid Society v. Bronger*, 91 Ky. 406, 15 S. W. 1118; *Creutz v. Hiel*, 89 Ky. 429, 12 S. W. 926; *Morgan v. Hodges*, 89 Mich. 404, 50 N. W. 876, 15 L. R. A. 438; *Gray v. United States S. & L. Co.*, 116 Ky. 987, 77 S. W. 200; *Taylor v. Patrick*, 1 Bibb, 168; *Fisher v. Mays' Heirs*, 2 Bibb, 448, 5 Am. Dec. 626.

We are of opinion that the question between appellant and appellee as to the liability of the former under the policy was one about which reasonable men might entertain a substantial doubt; and, this being so, the compromise cannot be said to have been without consideration. The evidence fails entirely to show the slightest fraud or imposition practiced by the company or its agents upon the appellee. As to this, we can accept her own statement. The company had proposed to compromise the matter, and offer-

ed her \$500, and then she said: "They claimed that, if I didn't take something, it would be one way or the other, and I said, 'You come back to-morrow, and I will make up my mind what I intend to do,' and I asked them if they would give me \$750, and they wanted to give it to me willingly, and I accepted it. I did not know whether I was entitled to it, but I thought that I had paid one year's premium and that I was entitled to it. They only intended to give me \$500, and the next day I asked them if they would give me \$750, and that was the agreement." It thus appears that the agents of the company were only contending for the right of their employer to dispute the validity of Mrs. Quinn's claim under the policy. This they had a legal right to do; and, when they proposed to give her \$500, she declined to accept at once, but took time to consider it, and the next day herself offered to take \$750 in compromise, and the company acquiesced. She also shows that the agents of the company, when they offered to settle for \$500, told her to consider the matter and let them know in a day or two, saying to her that she "might study it up"; that they had come to compromise with her, but they did not intend to pay the full \$1,000. A careful reading of Mrs. Quinn's testimony fails to show the alleged fraud or imposition on the part of the company or its agents. It is true she said she had been sick and was incapable of understanding business matters, but her whole testimony clearly refutes this. She was out of bed and received the agents of the company, and the next day after the check was given her she went down personally to her bank and deposited it. Perhaps her attitude towards the matter under discussion and her clear comprehension of the business proposition involved in it is better shown in the following answer than in any other part of her testimony: "Well, when they first came, they did not offer. They said they would not pay the full amount, and I asked them what amount they intended to pay, and one gentleman, I think it was the man from the home office, said he thought \$500, and I said 'No,' I would take it to court before I would agree to compromise with them for that. Then they talked different things that had happened, and then I explained that, if they were satisfied to give me \$750, I thought I would take it, and I signed the receipt for the full amount, \$866." No reasonable mind could conclude after reading the foregoing answer that Mrs. Quinn did not understand and appreciate her legal rights in the matter of the proposed compromise.

In addition to all this, the petition was fatally defective in failing to state that the plaintiff had paid, or tendered back, the amount received under the compromise. This action was instituted to set aside and vacate the compromise for fraud and misrepresentation. In order to accomplish this, it was nec-

essary that she should first tender back the amount she had received. She could not inveigle the company into a compromise and receive its money, and, after having put it to such a disadvantage, sue for the balance of the disputed claim. This was held in the case of *L. & N. R. R. Co. v. McElroy*, 100 Ky. 153, 37 S. W. 844; *Home Benefit Society v. Muehl*, 109 Ky. 479, 59 S. W. 520; *Shields v. Lewis*, 49 S. W. 803, 20 Ky. Law Rep. 1604; *Cunningham v. Belknap*, 60 S. W. 837, 22 Ky. Law Rep. 1582; *City of Louisville v. Louisville Railway Co.*, 68 S. W. 840, 24 Ky. Law Rep. 540; *L. & N. R. Co. v. Helm*, 121 Ky. 645, 89 S. W. 709; *Ingram v. Railway Co.*, 89 S. W. 541, 28 Ky. Law Rep. 509; *McGill v. L. & N. R. R. Co.*, 114 Ky. 363, 70 S. W. 1048. These authorities settle the principle quite beyond question. The court, therefore, erred in overruling the general demurrer to the petition because of the failure to allege that the money received by the compromise had been tendered back to the company, and after the verdict the motion of the defendant for a judgment non obstante veredicto should have been sustained. Section 386 of the Civil Code of Practice provides that judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him. Under the pleadings the defendant was clearly entitled to a judgment. We are of opinion that there was no evidence of fraud in the obtention of the compromise sought to be set aside, and the matter in dispute was one which legitimately authorized a compromise to be made.

Judgment reversed, with directions to set aside the order overruling the motion for a judgment non obstante veredicto, and to enter a judgment in favor of the defendant dismissing the petition.

ROBINSON v. HUFFMAN et al.

(Court of Appeals of Kentucky. Nov. 13, 1908.)

1. ADVERSE POSSESSION (§ 60*)—NOTICE TO OWNER—NECESSITY.

Where one enters into possession with the consent of the owner under the expectation that thereafter a conveyance will be made, the holding is not adverse without notice to the owner.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 290; Dec. Dig. § 60.*]

2. ADVERSE POSSESSION (§ 42*)—LIMITATIONS.

Where there is an absolute verbal gift of real estate and nothing further is contemplated, the holding of the premises by the donee is adverse from the taking of possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 207; Dec. Dig. § 42.*]

3. ADVERSE POSSESSION (§ 13*)—LIMITATIONS.

An owner in fee simple verbally gave land to a daughter, who, with her husband, immediately took possession, erected a dwelling thereon, and lived there continuously for more than 40 years. Subsequently, the owner becoming apprehensive that he would lose his farm, con-

veyed the same, with such land, to his sons, who subsequently divided the property. The daughter remained in possession, using the property as a home, and exercising ownership, and her right was not challenged for 40 years. Held, that the daughter acquired title by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 65-76; Dec. Dig. § 13.*]

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by Daniel Robinson against William Huffman and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

Roscoe Vanover and Auxier & Auxier, for appellant. J. S. Cline, J. R. Johnson, and J. M. York, for appellees.

BARKER, J. The appellant, Daniel Robinson, instituted this action against his sister, Hannah Huffman, and her co-appellees, to recover possession of about 20 acres of land in Pike county, Ky., claiming to be the owner and entitled to possession of the property, and that the defendants (appellees) were wrongfully in possession and unlawfully withholding it from him. By answer the appellees denied the ownership and right of possession of the plaintiff, and pleaded title in appellee Hannah Huffman. The title of the latter was alleged to be by verbal gift from her father, Isaac Robinson, who at the time was the owner of it, and also that she was the owner of the title by prescription; adverse possession of 15 years and for 30 years being pleaded. There was also a plea of champerty, but the view we have reached as to the title by prescription makes it unnecessary that we should examine that feature of the defense. All of the affirmative allegations of the answer were denied, and the action transferred to the equity side of the docket, and coming on for trial before the chancellor, he entered a judgment dismissing the plaintiff's petition. The correctness of that judgment is challenged by this appeal.

The crucial facts are not in substantial dispute. Isaac Robinson, the father of appellant, Daniel Robinson, and appellee Hannah Huffman, in 1864, he being then the owner of the fee-simple title of the property, verbally gave it to his daughter, Hannah Huffman. The property, which, as said before, consisted of about 20 acres, was rough mountain land. Appellee and her husband at once took possession of it under the verbal gift, erected a dwelling house thereon, and lived there continuously for more than 40 years. A daughter married the appellee Judge Wright, who, by permission of his wife's parents, built a house on the property, and made it his home. After Isaac Robinson gave the property in question to his daughter, he became indebted, and was apprehensive that he would lose his farm,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of which the property here involved was a small part, and he thereupon conveyed it to his sons, Daniel Robinson, and Andrew Robinson, on condition that they would pay off his debts. In the conveyance to his sons, Isaac Robinson included the land in question in the boundary describing the property. Subsequently the sons divided the farm; Andrew Robinson taking that part which was farthest from the property herein involved, and Daniel Robinson taking a conveyance to that part which adjoins the land claimed by his sister. No change in the status of Hannah Huffman was made by these conveyances. She remained in possession, using and occupying the property as a home for herself and family, exercising every dominion of ownership of which the property was susceptible, and her right so to do was not challenged either by her father or her brother, the appellant, during 40 years. It is shown in evidence that a railroad was projected through the property both of Daniel Robinson and his sister, and, although he stood on the record as being the owner of the property claimed by his sister, he declined to sell to the railroad a right of way through her property, but, when she sold a right of way through it, he joined in the deed to the railroad, but allowed her to take all the money without claiming any part of it. We think this evidence establishes in Mrs. Huffman an indefeasible title to the land under both the 15 and 30 years' statutes of limitations as against the appellant.

It is, however, urged with great force and persistence by the appellant that, inasmuch as his sister entered into possession under a verbal gift of the property, she was therefore merely a tenant at will, and was not holding adversely to the father, or, after his death, to her brother, and that, before she could claim to be in adverse possession, she must give notice of such adverse holding. We do not think this principle is applicable to the facts in the case before us. In some of the cases cited this distinction is made: That, where a party enters into possession with the consent of the owner under the expectation that thereafter a conveyance will be made, then the holding is not adverse without notice being brought home to the owner; but where, as in the case at bar, the conveyance of the property is absolute, and nothing further is contemplated or expected to be done, then the holding is adverse from the beginning, the absolute gift by the owner being of itself notice of the subsequent adverse holding of the grantee. It is not contended in this case that the father was afterwards to complete the title by a conveyance in writing; but, as we understand it, the gift was absolute from the beginning. Therefore the statute of limitations commenced to run as soon as the daughter took possession, and ripened into an indefeasible title at the end

of 15 years, and certainly at the expiration of 30 years.

The very question we have here arose in the case of *Owsley v. Owsley*, 117 Ky. 47, 77 S. W. 397. In that case the father had verbally given to his son a large and valuable farm and the two remained living upon this farm together. Many years afterward, owing to a misunderstanding arising from a business transaction, the father undertook to regain the farm from his son, and in the litigation which ensued the son pleaded title by prescription. In the opinion, on the subject in hand, it is said: "It is conceded that by the parol gift no title passed to appellee. Nor did appellant's admission that he had given his son the property, nor did even his oath to that effect in a trial in another case, divest appellant of his title. If that has been done, it is solely because appellee has, by a continuous adverse possession for 15 years, under claim of title, thereby acquired it. It has been decided a number of times by this court that such possession by the donee under a parol gift will ripen into a fee simple title. [Authorities omitted.]" To the same effect are *Medlock v. Suter*, 80 Ky. 101; *Creech v. Abner*, 106 Ky. 239, 50 S. W. 58; *Thomson v. Thomson*, 93 Ky. 435, 20 S. W. 373; *Commonwealth v. Gibson*, 85 Ky. 666, 4 S. W. 453; *Gilbert v. Kelly*, 57 S. W. 228, 22 Ky. Law Rep. 353.

Under the principle settled in the foregoing cases, and the facts shown in this record, we have no doubt of the validity of the title of the appellee Hannah Huffman. More than half of the property in dispute was fenced by her, and she claimed the whole by a well-defined boundary; there being a fence erected between appellant's part of the farm and that in dispute. At no time during the long period of possession did the appellant or his vendor, Isaac Robinson, ever demand rent from appellee, or undertake to exercise any ownership over the property she claimed. If her holding was not adverse, and her title by prescription is not established, we are at a loss to know by what facts or what length of time an adverse possession could be shown, or a title by prescription established.

Judgment affirmed.

MATTHEWS' ADM'R v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Nov. 20, 1908.)

1. MASTER AND SERVANT (§ 177*)—INJURY TO BRAKEMAN—NEGLIGENCE OF ENGINEER.

The engineer is not shown to have been negligent in backing the engine with some cars into the rest of the train, causing the fall of deceased, a brakeman, standing on one of the cars, though deceased gave a signal to back the train, as H., a fellow brakeman on the ground, who had just coupled the engine to the cars with it, signaled, to go forward, and the engineer

obeyed H.'s signal; it not being shown how deceased signaled, or that the engineer saw or could have seen him or his signal, and the engineer testifying that he received no signal to back and did not know deceased was on the car.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 177.*]

2. MASTER AND SERVANT (§ 198*)—NEGLIGENCE OF FELLOW SERVANT.

Any negligence of a brakeman in signaling to the engineer to go forward, when he had seen another brakeman give a signal to back, compliance with his signal causing a collision of cars and injury to the other brakeman, was the negligence of a fellow servant of the injured person.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 505; Dec. Dig. § 198.*]

3. MASTER AND SERVANT (§ 187*)—INJURY TO SERVANT—NEGLIGENCE.

To make a railroad company liable for injury to a brakeman by the bumping together of parts of a train, causing his fall from one of the cars, it must be shown that the movement of the train was with unnecessary force and not of a usual character.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 274, 277; Dec. Dig. § 137.*]

4. TRIAL (§ 260*)—INSTRUCTIONS.

The instructions given fairly presenting the law of the case, and, leaving unsaid nothing needed for the guidance of the jury, other requested instructions are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. EVIDENCE (§ 539½*)—QUALIFICATION OF EXPERTS.

Men experienced in railroading and the operation of trains and more or less familiar with the accidents incident to railroad life are qualified as experts to express the opinion that the moving forward of a car was the best and safest means of extricating one under its wheels.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2350; Dec. Dig. § 539½.*]

6. EVIDENCE (§ 126*)—RES GESTÆ.

Where a brakeman was thrown from a car under its wheels, what he said after being taken therefrom to another place, as to how he was injured, is not admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 372-376; Dec. Dig. § 126.*]

7. APPEAL AND ERROR (§ 1057*)—HARMLESS ERROR—EXCLUSION OF CUMULATIVE EVIDENCE.

Exclusion of evidence of what one, after being taken from under a car to another place, said as to how the accident happened, even if error, was harmless; others having testified to substantially similar statements of his while under the car.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199; Dec. Dig. § 1057.*]

8. TRIAL (§ 41*)—PLACING WITNESSES UNDER THE RULE—DISCRETION.

Allowing a witness to stay in the courtroom to assist in the trial, while others are excluded, under the rule, is in the discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 101-105; Dec. Dig. § 41.*]

Appeal from Circuit Court, Webster County.

"To be officially reported."

Action by William Matthews' administrator against the Louisville & Nashville Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Gordon, Gordon & Cox, for appellant. Yeaman & Yeaman and Benjamin D. Warfield, for appellee.

SETTLE, J. On the night of December 14, 1906, appellant's intestate, Wm. Matthews, at the time a brakeman upon one of appellee's trains, fell at Providence, Ky., from a stock car onto the railroad track, and was run over by the front wheels of a flat car, which broke and mangled both of his legs and otherwise injured him to such an extent that he died that night of the accident. He was a married man, 38 years of age, was then earning \$60 to \$75 per month, and had been in appellee's service as a brakeman about five years. His administrator brought this action to recover of appellee damages for his death. The answer of appellee contained a traverse and charged appellant's intestate with contributory negligence, and this plea was controverted by reply. The trial resulted in a verdict and judgment in favor of appellee. Thereupon appellant entered motion and filed grounds for a new trial, but the lower court overruled the motion, and this appeal followed.

The train upon which the intestate was a brakeman was a mixed passenger and freight train, and according to the evidence its locomotive, after leaving two freight cars on a side track, went on the house track for the purpose of getting a stock car and flat car that were standing thereon, and, having coupled to these, it moved out toward the main track, but stopped before the flat car, which was in the rear of the stock car, got entirely upon the main track. Immediately following the stop, the engineer, in obedience to a go-ahead signal from the brakeman Holloman, who had done the coupling and was standing on the ground by the flat car, again started the locomotive and two cars attached. At this juncture, the intestate, who was standing on the rear end of the stock car, lost his equilibrium and fell to the ground in front of the flat car, a front wheel of which ran over his legs, crushing them, as previously stated. It further appears from the evidence that, when the intestate realized that he was about to fall from the stock car, he attempted to jump upon the flat car, but was prevented from reaching it by a piece of timber extending across its front at a height of two feet from its floor. The stunning effect of the contact with this cross-bar rendered more certain his fall to the track below. His fellow brakeman, Holloman, upon seeing the intestate in the act of falling, called to him to jump to the flat car, and promptly

signaled to the engineer to stop the locomotive; but this could not be done until one of the wheels of the car had passed over his legs. The sudden stopping of the locomotive resulted in a slight rebound of the two cars attached to it, and this caused the wheel of the flat car, which had just run over the intestate's legs, to back against them and upon some of his flesh and clothing, thereby pinioning him to the track. The intestate received some injury to his breast or stomach, evidently caused by his contact with the cross-timber on the flat car, from the brake beam under the car, or by the moving of the car after his fall to enable the train crew and others assisting them to remove his body from the track. It was found by them that the body would have to be released from the pressure of the car wheel before it could be removed from under the car. A brief discussion arose as to the best means of getting the intestate released. One or more favored the use of a "jack" with which to raise the car, but the conductor and others thought a slight forward movement of the car would more quickly and safely accomplish his release, and the latter method was the one adopted. So the car was moved forward, not more than two feet, by the engineer, which released the intestate, who was thereupon carried to a hotel near by, where he remained until his death. We are unable to find from the record that the witnesses disagreed as to the facts thus far stated. There were, however, disagreements as to certain other matters of evidence to which we will later advert.

Appellant's chief complaint is that the trial court erred in instructing the jury, in that they confined appellant's right to recover to the negligence, if any, of appellee's servants in the matter of extricating the intestate's body from beneath the train, and allowed no consideration by the jury of the question of whether his fall from the stock car was caused by their negligence. We are satisfied the court committed no error in the particular indicated. There was no evidence conducing in the slightest degree to prove that the fall of the intestate from the car was caused by negligence on the part of appellee's servants. It is true one or two persons testified that the intestate, while under the car, or near it, and immediately following his removal from beneath it, said he gave a signal to back the train as Holloman, his fellow brakeman on the ground, signaled it to go forward, and that the engineer obeyed Holloman's signal by moving the train forward, which, being unexpected to the intestate, caused him to lose his balance and fall off the car. We may concede that this statement of the intestate was near enough to the accident and sufficiently connected with it to make it a part of the *gestæ*; but it shows no negligence on the part of the engineer, for the intestate did not say, nor did any other witness state,

that the engineer saw or could have seen a signal given by the intestate, or that the latter was so situated as to enable the engineer to see him. In what way or by what means the intestate signaled the engineer to back the train did not appear even from the intestate's declaration. The engineer testified that he received no signal on that occasion to back the train, and that he did not know the intestate was upon the top of the stock car. He further testified, however, that he received from the other brakeman, Holloman, who had just coupled the locomotive to the stock and flat car, and whom he knew to be then standing on the ground, a signal to move the train forward, which he obeyed. If it could be said that Holloman saw the intestate's signal to back, and was guilty of negligence in giving at the same time a signal to the engineer to go forward, if he did so, appellee would not be responsible for such negligence, as Holloman was a fellow servant of the intestate.

It is likewise true that the evidence failed to show that the engineer was negligent in the manner of moving the train at the time the intestate fell from the car. There was no sudden jerking or other unusual movement of the train. In order to fasten responsibility upon a railroad company for injury to an employé by a fall from its train caused by the movements thereof, it must be made to appear that the movement was one of unnecessary force, and not of a character usual in the operation of such a train. An illustration of our meaning may be found in the case of *Yates v. Millers Creek Const. Co.*, 89 S. W. 241, 28 Ky. Law Rep. 331, wherein it is said: "The fact that there was a sudden or even hard jerk of the tender by the engine does not prove that the engineer or fireman was negligent. * * * The proof wholly fails to show that the jerk that threw the appellant from the tender was not such as usually attends the movement of such a train, or that it was of unusual force, or was caused by any unnecessary force applied to the train through the engine or in the manner of operating it." *Cl. N. O. & T. P. Ry. Co. v. Jackson*, 22 Ky. Law Rep., 58 S. W. 526, 630; *L. & N. R. R. Co. v. Fox's Adm'r*, 42 S. W. 922, 20 Ky. Law Rep. 81. In confining the jury, by the instructions given, to the sole issue as to whether appellee's servants were guilty of negligence in adopting the means used to remove the intestate from beneath the car, after its wheels had broken and mangled his legs, the court granted him all he was entitled to under the pleadings and proof. The instructions were as follows: "(1) Gentlemen of the jury, the court instructs you that the deceased, W. S. Matthews, in entering the employment of the defendant, assumed all the ordinary risks necessarily incident to the character of work in which he was then engaged at the time of his injury, so you will therefore find for the defendant, unless you

shall believe from the evidence that after the deceased, W. S. Matthews, was thrown or fell under the car at the time and place mentioned in the evidence, and after his dangerous position was known to defendant's employees in charge of the train, they, the said employees so in charge, could by the exercise of ordinary care have released him from his then position and avoided further injury to him, and if you shall further believe from the evidence that, in attempting to and in releasing said deceased at said time, they failed to use such care, and by reason thereof said deceased was injured by defendant's said employees to such an extent that it directly contributed to or caused his death, then and in that event the law is for the plaintiff, and you should so find, and in your verdict award to the plaintiff such an amount in damages as will fairly and reasonably compensate the estate of said Matthews for the destruction of his power to earn money, not exceeding the sum of \$25,000, the amount claimed in the petition. (2) The court further instructs you that unless you shall believe from the evidence that the injury to the deceased, Matthews, that caused, or that directly contributed to, his death, was caused by defendant's employees in charge of said train failing to use ordinary care in removing or releasing said Matthews from under said car after discovering his position, then in that event you will find for defendant. (3) The court further instructs you that, although you may believe from the evidence that when the deceased, Matthews, fell or was thrown under the car, he was in great peril, and that to move the car was not the best or safest way to rescue or remove him, yet if you shall also believe from the evidence that the persons in charge of said train did in good faith, and in accordance with their best judgment, under the circumstances, as they then appeared to them, adopted that method of rescuing or removing him, provided in so doing they used ordinary care, then in that event the defendant is not liable for not having adopted some other method of removing him, and you should so find. (4) The court further instructs you that by 'ordinary care' as used in the foregoing instruction is meant such care as an ordinarily prudent person would usually exercise in like business and under the same or similar circumstances as proven in this case." The instructions fairly presented the law of the case and left nothing unsaid that was needed for the guidance of the jury. If correct in this conclusion, the instructions offered by appellant were properly refused by the trial court.

The testimony with respect to the main issue was conflicting. Without discussing it in detail, that of appellant, though by no means convincing, tended to prove that appellee's servants, by using the "jack" and lifting the end of the flat car, could have readily and quickly released the intestate

from his then position without further injury to him; but that the method adopted by appellee's servants for his release—that is, moving the car forward—not only caused additional injury to his legs, but wholly caused the injury to his breast or stomach which resulted from the pressure thereon of the brake beam under the car as it was moved forward; and, further, that these additional injuries certainly hastened, and otherwise directly contributed to, his death. When we turn to appellee's testimony, it throws an entirely different light upon the transaction, and is strongly conduced to establish the following facts: (1) That the bruise or injury to the intestate's breast or stomach was received in falling from the stock car and by his coming in contact with the cross-bar of timber on the end of the flat car; (2) that in view of the excruciating sufferings of the intestate while pinioned to the track by the wheels of the flat car, and the imminent danger of immediate death if not at once released, the moving of the car, in the judgment of appellee's servants, afforded the quickest and safest means of effecting his release, and for these reasons, and none other, the method of moving the car was resorted to; (3) that it would have taken from 10 to 15 minutes to have removed the car from the intestate's body with the "jack," and the operation would have been attended with greater risk and danger to him than by the moving of the car; (4) that in releasing the intestate the car was moved gently and only about two feet, and the removal of the intestate's body from beneath the car was unattended by additional injury to him. Upon these facts and under the instructions copied in the opinion, the case went to the jury, and we are not disposed to say that the verdict was not authorized. On the contrary, we think it supported by the weight of the evidence. Indeed, the evidence as a whole demonstrates the good faith and good judgment of appellee's servants in what they did to release the intestate from the situation of peril and torture in which he had unfortunately been placed by an accident for which neither he nor his fellow trainmen were in any sense to blame.

We find little force in appellant's complaint that appellee's witnesses were not experts, and, consequently, that their expressions of opinion to the effect that the moving of the car afforded the best and safest means of extricating the intestate from his perilous position should have been excluded. The witnesses referred to were men experienced in railroading, in the operation of trains, and more or less familiar with the accidents incident to railroad life. Their testimony amounted to more than a mere expression of opinion, and we think there was sufficient proof of their qualification as experts to entitle them to express an opinion upon the subject in question.

We find no error in the exclusion by the

court of the testimony of appellee Howard as to what was said by the intestate after his removal to the hotel in regard to the manner in which his injuries were received. The statement was too remote from the main transaction to constitute a part of the *res gestæ*. Besides, if its competency were free from doubt, its exclusion could not have been so prejudicial as to authorize a reversal, for it was, at most, but cumulative. Other witnesses testified to substantially similar statements made by the intestate while he was under the car, with respect to the competency of which there can be no doubt.

It is also insisted for appellant that the court, after granting the separation of witnesses on the trial, erred in allowing appellee's conductor, Bramwell, to remain in the courtroom and thereafter to testify as a witness for appellee. It appears that Bramwell was allowed to remain in the courtroom at the request of appellee's counsel, made when the separation of witnesses was ordered, and that he sat with and advised counsel during the trial as the agent or representative of appellee. Doubtless this was, because of his familiarity with the facts of the case. At any rate, it was allowed by the court, and the question of whether he should or should not have been excluded under the rule was a matter of discretion with the trial court, which this court will not attempt to control.

Finding in the record no error that will authorize a reversal, the judgment is affirmed.

LOUISVILLE RY. CO. v. BYER'S ADM'X. (Court of Appeals of Kentucky. Nov. 18, 1908.)

1. STREET RAILROADS (§ 114*)—PEDESTRIAN KILLED—SPEED OF CAR—EVIDENCE—WEIGHT.

Weight of the evidence in an action for death of a pedestrian struck by a street car *held* to show that the car was moving at an unusual and dangerous speed.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 247; Dec. Dig. § 114.*]

2. STREET RAILROADS (§ 114*)—COLLISION—PEDESTRIAN—LOOKOUT BY MOTORMAN—EVIDENCE—SUFFICIENCY.

Evidence *held* to tend to show that a motorman did not maintain a lookout before his car struck a pedestrian.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 243; Dec. Dig. § 114.*]

3. STREET RAILROADS (§ 118*)—COLLISION WITH PEDESTRIAN—INSTRUCTIONS—MOTORMAN'S DUTY.

In an action for death of a pedestrian struck by a street car, it is proper to instruct that the motorman was bound to maintain a lookout in approaching the crossing, whether there was evidence of his failure to keep a lookout or not, since it is necessary to define the several legal duties of the motorman.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 260, 261; Dec. Dig. § 118.*]

4. STREET RAILROADS (§ 118*)—COLLISION—PEDESTRIAN KILLED—INSTRUCTIONS.

Having refused to instruct that, if after plaintiff's intestate saw the street car which killed

him approaching, he undertook to cross the track so close to the car that the motorman in using ordinary care and the means at command could not avoid the accident, plaintiff could not recover, it was prejudicial error to fail to instruct that under those circumstances plaintiff could not recover, unless any inability to stop the car was due to any unusual or dangerous speed.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 118.*]

Appeal from Circuit Court, Jefferson County; Common Pleas Branch, Third Division. "To be officially reported."

Action by Frank Byer's administratrix against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Reversed for new trial.

Fairleigh, Straus & Fairleigh, and Howard B. Lee, for appellant. R. C. & J. J. Davis, for appellee.

SETTLE, J. Appellee recovered of appellant in the court below a verdict and judgment of \$3,500 by way of damages for the death of her intestate Frank Byers, alleged to have been caused by the negligence of appellant's servants in operating one of its electric street cars at an unusual and dangerous rate of speed upon and over one of the principal streets of the city of Louisville. The appellant was refused a new trial, and has appealed.

The answer of appellant contained a traverse and plea of contributory negligence. The material facts were that the intestate on Sunday, March 31, 1907, about 1 o'clock p. m., was struck by a passing car of the appellant at the intersection of Shelby and St. Catherine streets as he attempted to cross the street and railway track in front of it. According to the testimony of a nephew of the intestate, he and his uncle had gone from the home of the latter to the corner of Shelby and St. Catherine streets, intending to take a car and ride out to Cave Hill Cemetery. Upon reaching the place for taking the car, the intestate complained of being cold, and proposed to his nephew that they forego the trip to the cemetery and return home, to which the latter consented. They then started home, attempting to diagonally cross the railway track on Shelby street in front of the car, and walk westwardly out St. Catherine street. As they stepped upon the street from the curbing, the car was apparently half a block away, and approaching rapidly. As they got near the track, the intestate and his nephew walked rapidly or ran to get across it ahead of the car. This the nephew, being in the lead, succeeded in doing, but the intestate was less fortunate, and, though nearly across the track, was struck by the west front corner of the car, hurled to the ground, and killed. At the time of the accident there were two policemen and two ladies awaiting the coming of a

car, and standing near the corner of Shelby and St. Catherine streets where the cars usually stopped for passengers. As the car by which the intestate was killed approached them, one of the ladies signaled to it with her hand to stop, but it did not do so, or even lessen its speed, but passed on, going a distance of 30 or 40 feet when it struck the intestate. It was explained by appellant's servants on the trial that the car was what is known as an "extra," which was being rushed to one of its crowded lines, and for this reason it made no stops on Shelby street the day of the accident. The four persons referred to for whom the car would not stop testified on the trial that the car was about 30 feet from the place of the accident when the intestate stepped upon the track in front of it. They all agreed, as did the nephew of the intestate, that the car in approaching the place of the accident was running at a speed of 20 or 25 miles an hour, and that it did not slacken its speed before striking the intestate. The nephew, two policemen, and one of the ladies testified that they heard no signal from the gong of the car as it approached the crossing or before the collision with the intestate. The other lady stated positively that no signals were given. On the other hand, the conductor and motorman testified, in substance, that the car was running at a rate of speed not exceeding five or six miles an hour, which was the customary and a reasonable rate of speed for the car to travel; that in approaching the crossing at or near which the collision with the intestate occurred, the motorman kept a constant lookout ahead, and gave repeated and the usual signals with the gong; and that the intestate suddenly, and unexpectedly to the motorman, ran on the track just ahead and within a few feet of the car, whereupon the latter rapidly sounded the gong, immediately applied the brakes, and did everything in his power to stop the car before it struck the intestate, but found it impossible to do so. It is patent from the evidence that the view of the motorman ahead of the car and in the direction of the place of the accident was unobstructed the length of a block or square, and that the decedent could have seen the car the same distance.

It will be observed that the evidence, especially as to the speed of the car, was very conflicting, but the manifest weight of it was to the effect that the car was moved at an unusual and dangerous rate of speed. Moreover, the testimony of appellee's witnesses as to its speed was supported by these significant facts, viz.: That the decedent, who was a large man of 220 pounds weight, was knocked a distance of 25 or 30 feet by the collision, and the car ran 75 feet after the collision before it was stopped. The most reasonable way of accounting for the decedent's going upon the track in front of the car is that he did so supposing the car would

stop on the opposite corner to take on the four persons waiting there to enter it, which stop, if made, would have permitted him to cross the track in safety.

It is not contended by appellant that the evidence was not sufficient to take the case to the jury, but insisted that the trial court erred in giving instruction 1, and in refusing to give instruction A, which was asked by it. Instruction 1 is predicated upon the facts alleged in the petition as constituting appellee's cause of action, and, in addition, advised the jury of the duties to be observed by the motorman in order to avoid injury to persons upon or crossing the street car track. It is only that part of the instruction which told the jury it was the duty of appellant's motorman to keep a lookout ahead of the car in approaching the crossing and place of accident at the intersection of Shelby and St. Catherine streets to which appellant objects. This objection is based upon the assumption that there was no testimony introduced that tended to prove that the motorman did not maintain such a lookout at the time of the accident. It is true the motorman claimed to have kept a lookout and that no witness in terms contradicted him on that point, but there were nevertheless certain circumstances established by the evidence from which the jury might have inferred that a proper lookout was not maintained. One of these was that if the car was going only five or six miles an hour as shown by the appellant's testimony, and could, as it further conducted to prove, have been stopped within a distance of 50 feet, and the decedent, as shown by appellee's testimony, was 75 feet from the car after he stepped on the street from the pavement and started to cross the track, and there was nothing to prevent the motorman from seeing him and that his purpose was to cross the track ahead of the car, the failure of the motorman to slacken the speed of the car in approaching him, if it could not be stopped altogether to prevent striking him, affords some basis for the inference that he was not keeping a proper lookout. But, whether there was any evidence of a failure of the motorman to keep a lookout or not, that part of the instruction objected to was nevertheless proper, and it has been repeatedly approved by this court in cases similar to this. *Louisville Railway Co. v. French*, 71 S. W. 486, 24 Ky. Law Rep. 1279; *Owensboro City R. R. Co. v. Hill*, 56 S. W. 21, 21 Ky. Law Rep. 1638; *Louisville Railway Co. v. Bossmeyer*, 104 S. W. 337, 31 Ky. Law Rep. 998; *South Covington & Cincinnati St. Ry. Co. v. Eichler*, 108 S. W. 329, 32 Ky. Law Rep. 1309; *Louisville Railway Co. v. Hutchcraft*, 105 S. W. 323, 32 Ky. Law Rep. 429; *Louisville Railway Co. v. Boutellier*, 110 S. W. 357, 33 Ky. Law Rep. 484. It is necessary in such cases to define, in instructing the jury, the several duties imposed by law upon a motorman in operating an electric car, and none of these

is more important than that of maintaining a proper lookout.

Appellant's second complaint presents a more serious question. Refused instruction A reads as follows: "The court instructs the jury if they believe from the evidence that plaintiff's intestate saw the car with which he collided approaching, and, after seeing the car, undertook to cross the track in front of it, so close to the front end of said approaching car that the motorman in charge of said car could not by the exercise of ordinary care and the means at his command stop said car or check the speed of same in time to avoid colliding with plaintiff's intestate, then the law is for the defendant, and the jury should so find." The court gave the usual instructions applicable to a case such as this, including one as to contributory negligence, but the latter was so modified by another instruction as to make it necessary to give one presenting to the jury the question of whether or not the collision of the car with the intestate was accidental and his death an unavoidable casualty; and this aspect of the case instruction A was intended to cover. The trial court properly refused it in the form offered, but it should have instructed the jury upon that feature of the case as follows: "The court instructs the jury that if they believe from the evidence plaintiff's intestate, when the car with which he collided was approaching, saw it and undertook to cross the track in front of it so close to the front end of such approaching car that the motorman in charge of same could not, after discovering his peril, by the exercise of ordinary care and the means at his command stop said car or check the speed of same in time to avoid colliding with plaintiff's intestate, then the law is for the defendant and the jury should so find, unless they further believe from the evidence that the inability, if any, of the motorman to stop the car, was due to the unusual or dangerous speed at which he was running it, if he was so running it." The failure of the lower court, after rejecting instruction A offered by appellant, to give one expressed as above directed, was prejudicial error, and for that reason appellant should have been granted a new trial.

Wherefore the judgment is reversed, with directions for a new trial consistent with this opinion.

LOUISVILLE & N. R. CO. v. BROWN.

(Court of Appeals of Kentucky. Nov. 19, 1908.)

1. PLEADING (§ 245*)—AMENDMENT DURING TRIAL—DISCRETION OF COURT.

In a personal injury case the court acted within its discretion in allowing a trial amendment of the petition, alleging plaintiff's injuries to have been "great mental and nervous shock, and was otherwise painfully, physically, and permanently injured and impaired, and damaged," etc., to present the allegations that plain-

tiff was "frightened and caused to suffer great nervous and mental shock, and was otherwise injured in his back, left leg, and right ankle."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 659; Dec. Dig. § 245.*]

2. COSTS (§ 51*)—TRIAL AMENDMENT.

Where a trial amendment of a petition was allowed, but there was no continuance, and defendant lost neither time nor money by the amendment, it was not entitled to the costs of the trial to the time of amendment.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 219; Dec. Dig. § 51.*]

3. RAILROADS (§ 348*)—ACCIDENTS AT CROSSINGS—FAILURE TO SIGNAL—SUFFICIENCY OF EVIDENCE.

In actions for injuries to travelers at railroad crossings, alleged to have been caused by the failure of those in charge of trains to give the customary crossing signals, negative evidence of the failure to give signals is sufficient as a basis for a verdict.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1141; Dec. Dig. § 348.*]

4. DAMAGES (§ 216*)—INSTRUCTIONS.

A charge that, if the jury find for plaintiff, they should award him a sum that would compensate him for mental and physical suffering and for any impairment of his earning power resulting directly from defendant's negligence, is not subject to the objection that it authorizes a recovery for loss of plaintiff's time because of his injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 553; Dec. Dig. § 216.*]

5. APPEAL AND ERROR (§ 1060*)—CONDUCT OF COUNSEL—IMPROPER ARGUMENT.

In his closing argument plaintiff's counsel said: "Counsel's contention that you cannot find for plaintiff, unless your verdict is based on prejudice against railroad companies, is an insult to your integrity. We want no verdict based on prejudice. We want the same regard for law in this case as prompted another judge of this country to fine a corporation \$29,000,000." Held, that the argument was highly improper, but was not prejudicial, where the jury, in view of the reasonable verdict rendered, were evidently not influenced by it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

Appeal from Circuit Court, Marion County.
"Not to be officially reported."

Personal injury action by John Brown, Jr., against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

William C. McChord, William W. Spalding, Charles H. Moorman, and Benjamin D. Warfield, for appellant. Hugh P. Cooper, for appellee.

BARKER, J. A passenger train of the Louisville & Nashville Railroad Company collided with the buggy which appellee was driving on a crossing of the railroad and the Lebanon and Danville turnpike about two miles east of Lebanon. The horse was killed and the buggy wrecked. The appellee, in order to save his life, jumped from the buggy just before the collision, and claims that he received severe personal injuries, either by the fall or by parts of the wrecked buggy striking him, or both. To recover damages

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for this injury he instituted this action, charging that the injuries were caused by the negligence of the railroad company's employees in charge of the train in failing to give the proper signals for the crossing. The answer denied all the allegations of negligence set forth in the petition and pleaded contributory negligence. A reply completed the issues. The trial resulted in a verdict in favor of appellee for the sum of \$250.

The appellant complained that the trial court abused its discretion in allowing appellee to amend his petition during the trial of the case. This objection is based upon the following consideration: The original petition alleged the appellee's injuries to have been "great mental and nervous shock, and was otherwise painfully, physically, and permanently injured and impaired, and damaged in the sum of \$5,000." The amendment complained of contains the following change in the extent of the injuries: That appellee was "frightened and caused to suffer great nervous and mental shock, and was otherwise injured in his back, left leg, and right ankle." The court was of opinion that the allegations in the original petition were not sufficient to authorize a judgment for damages and so intimated. Thereupon the appellee offered and was allowed to file the amendment, in which he specified particularly the parts of his body that were injured by the alleged wrongdoing of the appellant company. We do not think the court abused its discretion in allowing the amendment, and, if the defendant was surprised or put at a disadvantage by reason of the amendment, it should have moved for a continuance of the case, which would doubtless have been awarded had it been asked for. In the absence of such motion, we feel authorized to conclude that the defendant was not taken advantage of or its substantial rights injured by the filing of the amendment complained of.

It is also urged that the court should have required appellee to pay all costs occurring up to the time of the filing of the amendment. We do not think this position is sound. If the appellant had been surprised, and the court, on its motion, had awarded it a continuance of the case by reason of the filing of the amendment, doubtless the motion to require the appellee to pay the costs of the trial, which was rendered abortive by reason of the filing of the amendment, would have been sustained; but, as the trial went on, there was no reason for requiring appellee to pay the costs. The appellant had lost neither time nor money by the filing of the amendment, and there was no valid ground for changing the rule that the costs should follow the judgment.

It is further urged that the verdict is flagrantly against the evidence. It may be conceded, for the purposes of this appeal, that the evidence for the defendant was of a more satisfactory nature than that of the

plaintiff. As usual in such cases, the evidence for the plaintiff was of a negative character; the witnesses saying they did not hear the sound of a whistle for the crossing or the ringing of a bell, whereas, the witnesses for the plaintiff stated positively that they heard the bell and the whistle for the crossing. It has been our rule to uphold verdicts based upon this negative kind of evidence; it being generally the best that the plaintiff's case will admit of. Its infirmity grows out of the necessity of the case. The witnesses for the plaintiff in such suits, where they are conscientious, can only say that they did not hear the customary signals, and, as said before, this character of evidence has been uniformly accepted by this court as a satisfactory basis for such verdicts.

The verdict of \$250 is not excessive. There was on this point, as on the others, contrariety in the testimony, but, assuming that for the plaintiff to be true, we think the finding of the jury to be within the bounds of reason.

Appellant complains that instruction No. 2 permitted the jury, in estimating the damages sustained by plaintiff, to give him the value of time lost by reason of his injuries, which it insists is unauthorized because lost time was not pleaded. The instruction complained of is as follows: "If you find for plaintiff, you should award him in damages such sum as you believe from the evidence will reasonably and fairly compensate him for any mental and physical suffering, and for any impairment of his power to earn money resulting directly from defendant's negligence, as set out in instruction No. 1, not exceeding \$5,000, the amount sued for." We have scanned this instruction in vain to find any language therein which even remotely authorized the jury to estimate the loss of appellee's time by reason of his injuries. The instructions of the court seem to us to have fairly stated the law of the case and fully protected the rights of the appellant.

The misconduct on the part of counsel for appellee in his address to the jury has given us more trouble than any other question raised by appellant. In the closing argument, he said: "Counsel's contention that you cannot find for plaintiff unless your verdict is based on prejudice against railroad companies is an insult to your integrity. We want no verdict based on prejudice. We want the same regard for law in this case as prompted another judge of this country to fine a corporation \$29,000,000." This statement to the jury was unwarranted and highly improper, and the trial court should have so told the jury and rebuked counsel for making it; but we do not feel authorized to reverse this case for the failure of the court so to do, for the reason that the jury were evidently in no wise influenced by what was said, although the motive for saying it,

as before stated, was highly improper. The object, of course, was to prejudice the minds of the jury against the corporation; but the good sense of the jury, as shown by the reasonableness of the verdict, furnished an antidote for the sinister poison which counsel for plaintiff sought insidiously to instill in their minds.

Upon the whole case, we are unable to find a sufficient reason for reversing the judgment, and it is therefore affirmed.

IN RE CITY OF NEWPORT.

(Court of Appeals of Kentucky. Nov. 19, 1908.)

LICENSES (§ 14*)—MUNICIPAL CORPORATIONS—VEHICLES.

Under Ky. St. 1903, § 3068, subsec. 2, authorizing cities of the second class to license specified vehicles, "and all other vehicles used or let for hire," there is no power to impose a license tax on vehicles not used or let for hire.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 25-29; Dec. Dig. § 14.*]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Proceeding by the City of Newport on petition to test validity of an ordinance. From a judgment sustaining its validity, appeal is taken. Reversed.

Courtland T. Baker, for petitioner.

BARKER, J. This is a proceeding on the part of the city of Newport (second class), under section 3063, Ky. St. 1903 (charter of cities of the second class), to test the validity of a general ordinance requiring licenses for vehicles owned and operated in the municipality. The ordinance provides for a license to be paid by the owner of every kind of vehicle operated over the streets of Newport, whether for hire or for the business or pleasure of the owner. The circuit court upheld the ordinance in all of its parts, except where it provided for a license for the use of vehicles used as a part of the business of the owner. We do not find it necessary to follow the reasoning of the trial judge or counsel for the municipality, as, in our opinion, the merits of the case turn upon a question different from that discussed in the briefs of counsel or the opinion of the lower court.

Subsection 2 of section 3058, Ky. St. 1903 (charter of cities of the second class), provides that the general council of cities of that class shall have power by ordinance, among other things, "to license, tax and regulate * * * livery, board, feed and sale stables, hansoms, cabs, hackney-coaches, carriages, barouches, buggies, wagons, omnibuses, carts, drays, job wagons and all other vehicles used or let for hire. * * *" In the case of *City of Covington v. Woods*, 98 Ky. 344, 33 S. W. 84, an ordinance of the

city of Covington similar in principle to the one before us was under discussion, and it was there held that, under the charter copied above, cities of the second class had power only to license vehicles that were used or let for hire. In the opinion it is said: "The general council must have concluded that the authority had been delegated by the General Assembly to it to impose and collect of the owners of vehicles, regardless of the use to which their vehicles were put, license fees. The act delegated the power to license, tax, and regulate 'livery, board, feed, and sale stables, hansoms, cabs, hackney-coaches, carriages, barouches, buggies, wagons, omnibuses, carts, drays, job wagons and all other vehicles used or let for hire.' The plain words of the statute are decisive of the question as to the kind of vehicles for which license fees were to be imposed and collected. The statute itself furnishes the means of its own exposition, and the intent of the act clearly appears from reading it. If the General Assembly had intended to have delegated the power to the general councils of cities of the second class to collect license fees on all persons plying vehicles on the streets, the qualifying words 'used or let for hire' would not have been used. It would have been easy for the General Assembly to have said all vehicles plying the streets without any particular designation had it not been the purpose to limit the imposition of license fees to vehicles in certain use. The enumerated vehicles are the kind which are usually 'used or let for hire' in cities. To make manifest and certain the kind of vehicles embraced, the act particularly named some and used the general words 'other vehicles' to designate the balance of like character, but all of which must be 'used or let for hire' to authorize the general council to impose the fees. We conclude that the ordinance, in so far as it imposes license fees on vehicles used or let for hire, is valid. In so far as it attempts to impose license fees on vehicles not used or let for hire, it is invalid. The General Assembly did not delegate the power to the general councils of the cities of the second class to impose license fees on vehicles not used or let for hire, and, if the General Assembly has the constitutional right to grant such power (and we do not decide the question, as it is not involved in this case), then the cities of the second class could only exercise it after receiving such grant."

It follows from this authority that the ordinance of the city of Newport, in so far as it imposes licenses on vehicles used or let for hire, is valid, and, in so far as it imposes licenses on vehicles otherwise used, is invalid.

Upon the authority of the case cited, the judgment of the lower court is reversed for proceedings consistent herewith.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

CITY OF NEWPORT v. FITZER.

(Court of Appeals of Kentucky. Nov. 19, 1908.)

Appeal from Circuit Court, Campbell County.
 "Not to be officially reported."

The City of Newport prosecuted William Fitzer for violation of an ordinance as to licensing vehicles, and, from a judgment of dismissal, it appeals. Affirmed.

Courtland T. Baker, for appellant. George Veith, for appellee.

BARKER, J. The question involved in this case is similar in principle to that involved in City of Newport (on petition, this day decided) 113 S. W. 467.

As the vehicle owned by appellee was not used or let for hire, the judgment, dismissing the prosecution against him for a violation of the ordinance discussed in the above-mentioned case, is affirmed upon the authority of the opinion therein.

JAMES, Auditor of Public Accounts, v. KENTUCKY REFINING CO.

(Court of Appeals of Kentucky. Nov. 17, 1908.)

1. TAXATION (§ 117*)—CORPORATE FRANCHISE—STATUTES—CONSTRUCTION.

Ky. St. 1903, § 4077, imposes a franchise tax on every railroad company, press dispatch, telephone, turnpike, palace-car, sleeping-car, and "every other like company" having or exercising any exclusive privilege not allowed to natural persons or for performing any public service. *Held*, to impose a franchise tax on a corporation manufacturing cotton seed oil and owning tank cars by which such products were transported to its customers by railroads on a mileage basis.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. § 117.*]

2. TAXATION (§ 117*)—FRANCHISE TAX—CHARACTER OF BUSINESS.

Where a corporation is engaged in the business of freight carrying, it is subject to a franchise tax imposed by Ky. St. 1903, § 4077, though such business is incidental only to its main activities.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. § 117.*]

3. TAXATION (§ 117*)—FRANCHISE TAX—FRANCHISE.

The term "franchise," as used in Ky. St. 1903, § 4077, imposing a franchise tax on corporations engaged in freight traffic, etc., is not the right to do the thing, but the doing of it in fact, so it was no answer to a corporation's liability for such tax that its engaging in such business was ultra vires.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. § 117.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2929-2941; vol. 8, p. 7666.]

4. TAXATION (§ 117*)—FRANCHISE—TRANSPORTATION BUSINESS—NATURE OF TAX.

The franchise tax imposed by Ky. St. 1903, § 4077, on persons engaged in the transportation business, is not an occupation tax, nor a tax on a mere privilege of engaging in business, but a tax on the business, since the business is not taxed unless property otherwise taxable is employed in the designated occupation; nor is the business taxed independently of, or without reference to, the tangible property to which it is by the statute annexed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 214; Dec. Dig. § 117.*]

5. TAXATION (§ 47*)—DIFFERENT ASSESSMENTS—CORPORATIONS.

Where part of a corporation's capital was engaged in the carrying business, it was liable to taxation on the capital not so employed, as provided by the revenue act of 1906 (Laws 1906, p. 88, c. 22), and also for the franchise tax imposed on persons engaged in such business, by Ky. St. 1903, § 4077; the proper method being to assess separately the tangible property engaged in the carrying business, and then to impose a franchise tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 109; Dec. Dig. § 47.*]

Hobson, Lassing, and Barker, JJ., dissenting.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Suit by the Kentucky Refining Company against F. P. James, Auditor of Public Accounts, to restrain the collection of a franchise tax assessed against complainant for the use of tank cars for the transportation of its product. Decree for complainant, and defendant appeals. Reversed and remanded with directions.

James Breathitt, Atty. Gen., for appellant. T. L. Edelen and Arthur M. Rutledge, for appellee.

O'REAR, C. J. Appellee is a domestic corporation, whose principal business is the manufacture of oil from cotton seed, the refining and sale of such oil, and dealing in the by-products of the manufacture. It owns and operates 200 or more tank cars for transporting its oil to market and to its customers. The cars are the familiar oil tank railroad cars in general use for transporting oil in large quantities. Appellee used all its cars in its own business. The method is to hire the cars to the transporting railroads at so much per mile; appellee paying the carrier roads their customary rates for hauling its oils. The net result is appellee furnishes cars to the railroad companies which it patronizes in which to carry its oils, thereby engaging to that extent in the business of a carrier. The State Board of Valuations and Assessments required appellee to report its business done as such carrier, as is required of common carriers generally, and thereupon assessed a franchise tax against it based upon the valuation placed by the board upon the franchise it was enjoying in respect to such business of furnishing these special freight cars for the transmission of freight traffic.

The statute under which the State Board of Valuations and Assessments proceeded is section 4077, Ky. St. 1903, which reads as follows: "Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The auditor, treasurer, and Secretary of State are hereby constituted a board of valuation and assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require. (Assessment of franchises in first and second class cities, sec. 2984a.)"

This suit was brought and successfully maintained in the circuit court for an injunction against the state board staying it from proceeding to collect the franchise tax so assessed. It is conceded by the state that, if appellee is liable for the franchise tax, it is because it is a like company to some of these enumerated in section 4077, Ky. St. 1903, *supra*. A very similar question came before this court in the comparatively recent case of *Louisville Tank Line v. Commonwealth*, 123 Ky. 81, 93 S. W. 635. In that case the appellant owned a number of cars identical with those owned by appellee. It rented them all to one customer—an oil refining company—who used them in its business precisely as appellee does. The question was whether that appellant was liable to pay the franchise tax laid by section 4077, Ky. St. 1903. We held that it was; that it was a like company to palace-car and dining-car companies. It is claimed by appellee in the argument in this case that the *Louisville Tank Line Case* is not in point, and may be differentiated from this one because in the former the business of the company was to own and lease such cars for the accommodation of freight traffic, while here the owning and using such cars by appellee was a mere incident to its business; but we fail to see that it makes any difference whether the business of engaging, though partially, in the traffic of freight carrying, is the main or incidental business of the persons exercising such franchise, for

a person who is a taxpayer may be engaged, in any number of occupations, any or all of which may be connected, yet some of them be of a character that a license tax to conduct them might be lawfully exacted by the state.

Appellee also contends that its charter does not authorize or permit it to engage in the business of a carrier, or in any business save that mentioned in its articles of incorporation; that therefore it does not exercise the franchise sought to be taxed. The franchise spoken of by this statute is not the right to do the thing, but the doing of it. The state does not seek by this section to tax the right to do it. It fixes a value upon the privilege which has been enjoyed, and taxes that value as property of the person who has exercised the privilege. The right to be a corporation is one thing; the fact that the corporation actually engages in a certain business, or enjoys a privilege peculiar to such business, is or may be quite a different thing. The legislative purpose was to classify certain kinds of employment, which upon an examination of the statute will be seen to have been all of a kindred nature—it was the serving of the public in some sense. It does not appear to us to be material whether the person exercising the privilege engaged in it as a sole occupation or not. Indeed, several of those named in the statute may be lawfully exercised by a single corporation, a firm, or a single individual, such, for example, as electric light companies and water companies. Yet if such was the case, and in addition the same concern manufactured and sold ice, or even if the latter were its principal business, it would not be excused from paying not only one but two franchise taxes; one upon its business as an electric light company, and another upon its business as a water company. At the same time, it would be taxable as a corporation, firm, or natural person, as the case might be, upon its property employed in the manufacture of ice. Such, indeed, has been done under statutes not dissimilar to the ones now in existence as to a corporation which did both an insurance and a guaranty company business. *Fidelity & Casualty Company v. Coulter*, 115 Ky. 805, 74 S. W. 1053. While by statute in this state railroad companies may not engage in any other business, nor may banks, yet, where the statutes are silent upon the subject, we apprehend a corporation may be empowered by its charter to engage in several different kinds of business. Then, if it did, such as has been supposed above, and including electric power and gas, could it be maintained that such concern should pay but a single franchise tax; whereas, under the statute, it might be subject to four if each business were treated separately? Or that it should pay none, if perchance it also did a business not enumerated as liable to a franchise tax, and made that business its principal business?

Such favoritism, such incentive to the

concentration of so-called public enterprises in one hand, could not have been the legislative purpose. Equality before the law is the great aim of an enlightened and free commonwealth. Particularly is this so with respect to the tax gathering function of government. To that end classification of subjects of taxation is attempted. Some classifications deal with persons, others with property, and still others occupations. If a single taxpayer should fall within several instead of a single classification, it would argue nothing against the validity of the tax, nor necessarily bring it into repugnance with the Constitution upon the ground that it was double taxation. An examination of section 4077, Ky. St. 1903, shows a classification of certain kinds of business, engaging in any of which is deemed the exercise of such a privilege as that it is reckoned as property, because it gives to the more familiar forms of property employed in the business a peculiar earning value which it would not otherwise have. It is not the mere privilege of doing the thing, but it is the value of the property so employed enhanced by the manner of its employment, which the Legislature has named a franchise for taxing purposes, and taxes it as a separate value of the property. *Commonwealth v. Ledman*, 106 S. W. 247, 32 Ky. Law Rep. 452. It will be observed it is never taxed unless property otherwise taxable is employed in the designated occupations; nor is it ever taxed independently of, or without reference to, the tangible property to which it is by this statute annexed. It is therefore not an occupation tax, as that term is used in law generally, and for the same reason is not a tax upon the mere privilege of engaging in the business. Among the subjects so classified by this statute is that of carriers of freight and passengers by means of railroads, and their various equipages. If the carrier is a railroad company, its designation is clear, and its liability under the statute not disputed; but railroad companies are known to be not the only common carriers of freight and passengers by the use of railway facilities. Express companies, not owning either tracks, locomotives, or cars, are yet such carriers. Hence they are included. Palace-car companies, owning cars, but neither tracks nor locomotives, are consequently included. Dining-car companies, which may be mere renters of cars, or for that matter caterers upon cars owned and operated by any of the other carrier companies, are so included. It has been held under this statute that a railroad company operating over tracks not owned nor used exclusively by it was subject to the tax, and by like reasoning if it also leased its cars, instead of owning them, it would seem to be liable. It has also been held that a railroad company owning a track but no equipage was liable where its track was leased to and used by another company by perpetual lease. *Illinois Central R. R. Co.*

v. Commonwealth, 108 S. W. 245, 32 Ky. Law Rep. 1112. And as we have seen in the *Louisville Tank Line Case*, supra, a concern which owned cars but did not operate them leasing them all to one customer, was liable to the tax. The idea seems to us to be a simple one. The business of carrying freight or passengers upon railroads was deemed to impart a peculiar and special value to all the physical property so employed. Therefore the special value so added was to be assessed and taxed. By whomsoever owned whether operated by the owner or not, if engaged in the carrying business, it falls within the statutory classification. If it does much or little, yet does bear some of the burden and enjoy some of the profits of railway commerce, it is so classified, and must be taxed upon the franchise thereby imparted to it and enjoyed by its owner. For these reasons, in addition to those advanced in *Louisville Tank Line v. Commonwealth*, supra, we hold that appellee is a like company to those carrier companies named in the statute.

Appellee complains that it reported under the *Morris Bill* (Revenue Act 1906, Laws 1906, p. 88, c. 22) and was assessed and paid a license tax for the year in suit (1907) upon its capital. It or the taxing officers, one or all, may have erred, but that will not prevent a correct application of the law when invoked by the taxing power. Doubtless, credit may be had on the tax now sought to be enforced for any excess, if there was any, so paid on the other assessment, for appellee was undeniably liable on its capital for the tax due under the act of 1906, so far as the capital was not employed in this carrying business. To the extent it was so employed, it seems the correct method is to assess separately the tangible property so employed, and then in addition the franchise tax discussed.

We will notice, in closing, a final argument made by appellee; that is, that it was carrying its own goods, in its own cars, to its own customers, and was not in any sense a common carrier, and that many concerns, such for example as coal mines, quarries, and the like, have tramroads upon which they operate their own cars and motive power in transporting their own property to connecting railroads. Such illustrations may be carried to even greater extreme, and might include the use by a man of his own well bucket. None of these illustrations seem to us to embarrass the question. The legislative classification dealt with the carrying business. That is commonly understood, and the Legislature consequently must have meant to deal with such traffic after it had become a part of the general volume. It was dealing with the tracks and vehicles engaged in that business. It knew they had an exceptional value because they were so engaged, and that value, wherever found, was intended to be taxed separately as part of the owner's property.

We think the learned trial court erred in his construction of the statute.

The judgment is reversed, and cause remanded, with directions to dismiss the petition.

HOBSON, J. (dissenting). Appellee manufactures oil from cotton seed. When oil is manufactured, it must be placed in some vessel for delivery to the customer. To deliver its oil to its customers, appellee uses large tanks, and, as these tanks are too large to be shifted from car to car, it owns cars on which its tanks are carried; the railroad company using its cars and charging it for hauling them. It is not in the carrying business, it only delivers the oil it makes to its customers, and it has adopted this method of delivery by means of tanks on cars because more convenient. By the revenue act of 1906, the manner of assessing certain corporations is provided by section 1, art. 4 (Laws 1906, p. 126, c. 22). The manner of assessing all other corporations is regulated by article 11. It is insisted that appellee is one of the corporations to be assessed under section 1, art. 4. That section names 20 kinds of corporations. It includes, also, "every other like company, corporation or association," and "every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons or performing any public service." It is conceded that appellee is not one of the 20 corporations named. It is also conceded that appellee neither has nor exercises any special or exclusive privilege or franchise not allowed by law to natural persons, and that it performs no public service; but it is insisted that it is a like company, corporation, or association to those named, and this is the only question in the case. Section 1, art. 4, is verbatim the same as section 4077, Ky. St. 1903. The opinions of this court construing that section are therefore applicable. In *Aetna Life Insurance Company v. Coulter*, 115 Ky. 801, 74 S. W. 1050-2, this court in determining what was a like company or corporation, said: "In determining the meaning of the word 'like' in this section, we must follow the rule *noscitur a sociis*. All the 20 named corporations have special or exclusive privileges or franchises not allowed by law to natural persons. The word 'like' must be read not only in connection with the preceding words, but with the following clause. The likeness which the Legislature had in mind is in having or exercising some special or exclusive privilege or franchise not allowed by law to natural persons, or performing some public service. In *Levi v. Louisville*, 97 Ky. 406, 30 S. W. 976, 28 L. R. A. 490, this court said that the board of valuation was created 'to value every and all corporations, associations or companies having or exercising any special privilege or franchise not allowed by law to nat-

ural persons.' And in *Board of Councilmen of City of Frankfort v. Stone*, 108 Ky. 400, 56 S. W. 679, the court said: 'The franchise primarily in view under section 4077, Ky. St. 1903, is any special or exclusive privilege not allowed by law to natural persons.' In the interpretation of all statutes levying taxes, a cardinal rule is that their provisions are never extended by implication beyond the fair meaning of the terms used, and in every case of doubt they are construed more strongly against the government, and in favor of the taxpayers, because burdens are not to be imposed unless the intention of the Legislature to impose them is distinctly shown." In the case of *Fidelity & Casualty Company v. Coulter*, 115 Ky. 809, 74 S. W. 1054, the court, having the same question before it, again said: "A company which is in name an insurance company, but is doing a guarantee or security business in this state, is a like corporation, within the meaning of section 4077, Ky. St. 1903, and is therefore embraced by it."

It is manifest that, if what the court said in these cases is still recognized as the law of the state, appellee cannot be held assessable under article 4, for, if the likeness which the Legislature had in mind is in "having or exercising some special or exclusive privilege or franchise not allowed by law to natural persons or performing some public service," it must be admitted that appellee is not a like corporation, as manifestly it exercises no special or exclusive privilege and performs no public service. The rule referred to in these opinions that taxes are never levied by implication, and that tax laws are construed more strongly against the government, is universally held, and to hold appellee a like corporation to those named in the statute is entirely to ignore this principle of construction as well as the rule of *noscitur a sociis*. By section 6 of article 4, every natural person engaged in the business of any of the corporations named in the first section of the article is required to be assessed and taxed as the corporations therein named. In *Louisville Tobacco Warehouse Company v. Commonwealth*, 106 Ky. 165, 49 S. W. 1069, 57 L. R. A. 33, it was pointed out that the purpose of the Legislature in this provision was to reach persons or associations having or exercising some special or exclusive privilege or franchise not allowed by law to natural persons or performing some public service. In other words, what the Legislature had in mind was the taxation in a certain way of public service corporations, and it provided that any association or person engaged in the business of any of these corporations should be taxed in the same way. In the case of the *Tobacco Warehouse Company* and in *Marion National Bank v. Burton*, 90 S. W. 948, 28 Ky. Law Rep. 870, 10 L. R. A. (N. S.) 947, the court said: "From these provisions it is manifest that the so-

called franchise tax is in reality a property tax upon all the intangible property of the corporations named in this act." In *Standard Oil Company v. Commonwealth*, 119 Ky. 79, 82 S. W. 1021, the court said: "Franchise taxes are collected, but they are imposed only on the tangible property of those corporations classed as public service corporations, or such as enjoy special or exclusive privileges not allowed by law to natural persons. Section 4077, Ky. St. 1903. Mere trading corporations are not included."

Appellee is a mere trading corporation. It is not in any sense a public service corporation. The Legislature named in section 4077 palace-car companies, sleeping-car companies, dining-car companies, and chair-car companies, and then it added the words, "and every other like company." What it had in mind was that there might be other car companies like those named performing public service. It did not have in mind taxing transportation in a peculiar way, simply because the goods were transported in a car, rather than a wagon. If the aeroplane should be made a success, and a company should be organized to carry goods through the air, it would be a like company to those named; but the farmer who brings his hay to market in his wagon is not engaged in the business of any of the corporations named in the first section of the article. As far as this act goes, there can be no valid distinction between the farmer who hauls his hay to market in his own wagon, and the appellee who hauls its own oil to its customers in its own tank; one is no more within the spirit of the statute than the other. Drummers now travel with a large assortment of trunks, and when they get to a town they hire a room and display their samples. If a large house should own a car in which these samples were displayed, and, instead of the expense of hauling the trunks and opening and displaying the samples at every town, should send a drummer out in a car and let him use the car to display his samples, would it be contended that that firm or company should be taxed under article 4? If a farmer ran 100 of his own wagons hauling his own hay, or a mercantile house put out 500 drummers in such cars with its own samples, would it affect the application of the statute? In other words, does the operation of the statute depend on the quantity of his own goods the owner hauls? If so, where will you draw the line? And by what authority do you draw it there? Again, a great many men own private cars in which they take trips from time to time, and in which they live more or less while on the journey, and carry no little freight and baggage. Nearly all circuses that travel through the country now own their own cars and simply hire the railroads to pull them. Not a few theatrical companies travel in the same way. But did any one ever suppose that these people were

in the transportation business within the meaning of article 4? A large number of the coal mines of the state are operated by the owners, who bring out the coal in cars to a tippie, which is sometimes several miles from the mouth of the mine. Are these people in the transportation business, and to be taxed under article 4? And, if not, why not, if appellee may be taxed? No distinction can be made which rests on the size of the vehicle or the fact that it runs on a track. A corporation doing a public service business would fall under the statute, though it used vehicles smaller than the farmer's wagon and requiring no track to run on. The distinction must rest on the character of the business, and to say that the statute applies to all those engaged in the business of carrying their own goods is entirely to abandon the position heretofore expressly held by the court that it applies only to public service corporations, and to make it include practically not only all industrial corporations, but the majority of natural persons engaged in the business of producing. If appellee is taxable under the statute, why must not the grocer who delivers his goods to his customers in his wagons be taxed under it? The court undertakes to lay down no rule by which in future it may be determined how a given corporation may be taxed, and if the rule heretofore laid down by the court is discarded, and it is held that the statute includes now the carrying business and all carrying of goods either by the owner or by anybody else, who is it that will be exempt from the operation of this section, for who does not carry his own goods? The court cannot mean to say that the statute has any special reference to carrying by a car, rather than in any other vehicle, for certainly a corporation who carried in automobiles or launches for the public would be a like company to those named in the statute. The application of the statute cannot depend upon the character of vehicle used, and, if it does not depend upon this, where can you draw a line when you discard the rule which the court has heretofore laid down?

The case of *Louisville Tank Line v. Commonwealth*, 123 Ky. 81, 93 S. W. 635, lends no support to the opinion. The appellant in that case was organized to operate as a carrier tank cars. It had a special franchise. It was a public service corporation, organized for this purpose and enjoying all the privileges of such a corporation. It was not engaged in carrying its own goods. It was carrying the goods of others. When a corporation is engaged in the carrying business, it is immaterial under the statute whether it carries for 1 person or 50. The whole oil trade of the state is now in the hands of the Standard Oil Company, and to have exempted the Louisville Tank Line from the statute would have been to allow the application of the statute to depend on

the number of persons engaged in the oil business. The holding that the Louisville Tank Line, which is a public service corporation, is taxable under the statute, is no authority for holding that appellee, a mere private corporation, may be so taxed. As this court has heretofore expressly held, appellee is not a like company because it transports goods on cars as the tank line transports them. The likeness the statute refers to is likeness in serving the public, not in the manner the goods are transported. So a carrier company which carried in the air or in pneumatic tubes under the ground would be a like company, if it had a franchise to carry and was a public service corporation. The likeness is in having the franchise to serve the public or being in the business of serving the public.

Heavy penalties are provided in article 4 for disobedience of its provisions. It is important therefore that people should know for certain who comes under this article, so they may not incur the penalties. This court, that nobody might suffer, undertook to lay down a broad general rule to define who comes under it, declaring that it embraced only the public service companies. When that rule is now departed from, who can tell what persons who trusted the rulings of this court for their guidance will suffer? And when the court thus abandons the rule itself declared, and disregards its own decisions, how is business to be conducted?

For these reasons I dissent from the opinion of the court.

BARKER and LASSING, JJ., concur in this dissent.

BEARD v. MASON.

(Court of Appeals of Kentucky. Nov 19, 1908.)

EASEMENTS (§ 26*)—RIGHT OF WAY—GRANT—CONSTRUCTION.

A purchaser of land excluded from any public highway acquired a right of way over adjacent land to a turnpike on condition that the right should cease on the way ceasing to be the only outlet to a public highway. Subsequently the purchaser acquired other land between his land and a public road, but the deed reserved to the grantor a strip which was the only outlet to the public road. *Held*, that the purchaser's right in the right of way over the adjacent land was not terminated by his failure to purchase the entire tract so as to acquire an outlet to a public highway, not being a fraud on the rights of the adjacent landowner.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 26.*]

Appeal from Circuit Court, Owen County.
"To be officially reported."

Action by F. M. Mason against J. T. Beard. From a judgment for plaintiff, defendant appeals. Affirmed.

J. C. Vallandingham and H. W. Alexander, for appellant. John W. Douglas, for appellee.

CLAY, C. Plaintiff, F. M. Mason, instituted this action against defendant, J. T. Beard, to enjoin him from closing the passway leading from plaintiff's farm to Lusby's mill and Corinth turnpike. Judgment was rendered in favor of plaintiff, and defendant appeals.

Andrew Beard, the father of Noah Beard, owned a farm consisting of about 74 acres of land, most of which was situated in Grant county, Ky., about one-half mile from any public road. Between it and Lusby's mill and Corinth turnpike road lay the farm of appellant, who is a brother of Noah Beard. Appellant's farm is situated in Owen county, Ky. Andrew Beard had made an oral gift of the 74-acre farm to his son, Noah, who desired to sell it to one Marine A. Ireland. Ireland would not purchase the farm unless Noah Beard procured for him the right of way over the land of his brother, J. T. Beard, the appellant herein, to the said turnpike road. This Noah Beard succeeded in doing by means of the following writing:—"August 20th, 1890. I, J. T. Beard, hereby guarantee unto Marine Ireland and his successor a private passway ten feet wide through my farm beginning in or near a drain in said Ireland's line and following in the same to the site of the old Horton house, thence along the brink of the right bank of the right prong of said drain to the Lusby's Mill and Corinth Turnpike. Said Marine Ireland and his successors bind themselves to keep a gate in good repair at each end of said passway and to close the same after them. Said J. T. Beard and his successors reserve the right to put one or more intermediate gates across said passway and bind themselves to keep same in good repair and said Marine Ireland and his successors bind themselves to keep the said intermediate gates closed after them. For and in consideration of said guarantee, I have received of Noah Beard, the predecessor of said Marine Ireland to the ownership of the tract of land for which said passway is intended, the sum of fifty dollars. If at any future time said passway should cease to be the only outlet to a public highway for the owners of said land; or should said Marine Ireland and his successors fail to comply with the spirit of this guarantee and agreement, then the same becomes null and void. [Signed] J. T. Beard. Marine Ireland." Marine Ireland subsequently purchased the 74 acres of land, which is known as the "Beagle land." Thereafter he conveyed the same to Joseph Beagle, and the latter sold the same on September 27, 1902, to appellee, F. M. Mason. On the 9th day of April, 1906, the appellee purchased from his sister and her stepdaughters, Mollie and Zula Barnes, the tract of land known as the

"Barnes land," lying between said Beagle tract and the public road. The deed to appellee contained the following reservation: "Six feet of land is hereby reserved to Zula Barnes and Mary Barnes between the F. M. Mason tract of land, formerly Joe Beagle tract, and said land herein conveyed." After the purchase of this land by appellee, appellant closed up the passway in dispute.

It is the contention of appellant that the reservation in the deed above referred to is a violation of the spirit of the contract securing the passway, and is in fraud of appellant's rights. From the testimony it appears that, prior to the purchase of the Barnes farm by appellee, appellant stated to him that, if he bought the Barnes farm, he (appellant) would close up the right of way. Appellee replied that, if he did buy it, he would not buy it all. In giving his evidence, appellee frankly admitted that the passway in dispute was of great value to the Beagle tract of land, and that he would not have purchased the Barnes farm if it necessitated the loss of the passway over appellant's land. Indeed, he states that the very purpose of the reservation in the deed was to prevent his losing the passway. His vendors both state that he said he would not purchase the land if he had to give up the passway in dispute. It seems that the Beagle farm adjoins Barnes' farm. The strip six feet wide, reserved to Mollie and Zula Barnes, lies between the Beagle tract and the Barnes farm, and there is no outlet from the Beagle tract to the public road, except by the passway in dispute, unless appellee has the right to cross the six feet reserved in the deed to his grantors. It must be admitted that appellee was under no legal obligation to acquire another passway from the Beagle tract of land. It was entirely a matter of discretion with him whether he would acquire the passway or not. In making the purchase he had a right to buy all of the land, or any portion thereof which he saw fit. Being under no obligation to acquire all of it, his failure so to do could not constitute a fraud upon appellant's rights. If the contract provided that, if the owner of the Beagle tract should ever have an opportunity to acquire another outlet to the public road and should fail to do so, appellant might close the passway in dispute, there might be some merit in appellant's contention. But this is not the effect of the contract actually made. It simply provides that if, at any future time, said passway should cease to be the only outlet to the public road, or should said Marine Ireland and his successors fail to comply with the spirit of the guaranty and agreement, then the same should become null and void.

The only real question in the case, therefore, is whether or not appellee has acquired another outlet to a public highway. He has testified unequivocally to the fact that his

grantors owned the strip of land six feet wide lying between the Beagle tract and the Barnes farm. His grantors testified to the same fact. The reservation in the deed is plain and certain. Manifestly, therefore, he has acquired no right of passway over the six feet of land lying between the two farms. That being the case, appellant had no right to close up the passway in dispute.

Judgment affirmed.

LORTS & FREY PLANING MILL CO. et al. v. WEIL.

(Court of Appeals of Kentucky. Nov. 18, 1907.)

1. WORDS AND PHRASES—"LIMB."

The word "limb" includes the part of a human being from the hip to the sole of the foot.

2. NEW TRIAL (§ 90*)—SURPRISE—"FLAT FOOT."

Plaintiff alleged that by defendants' negligence the tendons, ligaments, and muscles of his limbs had been permanently weakened. Before trial, defendants took plaintiff's deposition, in which he testified, as he stated in his testimony on the trial, that his right foot had been permanently injured by the accident. *Held*, in testimony that the ligaments of one of his feet which held the instep in a curved position were severed and produced "flatfoot."

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 177, 181; Dec. Dig. § 90.*]

3. NEW TRIAL (§ 151*)—NEWLY DISCOVERED EVIDENCE.

Affidavits of newly discovered evidence were insufficient to justify a new trial, where the newly discovered evidence was disputed by an equal number of affidavits.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 311; Dec. Dig. § 151.*]

4. TRIAL (§ 251*)—INSTRUCTIONS.

Where, in an action for injuries to a servant, defendants did not deny that they were jointly engaged in the erection of the building in which plaintiff was injured, and defendant made no claim that his codefendant was an independent contractor, there was no error in failure to instruct for B. because of plaintiff's failure to connect him with the accident.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

5. MASTER AND SERVANT (§ 103*)—INJURY TO SERVANT—SAFE PLACE—DUTY—DELEGATION.

A master engaged in the erection of a house cannot delegate his duty to keep the place in which servants are working in a reasonably safe condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

Appeal from Circuit Court, Jefferson County; Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Louis Well against the Lorts & Frey Planing Mill Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Gibson, Marshall & Gibson, for appellant; Alfred & Joseph Selligman, for appellee.

NUNN, J. This is an appeal from a judgment of the Jefferson circuit court, which

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

was rendered upon a verdict of a jury awarding appellee \$500 in damages on account of personal injuries received by him.

Appellants contend that the judgment should be reversed. First, for the reason of unavoidable accident and surprise, which ordinary prudence could not have guarded against; second, because of newly discovered evidence showing that the injuries for which appellee recovered damages were not the result of the accident set out in the petition, but had existed for many years prior thereto; third, because the court erred in giving instruction No. 4 to the jury, which allowed them to assess damages against appellants for injuries which he did not allege in his petition that he received; fourth, the court erred in refusing to grant appellant Fred Bicker a peremptory instruction at the close of appellee's testimony, and at the close of all the testimony when it failed to connect Bicker with the accident in any way; and, fifth, because the verdict is not sustained by sufficient evidence and is contrary to law. We will consider these questions in the order stated.

In order that the reasons assigned for reversal may be understood, we will first state the issues formed by the pleadings and the substance of the facts produced upon the trial. The petition, in substance, charges: That Lorts & Frey Planing Mill Company and Fred Bicker, appellants, in November, 1905, were engaged in erecting a dwelling house for the defendant Bicker; that a joist was placed at the kitchen door to be used for ingress and egress; that appellants carelessly and negligently failed to secure the same properly; that appellee, who was an employé of appellants, necessarily used the same in the performance of the labor he was employed to do; and that while using same it fell and turned, throwing him, whereby he received severe and permanent injuries. The allegations of negligence were made against both Bicker and the company jointly. The answer denies only so much of the petition as states the acts of negligence and the extent of the injuries, and by an affirmative defense pleads contributory negligence on the part of appellee, which was denied by reply. The proof showed that appellee was an assistant or helper to the plumber who had the contract to do that part of the work. The kitchen door at the back part of the building was elevated considerably above the ground, and a joist about 16 feet long, about 12 inches wide, and 2 inches thick, was placed by appellants, or some one in their employ, extending from the kitchen door to the ground, to enable persons laboring for them to pass into and out of the building. Some stobs were placed in the ground at the end of the joist to hold it in place, and the other end of the joist was placed in the door about the center. Appellee passed into the building, in the performance of his work, and after remaining there a few minutes was ordered

by his foreman to go to the cellar, which was under the kitchen, and in passing through the kitchen door to go to the cellar he stepped upon this joist, which turned and went down, throwing him to the rock and cellar below, from which he received severe injuries. The evidence for appellee shows that the stob at the end of the joist had been removed, or the joist had been removed from the stobs, after he had entered the building and before he started to the cellar. That of appellants shows that the end of the joist at the kitchen door had been changed and placed outside of and near the door while he was in the building. The court gave to the jury several instructions. The only one complained of by appellants in the brief of the counsel is the fourth.

Appellants contend that they were taken by surprise on the trial by appellee's testimony in regard to the character and extent of his injuries; that it was alleged in the petition: That, as a result of his fall, "the tendons, ligaments, and muscles of his limbs have been permanently weakened, and their strength impaired. That he suffered great physical and mental pain by reason thereof, and his power to earn a living had been greatly and permanently impaired." That on the trial appellee testified that his limbs between the ankle and knee were severely injured. That abscesses had formed which had to be lanced five or six times. That he suffered great pain for several months. That the ligaments in one of his feet, which held the instep in a curved position, were severed, which caused the instep to drop, which produced what is known as "flatfoot." This last statement, appellants claim, surprised them. That they had no reason to anticipate that any such injury would be claimed by appellee. That it was only claimed in the petition that his legs were injured. Appellants did not, when this evidence was introduced, claim that they were surprised and asked a discharge of the jury and for a continuance of the case, nor did they make any objection to the testimony, and made no mention of it until they filed grounds for a new trial. We are of the opinion that appellants had no reason to be surprised at the introduction of this testimony, because, while the word "foot" does not specifically appear in the petition, it was alleged that his limbs were injured, and the word "limb" includes from the hip to the sole of the foot. Appellants knew when they entered the trial that appellee would claim his injuries to be as stated by him in his testimony, for they took his deposition, by way of cross-examination, several days before the trial was entered into, in which he gave his injuries as stated by him in his testimony on the trial, to wit, that his right foot had been permanently injured and made flat by the fall.

With reference to the second ground assigned for reversal, to wit, newly discovered evidence: It appears that appellants filed

the affidavits of four persons who stated, in substance, that appellee was lame from a prior injury received by him, and that he had the "flatfoot" before he received the injuries complained of. Appellee produced as many or more affidavits showing that this was untrue. This court will not disturb the action of a lower court in granting or refusing a new trial, unless it appears that the lower court abused its discretion in the matter, and we are of the opinion that this was not done in the case at bar. It is a general rule that, to entitle a party to a new trial on the ground of newly discovered evidence, it must be of such permanent and unerring character as to preponderate greatly, or have a decisive influence upon the evidence to be overturned by it. See *Allen v. Perry*, 6 Bush, 85; *Price v. Thompson*, 84 Ky. 219, 1 S. W. 408; *Leonhart v. Stalzenberger*, 7 Bush, 209.

What we have said, in effect, disposes of appellants' objection to instruction No. 4. Their objection to this instruction is based upon the ground that by it the court allowed the jury to find for appellee for any injuries received as a result of his fall, and that this instruction allowed him to recover for injuries to his foot which he had not alleged in his petition.

With reference to the fourth ground for reversal—the failure to give an instruction requiring the jury to find for Fred Bicker, because the evidence failed to connect him with the accident in any manner whatever—it is only necessary to say that the allegations of negligence in the petition were made against both Bicker and his coappellant jointly. By appellants' answer they denied the negligence and the extent of the injuries, but it was not denied that they were engaged in a joint enterprise in the erection of the building. There was no claim by Bicker in his pleadings or evidence that his co-defendant was an independent contractor. That question was not raised until the brief for appellants was filed, which was too late. He should have denied, by a pleading, that he had anything to do with the erection of the building, and have alleged that he let the construction of the building to an independent contractor, and made the necessary allegations, to have relieved himself from all liability for negligence on the part of the contractor.

Finally, appellants claim that the evidence was not sufficient to sustain the verdict. It is admitted that appellee was a laborer of appellants in the erection of this house. The law required appellants to keep the place, at which appellee was laboring, in a reasonably safe condition, and this it could not delegate to other servants. This was required of the master. *Clay City Lumber & Stave Company v. Noe*, 76 S. W. 195, 25 Ky. Law Rep. 668. The joist prepared for appellee to use

while laboring for appellants was the thing that caused his injury, and the question of appellants' negligence with reference to it was submitted to the jury, and it found against appellants, and we do not feel disposed to disturb the finding thereon.

Finding no error prejudicial to the substantial rights of appellants, the judgment is affirmed.

GAMBRELL v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 19, 1908.)

1. HOMICIDE (§ 234*)—MURDER—EVIDENCE—CONSPIRACY.

In a murder case evidence held to show that there was a conspiracy among accused and his brothers to kill decedent, and that in pursuance of it, and while it existed, decedent was killed by one or more of them; all of them acting at the time in concert.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 234.*]

2. CRIMINAL LAW (§ 423*)—EVIDENCE—DECLARATIONS AND ACTS OF CONSPIRATORS.

After a conspiracy is formed and exists, each conspirator is responsible for what the others do in the prosecution of their common design, and, in a prosecution of one conspirator for a murder which was the object of the conspiracy, it was competent to show the cause of ill feeling between the conspirators and decedent, threats by them and their hostile declarations, purchase of cartridges by certain of them, and every circumstance that tended to throw light upon their acts in furtherance of the common design.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.*]

3. HOMICIDE (§ 112*)—SELF-DEFENSE—NATURE OF DEFENSE.

The necessity at the particular moment to take his adversary's life will not justify a man, if he himself was the wrongdoer or the aggravating cause of the difficulty.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 145-150; Dec. Dig. § 112.*]

4. HOMICIDE (§ 112*)—RESULT OF CONSPIRACY—SELF-DEFENSE.

Where two or more combine to kill another, and, in pursuance of the conspiracy, seek him out and kill him, or provoke an assault on him and then take his life, neither of the conspirators can rely upon the plea of self-defense; but though a person was killed pursuant to a conspiracy, and while it existed, no one of the conspirators sought him out for the purpose of killing him, or provoked the difficulty resulting in his death, or first attacked him, then any one of them could avail himself of the plea of self-defense.

[Ed. Note.—For other cases, see *Homicide*, Dec. Dig. § 112.*]

Appeal from Circuit Court, Knox County.
"To be officially reported."

Allen Gambrell was convicted of murder and appeals. Reversed, and new trial ordered.

B. B. Golden, J. M. Robison, Jas. D. Black and W. R. Black, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

CARROLL, J. The two principal questions in this case are: First, whether there was sufficient evidence to establish the existence of a conspiracy between Allen Gambrell and his codefendants to take the life of John Gambrell, and whether, in pursuance of such conspiracy, and while it existed, his life was taken; and, second, does the existence of a conspiracy, and a homicide as the result of it, operate to deprive the accused of the right to rely upon the plea of self-defense?

The appellant and his brothers, Silas, Rice, Tom, and Nelson, were jointly indicted, charged with the murder of John Gambrell. The indictment contains several counts, in one of them accusing all of them of unlawfully, maliciously, and willfully confederating and conspiring together to kill John Gambrell, and of committing the crime in pursuance of the conspiracy and while it existed. In others, it charges each of them individually with the murder, and the others with aiding, abetting, and assisting in its commission. The appellant was tried separately, and his punishment fixed by the jury at imprisonment for life in the state penitentiary. He asks a reversal of the judgment upon this verdict: First, because of error of the court in admitting incompetent evidence against him, and in rejecting competent evidence offered in his behalf; second, for error of the court in instructing the jury and in refusing to properly instruct the jury; and, third, because the verdict is against the law and the evidence. An examination of the record shows that the only alleged errors we need notice are those relative to the admission of evidence and the correctness of the instructions. Indeed, these are the only ones pointed out or relied upon by his counsel.

John Gambrell was killed in July, 1907. About a month previous to this, Garrett Gambrell, a brother of John, shot Green Gambrell, a brother of appellant, and from the effects of the wound received he died some days afterwards. The difficulty between Green and Garrett was the cause and beginning of the hostility between Allen Gambrell and his brothers and friends, upon the one side, and John Gambrell and his brothers and friends, upon the other. The record does not disclose any previous ill feeling between the parties. Soon after Green Gambrell was shot, Allen Gambrell procured the issue of a warrant against John Gambrell and his brothers Garrett and Hedger, charging them with the shooting of Green Gambrell, and this aggravated the ill feeling between the families. Soon after this, and while Green Gambrell was lying wounded at the house of Elijah Hubbard near where he was shot, Allen and his brothers were almost constantly in attendance upon him, and during the time several, if not all, of them were armed with pistols. John Gambrell occasionally passed along the

road near by the house of Hubbard, and on one occasion, while all of the accused were at Hubbard's, Nelson and Rice asked Silas and Allen if they were going with them that night to waylay the boys (meaning John Gambrell and his brothers), and if so to get ready; but for some reason they did not make the attempt. On another occasion, Silas Gambrell ran into the house of Hubbard, got his pistol, and told Allen and Rice to get theirs, that some persons were coming up the road, and he expected John Gambrell was one of them. One witness testified that, a short time after Green Gambrell was shot, he was advising Rice Gambrell to keep out of trouble, when Rice replied that "he would rather fight it out." On another occasion Rice said, speaking of John Gambrell and his brothers, that "he would kill them all." On Sunday morning, the day of the homicide, Nelson Gambrell said he was going to the schoolhouse, that all of his brothers would be there with whisky, and he was expecting trouble. On the same morning, Tom Gambrell called at the house of Gus Warren, got his pistol, and said that if he did not come back to get a wagon and haul him back. On the Saturday before, a man named Mount Warren, in company with Tom Gambrell, borrowed a 32 pistol (Smith & Wesson special) from Gayle Patterson. On Sunday morning, Allen and Rice Gambrell bought pistol cartridges at one place, and Tom bought cartridges at another. Other witnesses said they saw all of the Gambrells at the schoolhouse whispering a short while before John Gambrell arrived there, and heard one of them ask one of the others to let him have some cartridges, when the one to whom the request was made replied, "I need mine." Another witness said that after John Gambrell came to the schoolhouse, and while he was looking in at the window, Allen Gambrell passed by him and gritted his teeth, and presently threw a rock, just missing John's head. Other witnesses say that Allen Gambrell and his brothers were in the schoolhouse where the services were being conducted, and that when John Gambrell rode up all of them went out of the house. The homicide took place on a Sunday afternoon at a schoolhouse in which a religious meeting was at the time being conducted. Numbers of people, men, women, and children, were present, and many testified for the commonwealth, and others in behalf of the accused. The testimony in some of its details is conflicting, but in a general way two views of it were presented; one favoring the commonwealth, and the other the accused. That for the commonwealth tended to show that the altercation that ended in the death of John Gambrell was commenced by Allen Gambrell, who was at all times the aggressor and fired the first shot. The evidence for the accused conduced to show that the difficulty was commenced by John Gambrell, and that Allen shot him in self-defense.

The evidence for the commonwealth tended to show that Allen Gambrell and his four brothers, the majority, if not all of them, being armed with pistols, were present at the schoolhouse, that they knew John Gambrell would be there, and that they assembled for the purpose of engaging him in a difficulty and killing him. That more than one of them shot him is made plain by the evidence of the doctor, who examined the four pistol wounds inflicted upon his person, and testified that one of them was made with a 45 pistol, two with a 38 pistol, and one with a 32 pistol. Two of these balls entered the front of his body, one of them entered his back, and another struck him in the hand or arm. The difficulty commenced almost immediately after John Gambrell alighted from his horse and came up to the house. He there met Allen Gambrell. A few words passed between them. Allen threw a rock at John and drew his pistol, but was prevented from doing further violence by spectators who interfered. When this affray was ended by the interposition of others, John Gambrell went into the schoolhouse through one of the windows near which he was standing, and almost immediately the shooting commenced that ended in his death. The encounter on the outside, the angry words, the display of weapons, and the knowledge on the part of the congregation of the hostile feeling between the parties, naturally caused great excitement and confusion; the result being that the record contains conflicting statements as to who fired the first shot. Some witnesses testified that the first shot was fired by Allen; others that it was fired by John. Allen Gambrell, in his own behalf, said that he was on the outside of the schoolhouse when John went in through the window, and that in a moment afterwards he heard a pistol fired in the house, and some one said, "Rice is shot," and thinking, that it was his brother, he stepped inside the door, when John Gambrell immediately fired his pistol at him; the bullet going through his hat. Thereupon, to protect his own life, he quickly fired two shots at John. Immediately after the shooting, Allen Gambrell and his four brothers left the schoolhouse together, and a few days afterwards, and before his arrest, Allen Gambrell fled from the state and went to the state of Illinois, where he was arrested while going under an assumed name.

There are in the record a number of circumstances pointing to the conclusion that Allen Gambrell and his brothers entertained for John Gambrell a feeling of deadly hostility. These circumstances, taken in connection with the facts heretofore mentioned, were well calculated to convince the jury that there was a conspiracy and agreement between these brothers to take the life of John Gambrell, and that, in pursuance of it, and while it existed, he was killed by being shot by more than one of them; all of them acting at

the time in concert. Three of them shot him. Which one fired the fatal shot is not material. The declarations, acts, and conduct of Allen and those indicted with him, heretofore mentioned, were all competent and sufficient to establish a criminal intent on their part to take the life of John Gambrell. The declarations and acts of either of the conspirators, in pursuance of the conspiracy, after it was formed and before the end, was in legal contemplation the act of all of them. Each was responsible for what the other did in the prosecution of the design for which they combined. It was competent to show the cause of the ill feeling, the threats, the hostile declarations, the purchase of the cartridges, the whispered conversation at the schoolhouse, the fact that they left in a body when John Gambrell was seen approaching, and every circumstance and incident that tended to throw light upon their acts in furtherance of the common design. *Powers v. Commonwealth*, 61 S. W. 735, 22 Ky. Law Rep. 1807, 53 L. R. A. 245; *Commonwealth v. Hargis*, 99 S. W. 348, 3 Ky. Law Rep. 510. A conspiracy is almost necessarily established by the welding into one chain of a number of links, each in itself inconclusive and insufficient to prove the conspiracy, but, when connected and examined as a whole, sufficient to show it. What occurred at the schoolhouse was the end of the conspiracy. The object of its formation had been accomplished. The accused were acting in concert there. Tracing backward their steps, we pick up here and there a link in the chain that united them in the evil purpose of accomplishing the death of John Gambrell.

With the evidence in this condition, the court, in connection with other instructions, gave the following that are especially complained of: "If you believe from the evidence, beyond a reasonable doubt, that John Gambrell was killed in pursuance to and in furtherance of a conspiracy, in the manner and form as required by instruction No. 2, and that Allen Gambrell, the defendant, was a member of such conspiracy at the time, you ought not to acquit the defendant on the ground of self-defense, or apparent necessity therefor, or the defense of another, or the apparent necessity therefor, but should find him guilty of willful murder under instruction No. 2." Instruction No. 2 reads as follows: "If you shall believe from the evidence, beyond a reasonable doubt, that the defendants Nelson Gambrell, Silas Gambrell, Rice Gambrell, Allen Gambrell, and any other person or persons to the grand jury unknown, or any two or more of them, including the defendant, Allen Gambrell, conspired, confederated, combined, and banded themselves together and agreed to and with each other to kill and murder John Gambrell, and that in pursuance and furtherance of such conspiracy, confederation, combining, and banding together, and while the same ex-

isted, any one or more of the defendants above named, or some persons to the grand jury unknown within such conspiracy as included the defendant, Allen Gambrell, did shoot and kill the said John Gambrell in this county, and before the finding of the indictment herein, then you ought to find the defendant guilty of willful murder as charged in the indictment herein, and fix his punishment at death or confinement in the state penitentiary for life, in your discretion, according to the proof."

It will thus be seen that the jury were instructed that Allen Gambrell's plea of self-defense would not avail him, if the jury believed beyond a reasonable doubt that the state of facts existed set out in instruction No. 2. The question then presented is: Did the fact that Allen Gambrell was a member of the conspiracy formed to kill John Gambrell, in pursuance of which and while it existed John Gambrell was killed, deny him the right of self-defense, although except for the conspiracy he would upon his own evidence alone have been entitled to an instruction presenting this defense?

The reason upon which the doctrine of self-defense rests may be generally stated to be that the person depending upon it to excuse or justify his conduct must himself at the time of the homicide be free from blame, without fault, and not the aggressor. Every person has the natural as well as legal right to protect his own life, although in so doing it becomes necessary to take the life of another, and the right to defend his person against unlawful violence and use such force as appears to him in the exercise of a reasonable judgment to be necessary to protect himself from impending danger; but the fact that it was necessary at the particular moment to take the life of his adversary will not excuse or justify him, if he himself was the wrongdoer or the aggravating cause of the difficulty, or if his own conduct and actions brought about the condition that made it necessary to resort to this method for protection. One who provokes a difficulty, with the purpose of killing his enemy, and carries his plan into execution by killing him, cannot shield himself from the consequences of his wrong upon the pretense that it was necessary that he should take the life of his adversary in self-defense. These general statements are fully supported in *Oder v. Commonwealth*, 80 Ky. 32, where the court said: "But in no state of case is one person allowed by law to hunt down or seek another for the purpose of killing him, and in pursuance of such an intention, accompanied by such an act, takes his life. Hence, if the defendant sought the deceased with the intention of killing him, or purposely brought about the meeting between them, or made his presence a mere pretext for slaying him, he cannot rely upon the law of self-defense to excuse his act." And *Allen v. Commonwealth*, 86 Ky. 642, 6

S. W. 645, where the court said: "If, however, one by his own wrongful acts makes the harm or danger to himself necessary or excusable in the person who is inflicting or about to inflict it, then the former cannot, upon the plea of self-defense, excuse the taking of life or the infliction of great bodily harm. Nor can he do so if he seeks the other party, not innocently, but with the intention of provoking a difficulty, and does so. He must not, however, be deprived of the benefit of the plea of self-defense, because words innocently spoken by him or in jest, or some act done by him not calculated or intended to do so, and not resorted to as a shield for an intended wrong, may have contributed to bring on the difficulty." To the same effect are *Boner v. Commonwealth*, 40 S. W. 700, 19 Ky. Law Rep. 409; *Foutch v. State*, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687, and editorial note; *Logsdon v. Commonwealth*, 40 S. W. 775, 19 Ky. Law Rep. 413; *Johnson v. Commonwealth*, 94 Ky. 578, 23 S. W. 507; and many others that might be cited. And so when two or more confederate and combine together for the purpose of killing a person, and in pursuance of and while such conspiracy exists seek him out and kill him, or provoke or begin the assault or attack and then take his life, they will not be permitted to escape the consequences of their wrongful act upon the theory that it was excusable under the laws of necessity. We cannot think of a state of facts that presents stronger reasons for denying the right of self-defense than when several form a conspiracy to destroy the life of the object of their hatred and malice, and in pursuance of it seek him out or provoke or begin the attack upon him. A conspiracy to murder is the very essence of malice. It includes evil intent, hatred, and predetermination to kill. It embraces every element of guilt and has no one of the mitigating features that reduce murder to manslaughter or excuse or justify homicide. A "conspiracy," as the word indicates, is an unlawful agreement, and the members of the conspiracy are entitled to but scant protection under the law of necessity while they are carrying out their unlawful engagements.

But the instruction goes further than is here indicated, and deprived the accused of his right to rely upon the plea of self-defense if the deceased was killed pursuant to the conspiracy and while it existed, although no one of the conspirators may have sought him out for the purpose of killing him, or have provoked the difficulty that resulted in his death, or have first attacked him. If Allen Gambrell and his brothers, in pursuance of the conspiracy, and while it existed, went to the schoolhouse for the purpose of killing John Gambrell, or if either one of them first provoked the difficulty with him, or first attacked him, then neither of them could rely on the plea of self-defense. On the other hand, although they had previously

formed a conspiracy to kill John Gambrell, yet, if they did not go to the schoolhouse with that purpose in view, or did not first attack or assault him, or provoke a difficulty with him, they would be entitled to a self-defense instruction, if it appeared from the evidence that John Gambrell, at the time he was killed, commenced the assault, or made it necessary that they should take his life in defense of their own. Under the facts of this case there is no doubt that the instruction noticed was prejudicial to the substantial rights of the accused, and, as it did not in our opinion correctly present the law applicable to the case, we find it necessary to remand it for a new trial. The error in the instruction is not trivial or technical. It treated one of the most important features in the case; and under it, although the jury might have believed that John Gambrell commenced the attack by firing the first shot at Allen Gambrell, and further believed that Allen Gambrell's life was then and there in imminent danger, and that it was necessary that he should take the life of John Gambrell to protect his own, yet they could not acquit him on the ground of self-defense (and that was the only plea he relied on), if they believed that he was a member of the conspiracy formed for the purpose of taking the life of John Gambrell, and that in pursuance of such conspiracy, and while it existed, Allen Gambrell was killed, although they might not have believed that pursuant to the conspiracy Allen Gambrell went to the schoolhouse to kill John Gambrell.

With the exception indicated, and a few minor errors, the instructions clearly presented the law applicable to the various states of case presented by the evidence. It is true that they are quite lengthy, but the facts of the case are so complicated that it was necessary that several phases of the law of homicide should be set out. The instructions, as they should be given on another trial, are as follows:

"1. (a) The words 'willful' and 'willfully,' as used in these instructions, means intentional; not accidental or voluntary. (b) The word 'feloniously,' as used in these instructions, means proceeding from an evil heart or purpose; done with the deliberate intention of committing a crime. (c) The phrase 'with malice aforethought,' as used in these instructions, means a predetermination to do the act of killing without legal excuse; and it is immaterial at what time before the killing such a determination was formed. (d) A criminal conspiracy, within the meaning of the word 'conspired' as used in these instructions, is a corrupt combination of two or more persons to do an unlawful act or to do a lawful act by unlawful means. (e) You are to take and receive all the evidence which the court permitted you to hear about the alleged shooting of Green Gambrell by Garrett Gambrell for the purpose only, and in so far only, as it may in

your judgment tend to show motive for the acts and conduct of the parties to the difficulty in which John Gambrell was killed, if in your judgment it does so show or tend to show motive. The word 'motive,' as used in these instructions by the court, means inducement, reason, cause, or incentive to do the acts and things charged in the indictment herein, if they or any of them were done.

"2. If you shall believe from the evidence beyond a reasonable doubt, that the defendants Nelson Gambrell, Silas Gambrell, Rice Gambrell, Thomas Gambrell, Allen Gambrell, or any two or more of them, including the defendant Allen Gambrell, conspired and agreed to and with each other to kill and murder John Gambrell, and that in pursuance and furtherance of such conspiracy, and in execution thereof, and while the same existed, any one or more of the defendants above named within such conspiracy as included the defendant, Allen Gambrell, did willfully shoot and kill the said John Gambrell, in this county, and before the finding of the indictment herein, then you ought to find the defendant, Allen Gambrell, guilty of willful murder as charged in the indictment herein, and fix his punishment at death or at confinement in the state penitentiary for life, in your discretion, according to the proof.

"3. But if you do not believe from the evidence, beyond a reasonable doubt, that the state of facts as set out in instruction No. 2 existed, yet do believe from the evidence beyond a reasonable doubt that the defendant, Allen Gambrell, in this county, and before the finding of the indictment herein, willfully and feloniously shot and killed John Gambrell, not in his necessary or apparently necessary self-defense, and not in the necessary or apparently necessary defense of Nelson Gambrell, Silas Gambrell, Rice Gambrell, or Thomas Gambrell, or you believe from the evidence, beyond a reasonable doubt, that Nelson Gambrell, Silas Gambrell, Rice Gambrell, or Thomas Gambrell, or any one or more of them, in this county, and before the finding of the indictment herein, willfully and feloniously shot and killed John Gambrell, not in their necessary or apparently necessary self-defense, or in the necessary or apparently necessary defense of one of them or of Allen Gambrell, and that the defendant Allen Gambrell was present at the time and near enough so to do, and did, willfully and feloniously, aid, encourage, advise, or command the person or persons, who did shoot the said John Gambrell, so to do, not in his necessary or apparently necessary self-defense, and not in the necessary or apparently necessary defense of the other defendants, or some one or more of them, then you ought to find him guilty; guilty of willful murder if you shall believe from the evidence beyond a reasonable doubt that such shooting and killing of John Gambrell, or

such aiding and assisting, was done with malice aforethought; or guilty of voluntary manslaughter, if you shall believe from the evidence beyond a reasonable doubt that such shooting and killing of John Gambrell, or such aiding and assisting, was done in sudden heat and passion or in sudden affray and without previous malice.

"4. If you find the defendant guilty of willful murder, either under the second or third instructions, you will fix his punishment at death, or at confinement in the state penitentiary for life, in your discretion, according to the proof. If you find the defendant guilty of voluntary manslaughter, under either the second or third instructions, you will fix his punishment at confinement in the state penitentiary for a period of not less than 2 nor more than 21 years, in your discretion, according to the proof. If you find him not guilty, you will say so, and no more.

"5. If you shall believe from the evidence that no conspiracy existed as defined in instruction No. 2, but do believe that at the time the defendant shot and killed John Gambrell, if he did so, or at the time he aided, encouraged, advised, or commanded Nelson Gambrell, Elias Gambrell, Rice Gambrell, Thomas Gambrell, or any one or more of them, to shoot and kill the deceased, if he did so do, as defined in instruction 3, he believed, and had reasonable grounds to believe, that he or the other defendants above named, or any one or more of them, was then and there in danger of death or the infliction of some great bodily harm at the hands of the said John Gambrell, and that it was necessary, or was believed by the defendant in the exercise of a reasonable judgment to be necessary, to shoot and kill the deceased, or to aid, advise, encourage, or command the other defendants, or one of them, so to do in order to avert that danger, real or to the defendant apparent, then you ought to acquit the defendant upon the ground of self-defense and apparent necessity therefor or the defense of another and apparent necessity therefor.

"6. But, if you believe from the evidence, beyond a reasonable doubt, that the defendant, Allen Gambrell, first began the difficulty by shooting John Gambrell or making a demonstration to shoot him, then you ought not to excuse the defendant on the ground of self-defense or apparent necessity therefor, or the defense of another or apparent necessity therefor, as defined in instruction No. 4. Unless you believe from the evidence that he, or he and those acting with him, if any, abandoned such assault and difficulty in good faith, and then the deceased, seeing or knowing of such abandonment, continued to assault the defendant or either of the defendants, or to so menace them or any of them, or that it was necessary, or was believed by the defendant in the exercise of a reasonable judgment to be

necessary to shoot the deceased, or to aid, encourage, advise, or command one of the other defendants to so shoot and kill the deceased in order to avert that danger, real or to the defendant apparent, in which event you ought to acquit the defendant on the ground of self-defense and apparent necessity therefor.

"7. You are further instructed that if you believe from the evidence, beyond a reasonable doubt, that Allen Gambrell was a party to a conspiracy formed for the purpose of taking the life of John Gambrell, and that in pursuance of such conspiracy, and while it existed, Allen Gambrell and any one or more of the other conspirators went to the place where they knew or believed John Gambrell would be, for the purpose of killing him, and did then and there willfully kill him in execution of such conspiracy, or that Allen Gambrell, or any one or more of the conspirators, first commenced the difficulty by shooting or making a demonstration to shoot John Gambrell, you should not acquit Allen Gambrell on the ground of self-defense or apparent necessity, but should find him guilty of willful murder under instruction No. 2.

"8. If you shall have a reasonable doubt from the evidence of the defendant having been proven guilty, then you ought to find him not guilty; or if you shall believe from the evidence, beyond a reasonable doubt, that the defendant has been proven guilty, but shall have a reasonable doubt from the evidence as to whether his crime be willful murder as defined herein, or of the lower offense, voluntary manslaughter, as defined in these instructions, then you ought to find him guilty of voluntary manslaughter, and fix his punishment as provided therefor in instruction No. 4."

Wherefore, the whole court sitting, the judgment is reversed, with directions for a new trial not inconsistent with this opinion.

NORTON IRON WORKS v. MORELAND.

(Court of Appeals of Kentucky. Nov. 20, 1908.)

1. COURTS (§ 27*)—JURISDICTION—INCIDENTAL MATTERS.

The circuit court of a particular county, having jurisdiction to enforce an equitable lien for unpaid purchase money, could determine all other matters incidental to it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 84; Dec. Dig. § 27.*]

2. VENDOR AND PURCHASER (§ 285*)—UNPAID PURCHASE MONEY—EQUITABLE LIEN—ENFORCEMENT—PROPER RELIEF.

Where under defendant's agreement to purchase plaintiff's land, paying one-half cash and agreeing to pay the remainder on plaintiff acquiring a "railway switch track" right of way across other lands, plaintiff obtained a "tram road" right of way, and, supposing that the proper right of way had been procured, gave defendant a deed, on defendant's refusal to pay the remaining purchase money, and in a suit to enforce an equitable lien therefor, it was proper to give plaintiff judgment for such remainder to

be credited on the cost to defendant of condemning a switch track right of way, and adjudging that, to ascertain such cost defendant should have 60 days to prosecute condemnation proceedings, but that, before it should be required to do so, plaintiff must give bond in the sum of the balance due indemnifying defendant against costs, etc., incident to such proceedings.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 285.*]

3. EQUITY (§ 6*)—MISTAKE—RELIEF.

Equity will relieve against mistake as required by justice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 14; Dec. Dig. § 6.*]

Appeal from Circuit Court, Carter County.

"Not to be officially reported."

Action by C. S. Moreland against the Norton Iron Works. From a judgment for plaintiff, defendant appeals. Affirmed.

Malin & Malin, for appellant. Henry L. Woods, for appellee.

HOBSON, J. The Norton Iron Works desired to purchase a tract of land of C. S. Moreland in Carter county for the purpose of mining on it limestone for use in its furnace. It agreed to pay her for the land \$1,440, one half in cash, and the other half when she acquired a right of way for a railroad switch track across the lands of the Chesapeake Stone Company to the right of way of the Chesapeake & Ohio Railroad Company, so that the limestone might be moved away by rail. In the agreement she was to purchase the right of way, if she could, and, if she could not purchase it, she was to institute condemnation proceedings in the county court for that purpose. In pursuance to the agreement, she, being unable to buy the right of way, instituted condemnation proceedings in the Carter county court and secured a judgment for a private tram road, as provided in Acts 1904, p. 311, c. 126. On the day after the judgment was entered in the county court, a deed prepared by the Norton Iron Works was presented to her and her husband, and they signed it, supposing that the judgment in the county court covered all that she was required to do by the contract; but the contract that she had with the Norton Iron Works required her to secure a right of way for a railroad switch track, and she had in fact secured only a right of way for a tram road. The Norton Iron Works refused to pay her the balance of the money, telling her she had proceeded under the wrong statute. She then offered to pay all costs if the Norton Iron Works would institute a proceeding to secure the right of way which was wanted. This it refused to do, or to allow her to use its name in such a proceeding. The deed had been recorded, and so she had no title to the land and could not institute a proceeding in her own name. In this condition of things, when the Norton Iron Works refused to do anything, she brought this suit, asking that the deed be cor-

rected to conform to the real contract and to enforce the lien for the balance of the purchase money, or to compel the Norton Iron Works to institute the proceeding to condemn the right of way. The deed which she had signed provided that the \$720 was not to be paid until she secured the right of way for the railroad switch track and she had signed the deed, supposing that what had been secured was all that she was required to get. Issue was joined upon the petition, proof was taken, and on final hearing the circuit court entered a judgment in her favor against the Norton Iron Works for the sum of \$720, to be credited by a sum equal to the amount it will cost the defendant to obtain by condemnation proceedings the right of way referred to, and, for the purpose of determining the probable amount of this cost, the cause was referred to a commissioner to take proof and report what the amount would be. He also adjudged that the defendant was given 60 days to institute and prosecute in good faith the necessary proceeding to acquire such right of way, and in this way to ascertain the actual cost; but, before it should be required to make this election, she was required to execute a bond to it with good security in the sum of \$720 indemnifying it against all costs, damages, and expenses incident to such a proceeding. The court reserved other questions for further adjudication, and from this judgment the Norton Iron Works appeals.

It is insisted that the Carter circuit court had no jurisdiction, but the land lay in Carter county. The action sought to enforce a lien on the land, and the court, having jurisdiction for the purpose of enforcing the lien, could properly determine all other matters incidental to it. *Dawkins v. Hough*, 112 Ky. 855, 66 S. W. 1047, and cases cited.

The judgment entered by the court is in accord with the principles announced by the court in *Stafford v. Big Sandy R. R. Co.*, 10 S. W. 389, 32 Ky. Law Rep. 154. The deed had been executed under a clear mistake of fact. Mrs. Moreland and her husband executed it supposing that the proper right of way had been obtained. They signed it under a misapprehension. The Norton Iron Works had paid \$720, and, if some such relief as directed in the judgment could not be obtained, the time would never come for the payment of the balance of the purchase money. It could not keep the land without paying for it. A court of equity will always relieve against a mistake in granting such relief as the ends of justice require. When the Norton Iron Works has obtained the right of way, it will have all it bargained for, and the cost of doing this, under the judgment of the court, must come out of the money in its hands. It cannot lose anything in any event.

Judgment affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

DENNIS et al. v. ALVES et al.

(Court of Appeals of Kentucky. Nov. 13, 1908.)

1. EXECUTORS AND ADMINISTRATORS (§ 349*)—
SALE OF REALTY — PRESUMPTION OF JURIS-
DICTION.

The record, in proceedings by an executor to sell the estate, not affirmatively showing that infant defendants were not summoned and appeared before the court merely being silent on that question, it will be presumed on collateral proceedings that they were summoned, and that the court would not have rendered a judgment of sale unless they were properly before the court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1451; Dec. Dig. § 349.*]

2. EXECUTORS AND ADMINISTRATORS (§ 349*)—
SALE FOR DEBTS—ORDER—JURISDICTION.

Where all the persons interested in the estate were made parties, the court had jurisdiction, so that a judgment, in proceedings by an executor to sell the estate for payment of debts, was not void, even though erroneous, and hence the purchaser at the sale would acquire good title.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1446; Dec. Dig. § 349.*]

Appeal from Circuit Court, Henderson County.

"To be officially reported."

Action by John S. Dennis and others against Walter Alves and others. From a judgment for defendants, plaintiffs appealed. Affirmed.

Thos. E. Ward, for appellants. Montgomery Merritt, for appellees.

BARKER, J. The appellants instituted this action against Walter Alves and his co-appellees, alleging that they are the owners and entitled to the possession of a farm in Henderson county, Ky., called the "Point Place"; that the defendants are in the wrongful possession of this property, and unlawfully detaining it from the real owners, and they prayed for a judgment of the court that they were the owners and entitled to possession of the property. The defendants (appellees) answered, denying the title of the plaintiffs (appellants), and alleging ownership in themselves, and pleaded a judgment wherein the property was sold at judicial sale and purchased by their remote vendor, in bar of appellants' rights. They also pleaded the statute of limitations, and the issues were made up along these lines.

The first question in the case is whether or not the court had jurisdiction of the plaintiffs (appellants) in the action above referred to, wherein the property was sold at judicial sale. Without striving at absolute accuracy of detail it may be said that the grandfather of appellants, John H. Stanley, was in his life time the owner in fee simple of the "Point Place," a farm of about 200 acres. He was, in addition, the owner of a large estate, consisting mainly of real property. In

1878 he died, leaving a will which was duly and legally admitted to probate. By his will he devised the "Point Place" to his daughter, Lucy A. Dennis, the mother of appellants, for life, with remainder to her children. After the death of John H. Stanley, his son, James M. Stanley, qualified as executor of his will, and brought an action for the settlement of the estate of his testator, and for the payment of his debts and the distribution of his estate among his devisees. The estate was largely in debt, owing some \$20,000. The personal property amounted to a good deal less, say something like \$10,000. The petition alleged the insufficiency of the personal property to pay off the debts, and prayed for a sale of so much of the real property as was necessary to discharge the indebtedness. The appellants, who were infants of tender years, and were the remaindermen after the death of their mother, Lucy A. Dennis, were not made parties defendant to the original petition, but afterwards an amended petition was filed, alleging their interest, and that they were necessary parties to the litigation. Process was then awarded by the court, although the record does not show that summons was ever issued or served upon the infants. The record was necessarily large, and there were many other pleadings and cross-actions filed, setting up claims against the estate. Subsequently a judgment was rendered decreeing a sale of "Point Place" by the commissioner of the court, and in pursuance of this judgment it was sold along with some of the other real property, and was purchased by the executor, James M. Stanley, for the sum of \$7,365, which was paid into court and used for the purpose of extinguishing the indebtedness of the testator, a part of which was a mortgage debt due Mrs. F. Stratman for \$3,000, which was a lien upon the "Point Place." As Lucy A. Dennis and her children, to whom this farm was devised, in this proceeding lost the whole devise by the payment of the debts of the testator, she subsequently filed an answer and made it a cross-petition against the other devisees of her father, praying that the property unsold in the action be redistributed and that she be made equal with the other devisees as far as that was possible. This was done, and 131 acres of land was set apart to her and her children, upon the same condition as the original devise—to her for life, and remainder to her children, the appellants. This property was afterwards sold at the suit of the guardian of the children, in part for their maintenance, and in part to secure them a home in Henderson, Ky. One thousand six hundred dollars of the proceeds of the sale of the 131 acres was invested in the house and lot in Henderson, upon the same condition as the original devise to the mother for life, and remainder to the children. Four hundred dollars was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

paid over to each of the children in money. The balance was presumably expended in their education and maintenance. After the death of their mother, the life tenant, this action was instituted, as before stated, against the appellees, to recover the "Point Place." The appellees, it is admitted, have the same title to the property that was acquired by James M. Stanley, the purchaser at the judicial sale, from whom they have derived it by regular devolution of title.

So the question recurs: Was the judgment in the case by the executor to settle the estate of John M. Stanley void as to the infant defendants (appellants)? This question turns upon the presumption which will be indulged in favor of the judgment of a court of general jurisdiction when collaterally attacked. It is admitted that the record is silent as to whether or not process was ever issued on the cross-petition, or, if issued, whether served upon the infant defendants. For the appellees it is insisted that, although the record is silent upon this crucial point, every presumption will be indulged in favor of the validity of the judgment; and, unless it is affirmatively shown that the infant defendants were not properly before the court, their rights were concluded by the judgment had, and the purchaser at judicial sale acquired their title to the land. To decide this question it is only necessary to ascertain the correct principle of law governing it.

In the case of *Segal v. Reisert*, 107 S. W. 747, 32 Ky. Law Rep. 901, we had occasion to examine the principle involved here with great particularity, and to review at considerable length the authorities bearing upon it, and after this review it is said in the opinion: "It would seem from these authorities that, where a collateral attack is made upon a judgment of a court of general jurisdiction, it is not sufficient to simply allege the absence of a jurisdictional fact; but it must be alleged that the record affirmatively shows the absence of the jurisdictional fact. This the answer in the case before us fails to do, and for aught that appears here the record in the case in which the property was sold may affirmatively show that the married women were privily examined as required by section 495, Civ. Code Prac.; and if it does, or it would seem even if it were silent upon the question, it must be conclusively presumed in favor of the judgment that the privy examination was had."

In the case of *Maysville & B. S. R. R. Co. v. Ball, etc.*, 108 Ky. 241, 56 S. W. 188, a collateral attack was made on a judgment, upon the ground that it was void for want of service of process on the defendant. Upon this question the court said: "The attack on the judgment is not direct, but collateral. It is a well-settled rule that domestic judgments rendered in a court of general jurisdiction cannot be collaterally attacked unless the want of jurisdiction appears upon the record. Therefore no evidence is admissible except

that which is furnished by the record of the action wherein the judgment was rendered. Of course the rule is otherwise when a direct attack is made upon a judgment. The answer that the defendant was not served with process, and did not appear in the action, etc., is insufficient, because it also should have alleged that the record shows such to be the case. In *Van Fleet, on Collateral Attack* (section 855) it is said: 'An answer to an action on a domestic judgment, where special pleading is required or attempted, must not only deny service and appearance, but must allege what the record shows, or fails to show, on these points. * * * Hence an answer to an action on the record of another court must allege that it does not show any service or appearance, and, if the record is that of a superior court, it must allege that it affirmatively shows a want of service.'

Black, *Judgments*, § 271, announces the same doctrine, wherein it is said: 'When a party seeks in a collateral action to impeach the judgment or decree of a court of superior jurisdiction on the ground that he had no legal notice of the pendency of the action, it is necessary that he should allege in his pleading what, if anything, is shown by the record in relation to the issue and service of process, because, unless the record itself shows that the court never acquired jurisdiction of him, it will be conclusively presumed that the jurisdiction did attach.'

In the case of *Jones, etc., v. Edwards, etc.*, 78 Ky. 6, the same question we have here arose, and it was said: "The mere absence of evidence in the record of Peter F. Smith's executor against his devisees, etc., that two of three of his devisees had been summoned in the action is not sufficient to enable the appellees to make a successful collateral attack upon that record and shut it out as evidence in this case; and that it cannot be done has been substantially decided in the following adjudged cases: (Authorities omitted.)"

In *Freeman on Judgments*, § 124, it is said that: "Nothing shall be intended to be out of the jurisdiction of a superior court but that which expressly appears to be so. Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed, upon a collateral attack, that the court, if of general jurisdiction, has acted correctly and with due authority, and its judgment will be valid although every fact necessary to jurisdiction affirmatively appeared. The decisions to this effect are very numerous." To the same effect are *Miller v. Farmers' Bank, etc.*, 75 S. W. 218, 25 Ky. Law Rep. 373; *Northington v. Reed*, 75 S. W. 206, 25 Ky. Law Rep. 354; *Berry v. Foster*, 58 S. W. 709, 22 Ky. Law Rep. 746.

The record in the case in which the judicial sale was had does not affirmatively show that the infant defendants (appellants) were not summoned and properly before the court, the record on this question being merely si-

lent. Therefore, under the foregoing authority, we must presume that the court would not have rendered a judgment of sale foreclosing the right of the infants unless they were properly before the court; and, this being true, the judgment was not void, although it may have been erroneous.

It therefore follows that, so far as anything to the contrary appears in the case before us, the court had jurisdiction to make the sale of "Point Place," and that the purchaser acquired all the title in the land which the appellants then owned.

Judgment affirmed.

GALVIN v. SHAFER.

(Court of Appeals of Kentucky. Nov. 20, 1908.)
ELECTIONS (§ 305*)—CONTEST—ABATEMENT—
DEATH PENDING APPEAL.

Appeal in an election contest abates on death of contestee pending his appeal; Ky. St. 1903, § 1596A, subsec. 12, providing for a contest and an appeal by either party, making no provision in case of death of either party, an election contest not being within the jurisdiction of the courts of common law, and therefore not surviving at common law, section 10 making certain enumerated actions survive, not embracing it, and though the estate of decedent, he being the unsuccessful party, is liable for the costs, an appeal not lying from a mere judgment for costs.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 305.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Election contest by George E. Shafer against R. E. Galvin. From an adverse decree, contestee appeals. Dismissed.

W. J. O'Connor, for appellant. C. B. Blakey, for appellee.

O'REAR, C. J. Appellant and appellee were voted for for the office of school trustee in Jefferson county. Appellant was awarded the certificate by the board of canvassers. In due time appellee instituted a contest in the circuit court, resulting in a decree in his favor, adjudging that he had been elected to the office, and that appellant had not. Seasonably appellant prosecuted an appeal to this court, but before the case was submitted for hearing he died. The case is now being considered on the motion of appellee to dismiss the appeal. The ground of the motion is that, as appellant has died pending the appeal, there is no one who can prosecute it; that appellant's appeal died with him, and, that, as the Legislature has not provided for revivor of the appeal in such cases, no such right exists.

By the act of October 24, 1900 (Laws 1900, Ext. Sess. c. 5, p. 27), now appearing in Carroll's Kentucky Statutes (1903) as section 1596A, the circuit courts are given original

jurisdiction of certain election contests, including the class of which the case at bar is one. By the same act it is provided (subsec. 12): "Either party may appeal from the judgment of the circuit court to the Court of Appeals by giving bond to the clerk of the circuit court, with good surety, conditioned for the payment of all costs and damages the other party may sustain by reason of the appeal and by filing the record in the clerk's office of the Court of Appeals within thirty days after final judgment in the circuit court. And in the Court of Appeals the case shall be heard and determined as speedily as possible, and shall have precedence over all other cases. * * * The unsuccessful party shall pay all costs in both courts." Prior to that act the practice in such cases was regulated by statutes entirely different from the present law, and before nonjudicial tribunals. The present act, while requiring the practice in such cases to conform to the practice in equity actions in the particulars where same can be made applicable, creates a unique course of procedure in many particulars; but there is a complete omission to make any provision for the death of either of the parties to the contest at any stage of the case, either in the circuit court or in this court. If the contestant die before beginning the contest, no provision is made for a contest by any other person; or, if he died pending the contest in the circuit court, there is no provision for revivor, and no survivorship provided; or, if either party die pending the appeal, there is a like failure to provide for revivor. The actions which survive in this state are those which survived at the common law, and such others as are specifically named by statute. Section 10, Ky. St. 1903, enumerates certain actions which did not survive at the common law, but which by that section are made to survive. The courts did not have jurisdiction at the common law to try contests of elections. Hence there could be no survivorship of such an action at the common law. Nor does the statute, as has been already pointed out, make provision for such survivorship. A public office is not an inheritance. Neither the creditors nor heirs at law of the incumbent can have any title to or legal interest in his office. The administrator, not being entitled to it, could neither enter it without suit nor sue to recover it. He is nowise concerned in the litigation over its title.

It is suggested that, as the statute makes the unsuccessful litigant in the contest liable for the costs, appellant's estate is concerned in the judgment in this case, as that judgment includes the recovery of the costs against him, and, unless the judgment is reversed, the estate would be compelled to pay the costs. The case of *Snibley v. Palmtag*, 127 Cal. 31, 59 Pac. 200, is cited and relied on by appellant. That case was an election

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contest. The respondent died pending the appeal. On a motion to abate the appeal, the Supreme Court of California, denying the motion, said: "It is not correct to say that the estate of the deceased has no interest in the controversy. It is provided in section 1125 that if the proceeding be dismissed for want of prosecution, or if the election be affirmed, judgment must be rendered against the party contesting such election. Having commenced the proceeding and prosecuted it to judgment, by which the contestee is deprived of an office to which he had been declared elected, neither he nor his estate could escape the responsibility he has assumed. Appellant has a right to his appeal, and there is a chance that the judgment may be reversed, and that upon a retrial the election would be affirmed." It further appears from the opinion in that case that any elector could have contested the election. We are not satisfied with the reasoning of the court in that case. The opinion seems to be rested at last upon the idea that, because the estate of the decedent had become liable for the costs in the trial court by reason of the judgment, that liability gave it such an interest in the litigation as entitled it to prosecute the appeal to have the judgment reversed. An action for assault and battery does not survive. A judgment for costs against an unsuccessful plaintiff in such an action would have involved his estate in liability, notwithstanding his death; but could his administrator have prosecuted an appeal to have the judgment below reversed so that incidentally the estate might escape the costs?

But in this state there is no appeal from a mere judgment for costs, no matter how much they may amount to. Appellate jurisdiction here is made to depend upon other matters, always excluding the costs. Section 950, Ky. St. 1903. Costs cannot be considered as affecting the right of appeal. *Boske v. Security T. & S. V. Co.*, 56 S. W. 524, 22 Ky. Law Rep. 181; *Moore v. Boner*, 7 Bush, 26; *Rhodes v. Frankfort Chair Co.*, 79 S. W. 768, 25 Ky. Law Rep. 2042; *Tandy v. Hatcher*, 9 Ky. Law Rep. (abstract) 721. In *King v. Tilford*, 70 S. W. 1064, 24 Ky. Law Rep. 1270, the appellants, as members of the board of aldermen of Louisville, had instituted proceedings to impeach appellees, as members of the board of public safety. An injunction was granted appellees restraining appellants proceeding with the impeachment. Appellants prosecuted an appeal to this court from the judgment perpetuating the injunction. Pending the appeal the terms of office of the parties expired. The appeal was dismissed, as "a reversal would accomplish nothing, and an affirmance would not benefit appellees." Of course, the matter of costs was present in that case, but the court held it to be a moot question notwithstanding. In contests of elections to seats in Congress, the death of a party abates

the contest; but, under the provision of Constitution which makes the house judge of who may be entitled to hold seat in that body, it may, after the death of a contestant, determine whether the contest is legally entitled to his seat. *Paine's Index of Elections*, § 1043, etc. In the contest of the election of Governor in 1900, the contestant died pending the contest. In a suit by the contesting Lieutenant Governor on the same ticket, it was held by this court (*Taylor v. Beckham*, 108 Ky. 291, 56 S. W. 177, 41 R. A. 258, 94 Am. St. Rep. 357) that, if the contestant had been elected Governor, upon his death the one elected Lieutenant Governor on his ticket would have become entitled to the office, and that he "had the right to continue the contest to secure what the Constitution guaranteed to him." Whether otherwise the right of continuing the hearing of the contest survived was not decided.

Inasmuch as the Legislature has not provided for the emergency of death of a party to the contest pending the hearing or appeal, and as independent of legislative enactment such right does not survive at the common law, we must hold that the appeal abates on the death of either party to it. The hardship of possible injustice in such a result cannot justify the courts making law to relieve it. If a contestant, although wrongfully deprived of the office to which he had been elected, and wrongfully denied the certificate, had died before filing his petition for a contest, the certificate would have been complete title of the holder, and no provision exists for its impeachment. That might have worked a hardship on the public. So held in the language of the statute (subsection § 1596A), "on the production of a copy of the final judgment, the successful party shall be permitted to qualify or be commissioned, and the legislative declaration of what the statute shall be. Whether hardships ensue is for legislative consideration, not ours.

The appeal is dismissed.

KELLY v. PETER & BURGHARD STONE CO.

(Court of Appeals of Kentucky. Nov. 19, 1907.)
CONTRACTS (§ 68*)—CONSIDERATION.

Plaintiff having a claim against defendant for injuries sustained, it was agreed that defendant should pay plaintiff \$150 in money for his regular employment when he recovered from his injuries. Defendant paid money, but refused to furnish the employment. Held, that the compromise furnished a sufficient consideration for the agreement to employ and that plaintiff could recover damages thereon.

[Ed. Note.—For other cases, see Contracts. Cent. Dig. §§ 328, 329; Dec. Dig. § 68.*]

Appeal from Circuit Court, Jefferson County; Common Pleas Branch, First Division.
"To be officially reported."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

Action by J. W. Kelly against the Peter & Burghard Stone Company. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Popham & Webster, for appellant. Isaac T. Woodson, for appellee.

BARKER, J. The appellant instituted this action against the appellee to recover damages for an alleged breach of contract of employment. The cause of action is contained in the following excerpt from the petition: "He states: That plaintiff was in the employ of defendant in and around said establishment during the month of September, 1904, and, while plaintiff was engaged at said time and place in handling a huge stone, he was injured in his feet and upon his body, and thereafter made claim upon defendant for damages, claiming said injuries were received through its negligence; that shortly thereafter defendant, by and through its agents, effected a settlement of said claim with plaintiff on account of said injuries, by paying plaintiff the sum of \$150 in cash, in addition to which defendant at the time of said settlement, in March, 1905, or thereabouts, contracted and agreed with this plaintiff that, as soon as he was able to resume work, the defendant would allow plaintiff to continue in its employ, and furnish him steady work during the times he was able to work." In addition to the foregoing, it is alleged: That the appellee afterwards refused to employ plaintiff or permit him to resume work pursuant to the agreement, although he was ready, able, and willing to work, and offered so to do; that, although he diligently sought other employment, plaintiff was unable to obtain it; and that by reason of the wrongful breach of the contract he had been damaged in the sum of \$2,400, for which he prayed judgment. A general demurrer to this petition was filed by the defendant and overruled by the court. Afterwards the defendant answered, and, plaintiff having demurred to the second paragraph of the answer, the judge of the trial court changed his mind as to the merits of the petition, carried the demurrer back to the petition, and sustained it. Plaintiff declining to amend, the petition was dismissed. From this judgment he is here on appeal.

The trial court, in sustaining the demurrer to the petition, was of opinion that the contract set up by the plaintiff lacked mutuality, or, in other words, a consideration, and for that reason came within the principle enunciated in *L. & N. R. R. Co. v. Offutt*, 99 Ky. 427, 36 S. W. 181, 59 Am. St. Rep. 467. In this we think the court erred. The contract alleged in the petition did not lack a consideration. On the contrary, it is expressly alleged that the plaintiff had been hurt in the employment of the defendant company, and had a claim against it for damages, which he was asserting, and that in settle-

ment of this claim the defendant company paid plaintiff \$150 in cash, and in addition thereto contracted and agreed with him that, as soon as he was able to resume work, it would allow him to continue in its employment and furnish him steady work during the time he was able to work. The case of *L. & N. R. R. Co. v. Offutt* has no application to that at bar. There the contract alleged was merely one for employment, and, as it was not alleged that Offutt agreed or bound himself to work for the company, the contract was unilateral, and therefore without mutuality or consideration. Offutt had been regularly in the employ of the company before, but had been discharged for violating the rules of his employer. Afterwards, when there was a strike of the employes of the railroad company, he was given special employment as a detective, or agent, and was sent to Bowling Green; his pay being \$5 per day and his expenses during the time he was specially employed. When the strike was settled and the special employment was at an end, Offutt was paid in full for his services. It was not alleged in the petition that in consideration of Offutt's accepting the special employment he was thereafter to be restored to his former regular employment and kept in it so long as he did faithful and honest work for the company. The opinion recites merely that the appellee claimed that, at the time he accepted the employment for the special services referred to, he asked that he might be restored to the position in the service of the company from which he had been discharged, and that it was then and there contracted with him that he should be restored to the position, and that he should keep it so long as he did faithful and honest work for the company; but, while it appears that the two contracts were simultaneously made, the one was not a consideration for the other. In other words, they were two separate contracts, and the agreement for regular employment alleged stood upon its own merits and its own consideration, and it was therefore held that this contract, lacking mutuality, was invalid and nonenforceable. The contract there was not the same in principle as that with which we are now confronted. Here the plaintiff had a claim for damages against his employer for personal injuries, and, in order to compromise and settle this claim, the employer paid the servant \$150 in money and agreed that when he recovered from his injuries he would be furnished regular employment as long as he was able to do the work. The compromise of the tort was the consideration for the contract sued on. We know of no reason why such a contract is not enforceable. Indeed, it was expressly held in *L. & N. R. R. Co. v. Offutt* that such contracts were valid and binding. On this subject, it is said in the opinion: "We can conceive of no reason for holding that a contract of employment or of service, either for

a fixed term or for an indefinite time, would not be legal or would be against public policy. In actual experience such contracts are constantly made, and on both principle and authority such contracts must be held not to be within the statute of frauds, and therefore may be made by parol."

The case of *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455, 50 S. W. 685, is in all respects similar to that at bar. In that case, Rule was an employé in the sawmill of the appellant company, and upon having his thumb cut off, as he claimed, by the negligence of the company's agents, demanded damages for the injury. This claim was compromised by the company, as it was alleged, by an agreement that, if the employé would forego his suit for damages and surrender all claim therefor, it would give him employment at the rate of \$2.50 per day so long as it was engaged in the sawmill business on the Ohio river. This proposition he accepted, but afterwards, when he was able to work, and when the mills of the company resumed operation, he was refused employment. In an action for a breach of the contract for employment, the employé obtained a verdict for \$1,400, and upon appeal it was insisted by the company that the contract alleged lacked mutuality. In other words, it was said there, as here, that the company was bound to hire, but the employé was not bound to serve; he could work or not, as he chose, whereas, the company had obligated itself to give him employment at \$2.50 per day as long as its mills were operated on the Ohio river. In response to the contention that the contract alleged lacked mutuality, it was said: "In our opinion, whilst these are the characteristics of the contract, it does not follow that the employé is without remedy. Except for the fact that courts do not, as a rule, so enforce these contracts of hiring, by reason of their personal nature, the agreement as alleged might be the basis of an action for specific performance, and, such an action not being maintainable by reason of the rule adverted to, we perceive no reason why the appellee might not purchase for a valuable consideration the right to obtain employment or option to work at appellant's mills so long as they engaged in running them at the place designated. Such a contract does not differ in substance from those known as optional contracts in the purchase of property, and which have often been upheld by this court where there is a consideration for them, even when there is only an agreement to sell, and no corresponding agreement to buy." It was further held that the contract was not invalid because for an indefinite length of time; nor was it within the statute of frauds.

It seems to us that the opinion in the case last above cited is conclusive of the question we have here. We see no reason why

a company should be allowed to settle a proposed action against it for damages by promising to give permanent employment to its injured employé, and, when the time within which the employé could prosecute his claim for damages had expired, to refuse to carry out the contract. This would be exceedingly unjust and inequitable to the employé, and would tend to uphold the fraud and chicanery of dishonest employers. It seems to us much more rational to encourage the settlement of such claims as appellant alleges he originally had against appellee, by upholding the compromises by which they are effected, than to force the injured employé either to litigate his claim for personal injuries or afterwards be at the mercy of his employer.

Judgment reversed, with directions to overrule the demurrer to the petition and for further procedure consistent herewith.

J. I. CASE THRESHING MACH. CO. v. HARP et al.

(Court of Appeals of Kentucky. Nov. 20, 1903.)

SALES (§ 238*)—EXPRESS WARRANTY—BREACH—WAIVER.

Where an agricultural machine is sold with a warranty that it is made of good material, is durable, and will perform its work as represented, and provision that, if it fails to fill the warranty after 10 days' trial, notice, specifying the failure, shall be given the seller, who shall have a reasonable time to remedy defects, and, if the machine still fails to comply with the warranty, it shall be returned by the purchaser, and the seller shall have the right to substitute another, or rescind for the contract by returning the money or notes received for the machine, the purchaser has no right of action for damages, where he, after learning that the machine did not work satisfactorily, continued to use it for at least two seasons without any offer to return it.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817-822; Dec. Dig. § 238.*]

Appeal from Circuit Court, Hardin County. "Not be to officially reported."

Action by W. P. Harp and others against the J. I. Case Threshing Machine Company. Judgment for plaintiffs. Defendant appeals. Reversed, and new trial granted.

L. A. Faurest, for appellant. H. L. James, for appellees.

SETTLE, J. The appellee, W. P. Harp, in 1903, purchased of appellant a husker-shredder complete, with canvass cover, for which he agreed to pay \$580 in three annual installments. The contract was contained in one of the printed forms customarily used by appellant, and, in addition to the warranty that it was made of good material, durable, and would perform its work as represented, it provided that, should the shredder fail to fill the warranty, after 10 days' trial by the purchaser, notice in writing should be given the appellant at Racine, Wis.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and also the agent from whom the machine was received, stating in what parts and wherein it failed to fulfill the warranty; that appellant should then have a reasonable time in which to remedy the defects, and, if the shredder should still fail to comply with the warranty, the machine should be returned by the purchaser to the place where received, and appellant notified thereof, in which event it should have the option to substitute another or return the purchaser's notes or money received for the machine, and thereby rescind the contract without further liability. The shredder furnished Harp under this contract failing to do satisfactory work, a further agreement was on November 10, 1903, made between appellant and Harp, to the effect that payment of the latter's notes should be extended one year without interest and credited by \$30, and to also extend the warranty "as if the shredder for which said notes were given was sold in 1904." December 14, 1903, Harp wrote appellant that the machine was still unsatisfactory and could not be repaired away from the factory. Accepting this ultimatum of Harp, appellant, in 1904, sent him another shredder in lieu of the first. Though objecting at first to the substitution, Harp consented to accept the last machine, and October 29, 1904, wrote appellant to send a man to start the shredder on the following Tuesday. Appellant complied with this request and sent its agent, Ray, to Harp's on the day indicated. Ray started the machine, and on November 5th went again to adjust some part of it upon complaint of Harp. At that time the machine was performing to Harp's satisfaction, and he then gave Ray the following testimonial: "J. I. Case T. M. Co., Louisville, Ky.—Gentlemen: The husker-shredder purchased of you is working all right and is giving me entire satisfaction so far and is working reasonably fast. W. P. Harp." Harp did not complain again that season of the shredder. After the delivery of the last machine, Harp made up a company of seven, including himself, to take the shredder off his hands, and in December following, which was after the close of the shredding season, appellant's agent, Ray, went to Glendale by its direction and at Harp's request, to accept the notes of the seven persons constituting the company for the last machine, in lieu of those of Harp. This was done. After these notes were executed, the shredder was used the seasons of 1905 and 1906. In 1905, an agent of the company worked on the machine once, and at the same time Ray put on it an improved part that he had promised the appellees, in December previously, he would get the company to furnish them. At the close of the season of 1906, it appears that the machine was left in the horse lot of a Mrs. Ash, exposed to the weather, and that it was probably not thereafter used. The notes that were given by Harp and his associates were

transferred by appellant's agent to a third party and paid by the makers when due. Thereafter this suit was brought by Harp alone, setting up the written contract under which he had purchased the two machines from appellant, and seeking to recover damages of it upon the ground that there had been a breach of the warranty, in that the machine had failed to perform its work as represented by appellant and had proved worthless. Later an amended petition was filed, making the other members of the company coplaintiffs with Harp, to the action. The answer of appellant contained a traverse of the averments of the petition, alleged a failure of appellees to comply with their part of the contract, and that they were estopped to maintain the action because the machine, if unsatisfactory or worthless, as claimed by them, had never been returned to appellant, nor had appellees offered to return it. The trial resulted in a verdict and judgment in favor of appellees for \$275, and, a new trial having been refused appellant, it seeks by this appeal a reversal of the judgment.

Without going into the question of whether the court erred in overruling the demurrer that appellant filed to the petition, or considering other questions raised upon the pleadings, we deem it sufficient to decide the case upon the main question involved. It is not apparent from the evidence that appellees made any serious complaint to appellant of the machine after the last repairs were done upon it by appellant's agent in 1905, and it is not denied that it was used by appellees during the shredding season of the years 1904, 1905, and 1906. After having this long use of the machine, we think it is now too late for appellees to complain that it did not work satisfactorily, although it may not have done so. It is true they aver that a new warranty was made by appellant's agent, Ray, at the time appellees executed the note given in lieu of those of Harp; but if we concede that Ray was authorized to make such a warranty, and that it was made as claimed, it is manifest that the warranty was but a renewal of that contained in the written contract originally entered into by Harp with appellant. That warranty was conditioned and connected with certain things that were to be done by Harp or by him and his associates composing the company, and these conditions we think the testimony fairly shows he and they failed to perform. It is not claimed by appellees that Ray in making the alleged warranty relieved them of the performance of any of the conditions connected with it, as expressed in the original or written contract. Taking the testimony as a whole, we are satisfied that the alleged warranty made by Ray was but a renewal of the original warranty made by appellant. In other words, the original contract was continued in force after the execution of the note appel-

lees delivered to Ray in lieu of those of Harp.

We think this case comes within the rule announced in the cases of *Garr-Scott & Co. v. Hodges*, 90 S. W. 580, 28 Ky. Law Rep. 889; *Wisdom v. Nichols-Sheppard Co.*, 97 S. W. 18, 29 Ky. Law Rep. 1128; *McCormick Harvesting Machine Co. v. Arnold*, 116 Ky. 508, 76 S. W. 323. In the case first cited the court said: "The express warranty in this case not only states what is warranted, but shows the agreement of the parties as to what is to be the measure of recovery for its breach; that is, a return of the property and cancellation of the purchase-money notes, unless the seller furnishes other articles in lieu of that found deficient. When, therefore, appellee found that the machinery was below the quality warranted, and after having duly notified the seller of the fact, there were but two courses for him to pursue. One was to proceed upon the warranty, which was to return the articles and obtain a return of his notes. This would have been a complete defense to the notes. The other course was to waive the defect in the machinery. This he could do expressly or by implication, as where he kept and continually used the machinery as his own. Waiving the defect necessarily involved an abandonment of his right to claim under the warranty. Appellee had a reasonable time within which to make an election; that is, it was proper for him to have given the machinery such a reasonable test for such a reasonable length of time as to have demonstrated that it was not up to the warranty. Whenever that fact was settled, then it was not necessary that he should elect either to proceed upon his warranty or to keep the machinery notwithstanding the defects. His testimony leaves no doubt that he discovered early in the season that the machinery was deficient. He declared that it was wholly unsuitable and unsatisfactory, notwithstanding he persisted in using it actively and to its full capacity through the remainder of the season. What is here said about the rescission of the contract upon the failure of the articles to come up to the warranty is not based upon the general law of a breach of the warranty of a chattel, for generally the vendee may hold the property and sue to recover damages upon the breach of warranty. This, though, is where the parties have not provided by express stipulation for a particular measure of damages in case of a breach. It is to be presumed that, when parties contracting with reference to the sale of a chattel have entered into an express warranty concerning its quality and fitness for its particular purpose, and have agreed that, if it should not come up to the warranty upon a reasonable test, then the contract should be rescinded, and which is to be the only remedy. * * * The court will not supply

a different warranty from the one that the parties have made, nor a different measure of damages for the one the parties have agreed should be applied to their case. Under the facts as shown by the evidence, appellee, the court should have sustained the appellant's motion for a peremptory instruction to the jury to find for the amount of the notes sued on."

As appellees, after ascertaining that the shredder purchased by them from appellant did not work satisfactorily, nevertheless continued to use it, for at least two seasons without an offer to return it, in order that they might have a rescission of the contract and a return of their note, they had no legal right to maintain this action for damages. Upon the facts of the case, the lower court should have peremptorily instructed the jury to find for appellant.

Wherefore the judgment is reversed, with directions to the lower court to grant appellant a new trial consistent with the opinion.

FOSTER et al. v. JORDAN et al.

(Court of Appeals of Kentucky. Nov. 18, 1903.)

1. WILLS (§ 229*) — PROBATE — PERSONS WHO MAY CONTEST—PURCHASERS OF HEIR OF TESTATOR—"PERSONS INTERESTED."

Purchasers from an heir of a testator may resist the probating of his will; they being "persons interested," within Ky. St. 1903, §§ 485, 486, 487, 488, 489, 490, 491, making such persons proper or necessary parties to probate proceedings.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 550; Dec. Dig. § 229.*]

For other definitions, see Words and Phrases, vol. 4, p. 3696.]

2. LIMITATION OF ACTIONS (§ 39*) — WILLS — PROBATE — STATUTORY PROVISIONS — "ACTION."

Ky. St. 1903, § 2522, provides that an action for relief not otherwise provided for shall only be commenced within 10 years from the accrual. Section 469 defines "action" as used in the statutes to include all proceedings in a court of the commonwealth. *Held* that since there is no provision in the statutes expressly limiting the time within which wills either of residents or nonresidents may be probated, and since the probating of a will, if not an action, is at least a proceeding to obtain relief, a proceeding to probate a nonresident's will is within section 2522, and must be commenced within 10 years after testator's death, regardless of whether the will was previously probated in the state of testator's domicile or not.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 190; Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 1, pp. 128-140.]

3. WILLS (§ 434*) — PROBATE IN ANOTHER STATE—EFFECT ON LAND IN KENTUCKY.

The probate of a nonresident's will in the state of his domicile has no legal effect on the title to his land in Kentucky, but in order to pass title thereto the will must be probated in Kentucky according to its laws.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 940; Dec. Dig. § 434.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

4. LIMITATION OF ACTIONS (§ 165*)—NATURE OF STATUTES.

Statutes of limitation are statutes of repose.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 649; Dec. Dig. § 163.*]

5. LIMITATION OF ACTIONS (§ 1*)—TIME FOR SUING—POLICY OF STATE.

It is a well-established policy of Kentucky to fix in every case a limit of time for bringing actions or proceedings for relief.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from Circuit Court, Hickman County.

"To be officially reported."

Proceeding by Frank Foster and others for the probate of the will of John McIntosh, a nonresident, under Ky. St. 1903, § 4854. From an order of the county court admitting the will to probate. Edwin S. Jordan and others, purchasers from an heir of testator, appealed to the circuit court, which refused probate, and the propounders appeal. Affirmed.

Thos. E. Mathews and Wheeler, Hughes & Berry, for appellants. Robbins & Thomas and Joe W. Bennett, for appellees.

NUNN, J. One John McIntosh died in the year 1859, testate, domiciled in Davidson county, Tenn. At the June term, 1859, of the Davidson county court, a court of probate jurisdiction, his will was duly probated. In this will the testator disposed of his estate in Tennessee, and then gave to one of his sons and to his daughter, Louisa E. Foster, for her life, with remainder over to her children, and to a grandchild, certain real estate located in Hickman county, Ky. About the year 1865 the grandchild of McIntosh, to whom he devised an interest in the Kentucky land, sold and conveyed his interest to one Utterback. Some time after that, Utterback, Frank McIntosh, and Louisa E. Foster instituted an action in the Hickman county court and had the land divided among them, and a conveyance was made to Louisa E. Foster in fee for her portion of the land. Soon after this she sold the part allotted to her to appellees. In the year 1907, the life estate of Louisa E. Foster was terminated by her death. In November, 1907, the remaindermen and the heirs of John McIntosh probated his will in the county court of Hickman county, Ky., under the provisions of section 4854 of the Kentucky Statutes of 1903, and from the order of the county court probating the will appellees herein appealed to the circuit court of Hickman county by petition. All formalities were waived by both sides, the issues were formed, and upon the hearing of the case by the court, a jury being waived, as the issues made were purely issues of law, it was determined by the court that the will was properly proven; but the right to probate the same was barred by the

statutes of limitations, the will not having been offered for probate in Kentucky within 10, 20, or 30 years after the date of the testator's death. The court also held that appellees had such an interest in the matter in controversy as to give them the right to protest against the probate of the will; they having bought the interest of Louisa E. Foster, who conveyed the same as if she owned the fee, instead of a mere life estate.

The right of a purchaser from an heir of a testator to resist the probating of his will has been conclusively settled by this court. See the cases of *Brooks v. Paine's Ex'r*, 123 Ky. 271, 90 S. W. 600; *Davies v. Leete*, 111 Ky. 659, 64 S. W. 441, and the cases there cited. In the *Davies-Leete* Case, this court, in discussing this question, said: "The statutes use the words 'persons interested' (sections 4856, 4861, Ky. St. 1903) in defining who are proper or necessary parties to probate proceedings. We are of opinion that any person who claims title under any one an heir at law of the testator, as well, perhaps, as any creditor of such heir at law, if the heir be insolvent, may become a party to such proceedings under the above clause. This would not, of course, admit a stranger to testator's title, or one claiming under title hostile to his, to contest the will, in order that he might destroy a link in his adversary's chain of title (*Johnson v. Bard* [Ky.] 54 S. W. 721); nor would it admit any relation not an heir at law or such creditor."

The only other question to be determined is whether the statute of limitations imposed by appellee is a bar to the probating of the will at this time in this state.

Appellants' contention is, as the will was probated in Tennessee, within the proper time, and in the state of the residence of the testator, the statutes of limitations do not apply to the probating of the will in this state, but concedes that the probating of it would be barred if it had been made in this state, or if it had never been probated in the state of Tennessee, and referred to the cases of *Allen v. Froman*, 96 Ky. 313, 28 S. W. 497; *Johnson v. Bard*, 54 S. W. 721, 31 Ky. Law Rep. 999, and *Morrison v. Fletcher*, 119 Ky. 488, 84 S. W. 548, as supporting their contention. We do not so construe the authorities cited. In the *Allen-Froman* Case, there was an attempt to probate the will of George Coil, who died in the state of Alabama, the place of his domicile, and the statutes of limitations were pleaded against the probating of it in this state. The court, in considering the question, incidentally mentioned the fact that the will had never been probated in any court of Alabama, and determined that the 10-year statute of limitation applied and was a bar to the probating of the will in this state, but did not intimate that the rule would have been different if the will had been probated in the state of Alabama. In

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the case of *Johnson v. Bard*, supra, the opinion, delivered January 4, 1900, but not reported in the Kentucky Law Reporter until five years afterwards, was one where the probate of the will of David McCaleb, a resident of Mississippi, was considered. McCaleb's will was probated in Mississippi in the county of his late residence, on the 25th day of April, 1850. On the 18th day of December, 1897, his heirs and devisees probated the will in the county of Christian, Ky., where David McCaleb owned some real estate which he devised by his will. Appellant, Johnson, appeared in the county court and undertook to resist the probating of the will. This court determined only that Johnson was not an heir, devisee, or a creditor of the testator, and had no such legal interest as entitled him to be made a party thereto, or to resist by a plea of limitation the relief sought by appellees. The court did not determine what would have been the result if the plea of limitation had been interposed by some one who was interested in the probating of the will, as defined in the *Davies* and other cases referred to. The case of *Morrison v. Fletcher*, supra, was one where the question at issue was not involved. Mary M. Morrison made a will which was probated in the state of Arkansas, the place of her domicile, which was afterwards probated in Hardin county, Ky., where she owned a house and lot. The issue arose between the heirs of Mary M. Morrison and Fletcher. In the action *Fletcher* averred that the will of Morrison was void and had no binding force in Kentucky, for the reason that more than 10 years had elapsed from the death of Mary M. Morrison before it was probated in the county of Hardin, Ky. This court determined in that case that the judgment of the county court admitting the will to probate could not be attacked in a collateral action or proceeding. It did not determine what would have been the result if some one interested had appeared in the county court and pleaded the statutes of limitations, or had appealed from the order of probate, within the time fixed by the statutes, and pleaded the statutes of limitations, as was done in this case. It is true that in the *Morrison-Fletcher* Case, aside from the question before the court therein, this court made reference to the *Johnson-Bard* Case, supra, and apparently misconstrued what was decided in that case. These are the only cases cited, which were decided by this court, and we have been unable to find any others, where this court has given an intimation on the question now being considered; that is, whether there is any statute of limitations in this state applicable to the probating of a will which had been previously duly probated in another state, the place of the domicile of the testator.

The will in this case was probated in the Hickman county court under section 4854, Ky. St. 1903, which is as follows: "When a will

of a nonresident relative to estate within this commonwealth has been proved without the same, an authenticated copy and the certificate of probate thereof may be offered for probate in this commonwealth. When such copy is so offered the court to which it is offered shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the state or county of the testator's domicile, and shall admit such copy to probate as a will of personalty in this commonwealth. And if it appears from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this commonwealth by the law thereof, such copy may be admitted to probate as a will of real estate." There is no provision in chapter 135, Ky. St. 1903, titled "Wills," nor in chapter 80, Ky. St. 1903, titled "Limitations of Actions," that in any terms fix the limit of time within which wills may be probated, whether the wills are made by residents of this or foreign states.

This court decided, in the *Allen-Froman* Case, that section 2522, Ky. St. 1903, which is as follows: "An action for relief not provided for in this or some other chapter, cannot only be commenced within ten years next after the cause of action accrued"—applied to the probating of wills made by persons domiciled in this state, and wills made by nonresidents when not probated in the state of the testator's residence. This case has been followed and approved by this court in the cases of *Reid's Adm'r v. Bengel*, 112 Ky. 810, 66 S. W. 997, 57 L. R. A. 253, 99 Am. St. Rep. 334, and *Cleveland Orphan Institution, etc., v. Helm, etc.*, 74 S. W. 274, 24 Ky. Law Rep. 2485. In the last case cited the court said: "We are of the opinion that the principles stated in the cases above referred to are sound and should be upheld, for the reason that the public have a great interest in having a known limit fixed by law for litigation for the quiet of the community, and that there may be a certain fixed period after which the possessor may know that his title and right cannot be called in question or harassed by stale demands after witnesses of the facts are dead." It is contended that section 2522, Ky. St. 1903, applies alone to actions for relief. It is true the word "action" only is used, but section 469, Ky. St. 1903, is as follows: "The term 'action,' when used in this revision, shall be construed to include all proceedings in any court of this commonwealth." And if the probating of a will is not an action, it is certainly a proceeding to obtain relief, for the devisees and remaindermen under the will of McIntosh could not be permitted to recover the land from appellee until the will of McIntosh had been probated in Kentucky. See section 4852, Ky. St. 1903.

The probation of the will of McIntosh in Tennessee had no legal effect whatever on

his lands in Kentucky. By the probaton of the will in Tennessee his property in that state was affected, and the title thereto fixed. His real estate in Kentucky could not be affected by the will, except by probating it here. See the cases of *Sneed v. Ewing*, 5 J. J. Marsh. 465, 22 Am. Dec. 41, and *Cornellison v. Browning*, 10 B. Mon. 425. In the last-named case the court said: "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which it can pass from one to another, and no title to land passes by will unless it is executed, proved, and registered conformable to the laws of the place where the property is situated." In this opinion it is expressly decided that no title passes to real estate in this state until and unless such will is executed or probated in this state according to our laws. We cannot see any reason why the statutes of limitations might be interposed to prevent the probating of a will of a person domiciled in this state or domiciled in another state, when the will has not been probated there, and not making it apply to the will of a nonresident when the will is recorded at the late domicile of the testator. The purpose of probating a will where the land is situated is to give notice of the title that the purchaser may not be imposed upon, and the necessity is just as great in the one case as the other. In the case at bar it appears that the will was made and recorded in Davidson county, Tenn., in the year 1859, and appellants made no attempt to have it probated in Hickman county, Ky., until the year 1907, or 48 years after it was executed. There was nothing placed on the record of Hickman county giving notice that appellants claimed any interest in the land. Our limitation laws are statutes of repose, and were made especially to meet such cases as the one at bar. It is a well-established policy of this state to fix in every case a limit of time for bringing actions or proceedings for relief. *Hoffert v. Miller*, 86 Ky. 572, 6 S. W. 447.

For these reasons the judgment of the lower court is affirmed.

NUNN v. PEAK et al.

(Court of Appeals of Kentucky. Nov. 17, 1908.)

1. TRUSTS (§ 203*) — SALES BY TRUSTEE — RIGHTS OF PURCHASER.

A purchaser of trust property who is not connected in any way with the trust, and who deals with the trustee at arms' length, in the absence of fraudulent collusion with the trustee, has a right to purchase as cheap as he can, unless the difference between the actual value and the price paid is so great as to raise the presumption of fraud.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 273-276; Dec. Dig. § 203.*]

2. CHAMPERTY AND MAINTENANCE (§ 7*) — SALE OF LAND HELD ADVERSELY.

Where a person living on and actually cultivating a farm held by a trustee under a will was in possession under the will which created the trust and invested the trustee with power to sell, his possession was not adverse to the trustee, but he was her tenant, and a sale of the land by the trustee under a power in the will was not champertous.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. § 82; Dec. Dig. § 7.*]

3. TRUSTS (§ 61*)—CONSTRUCTION—RIGHT OF BENEFICIARIES TO TERMINATE — ACTIVE TRUSTS.

Where a testator gave land to a trustee with the sole right to sell at any time she chose, the proceeds to be invested for or used for the benefit of testator's children, the trust was an active executory one, demanding the constant attention of the trustee and not a simple or dry trust, and, there being no time fixed for the ending of the trust during the trustee's life, it could not be limited or ended at the desire of the beneficiaries after coming of age.

[Ed. Note.—For other cases, see *Trusts*, Dec. Dig. § 61.*]

Appeal from Circuit Court, Metcalfe County.

"To be officially reported."

Action by Eugene Nunn against J. N. Peak and others, to vacate a deed by a trustee under a will. The amended petition was dismissed in part, and plaintiff appeals. Affirmed.

Allen Sandidge, Porter & Sandidge, and J. R. Beauchamp, for appellant. Baird & Richardson, for appellees.

BARKER, J. On the 27th day of July, 1901, James R. Nunn died at his residence in Metcalfe county, Ky., leaving a last will and testament which was duly probated by the county court. The will is as follows:

"Whereas, I, James R. Nunn, of Metcalfe county, Kentucky, do hereby make and constitute this my last will and testament, hereby revoking all former wills, which is in manner and form as follows, viz:

"First. I desire that after my death that my burial and funeral expenses be paid out of my personal estate or cash on hand.

"Second. I will and bequeath to my wife Esther Nunn the homestead tract that we now occupy, known as the Old J. W. Nunn Homestead Tract, and the same that was allotted to me in the division of my father's estate; also all other lands adjoining the homestead tract that I may own at my death, to use, occupy and control; also all my personal estate owned by me at my death shall be used and controlled by the said Esther Nunn as she sees fit so long as she remains my widow, and in the event she should marry again and cease to be my widow, then she is to vacate said homestead and give it up to my children to be used and occupied by them and for their use and benefit, and in the event she should marry again she shall retain out of the personal proper-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ty one horse and cow and a reasonable portion of the household property and turn the remainder over to my children to be used by them for their benefit.

"Third. I will and devise that all the balance of the real estate owned by me at my death be sold by my wife Esther Nunn at any time she may choose if she sees proper to do so by giving her the sole right to convey the same and also empower her to reinvest the proceeds of the sale of said lands in other lands adjoining the homestead now occupied by us, or to invest the proceeds in United States bonds, or deposit the same in bank, or to loan the same at interest that will be a safe investment for the benefit of my children, and shall not use the proceeds of the sale of said land in any way for any purpose except as above stated except what may be necessary to be used for the education and of the raising of the children, and in the event there is no sale made of the above mentioned land, my wife Esther Nunn is to have full power to control and rent the same publicly or privately as she may see fit until a sale is effected.

"It is further understood that the said Esther Nunn will have the power to sell a part of the whole of said lands or to sell each tract separately as she may see fit.

"Fourth. I will and desire that the Administrator of my father's estate, also the executor of my mother's estate, will also pay over to my said wife my entire interest that may be coming to me from her estate, both of said interests to be held by my wife, Esther Nunn, for the benefit of my children and the amount to be put at interest in some safe investment as my wife may see proper to do so.

"Fifth. And lastly I hereby appoint my wife, Esther Nunn, my sole Executrix of this my last will and testament, and that she be allowed to administer my estate under this will without being required to give bond.

"Given under my hand this the 2nd day of March, 1891.

"[Signed] James R. Nunn."

The land involved in this litigation is a part of the trust fund established by the third paragraph of the foregoing will. Just prior to the institution of this action in 1907 the trustee under the will, Mrs. Esther Nunn, sold the land in dispute to J. N. Peak for the sum of \$5,000, and executed and delivered to him a conveyance therefor. Thereupon the appellant, Eugene Nunn, instituted this action to vacate the deed by which the land was conveyed by the trustee to appellee Peak. In the petition, as amended, there are many things alleged with reference to the trustee's management of the trust fund which have no bearing upon the issues before us. Much of this consists of allegations of the mismanagement of the trust fund, as well as misapplication of it. The allegations with which appellee Peak is con-

cerned are, first, that the trustee sold him a farm for \$5,000, when in reality it was worth \$7,000; second, that the appellant who was one of the cestuis que trusten under the will, was in the possession of the farm, residing upon it as a home, and that prior to the conveyance he had informed Peak that he opposed the sale of the farm to him. These allegations we will notice in the order named. First, so much of them as tend to connect the appellee Peak with the fraudulent misapplication of the trust fund. This fraud is not charged upon him directly and we are of opinion that the language used in the petition does not charge him with any moral or legal turpitude whatever. There is no participation on the part of Peak in the wrongdoing of the trustee charged. Certainly the purchaser was under no obligation to give the seller more than he demanded for the thing to be bought. The trustee and the purchaser dealt at arm's length, unless there was some fraudulent conspiracy or collusion between them. Unless this be shown the sale must be upheld so far as this ground is concerned. Nor in this phase of the position of appellant aided by the fact that he alleges in his petition as amended, that Peak knew all of the facts set out against the trustee. Unless the purchaser was a participant in the wrongdoing, his knowledge of it in no wise affects his relation to the purchase of the farm. He had no duty connected with the trust, either to prevent its dissipation or to aid in it being made remunerative. So far as the petition shows, he came in contact with the trust fund merely as a proposed purchaser of a part of it. He had a right to buy as cheap as he could, unless the disproportion between the actual value and the price paid was so great as to raise the presumption of fraud, which does not occur in the case before us.

The other allegations of the petition with which the purchaser is concerned are those which seek to invoke the statute against champerty. We do not think the contention of appellant as to this ground for vacating the deed is sound. His was not an adverse possession to the trustee. On the contrary he held under the instrument which created the trust and invested the trustee with a her power with reference to the land. He was her tenant, and his possession was her possession. Therefore the statute against champertous sales has no application to that by the trustee under the power given by the will of J. R. Nunn, although the appellant was living upon the farm and actually cultivating it at the time. There is nothing alleged in the petition which is antagonistic to the idea that the appellant was holding the land and using and occupying it by the permission and consent of the trustee. The fact that the cestuis que trusten in the long interval elapsing between 1891 when the trust was created, and 1907, when

the trustee undertook to sell the land to Peak, have become of age, does not destroy or put an end to the trust. A mere reading of the will, which we have copied in this opinion, will show that the trust fund was created for the benefit of the children of the settlor; that his wife, who is the grandmother of appellant, was made trustee and given unlimited power to sell or rent the real estate of the trust; that there is no time fixed when the trust will end during the life of the trustee, and, as said before, the fact that the cestuis que trustent have become of age does not of itself end the trust established for their benefit. The settlor evidently had unlimited confidence in the trustee. He appointed her as his executrix without bond, and gave her unlimited power, as said before, to manage the trust for the benefit of her children and grandchildren. She therefore had power to sell the land in question to the appellee Peak, and her deed to him conveyed the fee-simple title thereto. The purchaser was not bound to look to the reinvestment of the purchase money; nor could the appellant limit his grandmother's power of sale by his opposition or refusal to consent to any sale she might see fit to make. The will of his grandfather will be scanned in vain for any grant to him of a veto power on his grandmother's discretion in reference to the sale of the trust property. The confidence of the settlor was in the trustee—not in the beneficiaries. They were to be provided for, and the mere fact of the establishment of the trust without limitation as to the time negatives the idea that the settlor had confidence in the judgment of the cestuis que trustent. This is not a simple or dry trust, which may be brought to an end upon the demand of the beneficiary; on the contrary, it is an active, executory trust, demanding the management and control and attention of the trustee constantly, and therefore it cannot be limited or ended by the desire of the beneficiary. *Carpenter v. Carpenter's Trustee*, 119 Ky. 582, 84 S. W. 737, 68 L. R. A. 637, 115 Am. St. Rep. 275. The long time elapsing since the creation of the trust does not weaken or limit the power of the trustee to sell the trust property whenever, in her wisdom, it is for the benefit of the beneficiaries so to do. *Jones v. Breed's Ex'x*, 13 S. W. 366, 11 Ky. Law Rep. 896. Of course, we do not mean to be understood as holding that the trustee may fraudulently waste or dissipate the trust fund. She is accountable to the cestuis que trustent for the faithful performance of her duty under her husband's will. All of the appellant's complaint which looks in this direction is still in the court below, and can be tried out there. The circuit judge only dismissed the petition as amended in so far as it affected the purchase by Peak.

While the suit brought by appellant was

pending, the purchaser, Peak, instituted an action in ejectment against him, claiming title to, and right of possession of, the farm, and alleging that appellant was wrongfully withholding it from him. As Peak only claimed title through the deed from the trustee to him, the issue arising in his suit of necessity must be tried out in this. This was evidently the opinion of all the parties to the two suits, as they were consolidated by an agreed order, and the court seems to have so treated them thereafter. It is therefore not necessary to speak further of the action in ejectment. The rights of the appellant here were settled by the demurrer to his petition as amended, and in our opinion settled correctly.

Therefore the judgment is affirmed.

CINCINNATI, N. O. & T. P. RY. CO. et al.
v. RAINE.

(Court of Appeals of Kentucky. Nov. 18, 1908.)

1. CARRIERS (§ 271*) — TRANSPORTATION OF PASSENGERS—DESTINATION OF CARRIAGE—CARRIER'S DUTY—PERFORMANCE.

When a carrier's servants know that a passenger is in the wrong car, and that he must go into another car to reach his destination, they may simply tell him what to do, and ordinarily leave him to follow their directions.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 271.*]

2. CARRIERS (§ 414*) — TRANSPORTATION OF PASSENGERS—SLEEPING CAR COMPANIES.

Where a passenger had ordered reservation in a sleeping car which was to be attached to the train at a junction and was permitted to sit in another sleeper until the junction was reached, she was not a passenger of the sleeping car company while so doing, and it was not responsible for the failure of its conductor to see that she got into the correct sleeper.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 414.*]

3. CARRIERS (§ 271*) — TRANSPORTATION OF PASSENGERS—DESIGNATION OF VEHICLE.

Plaintiff, having purchased a ticket over three railroads to Atlanta, ordered reservation in a sleeping car which she expected would be on the train she boarded. She was informed by the Pullman conductor in the train conductor's presence that that car would be incorporated into the train at a junction point, and was permitted to remain in the sleeper where she was then located until the junction was reached. After the train had left the junction point, she was informed that the Atlanta sleeper had been placed in a prior section of the train, and she was compelled to return to the point from which she started. *Held*, that the Pullman conductor in failing to transfer plaintiff, and in permitting her to ride in the wrong car, acted as the agent of the railroad company over whose line the train was operated to the junction point, and that it alone was liable for the damages sustained.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 271.*]

4. CARRIERS (§ 277*)—INJURY TO PASSENGERS.

When a passenger was required to alight at night at an intermediate station because she had not been placed on the right train, she appeared to be in good health. She went to a hotel, took

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a room, and, after a while, ordered a fire, remaining there without sleep all night, when she returned to the place from whence she started. She contracted a violent cold which seriously affected her. *Held*, that such physical condition was not the proximate result of the carrier's default, and that her measure of damages was the expense incurred and the value of the time lost by the delay.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1082; Dec. Dig. § 277.*]

Appeal from Circuit Court, Boyle County.
"To be officially reported."

Action by Minnie Raine against the Cincinnati, New Orleans & Texas Pacific Railway Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

C. R. McDowell and Humphrey & Humphrey, for appellant Southern Ry. in Kentucky. C. H. Rodes, C. R. McDowell, and Kohn, Baird, Sloss & Kohn, for appellant Pullman Co. John Galvin and C. H. Rodes, for appellant Cincinnati, N. O. & T. P. Ry. Co. Robt. Harding, J. F. Vanarsdall, E. M. Hardin, and E. V. Puryear, for appellee.

HOBSON, J. Mrs. Minnie Raine lived in Atlanta, Ga. Her father lived at Harrodsburg, Ky., and she made trips about three times a year from her home to her father's. In January, 1906, she was at her father's and desired to go home on Sunday, January 7th. That morning her father called up the station agent of the Southern Railway in Kentucky at Harrodsburg by telephone, and told him that he wanted a reservation for his daughter in the sleeper for Atlanta on the train that night. The agent said he would wire Louisville and get it. That afternoon he called up the station agent, and was told by some one at the station that the reservation had been secured. The train from Louisville reached Harrodsburg about 10:35 p. m. Mrs. Raine bought a through railroad ticket to Atlanta, and with this got on the train at the day coach. She passed back, walking through two sleepers, where she found the sleeping car conductor. She asked him for the Atlanta sleeper, saying that she had a reservation in there. He told her there was no Atlanta sleeper on the train, but that there would be an Atlanta sleeper which would come from Cincinnati on the train which they would meet at Danville. Danville is 10 miles from Harrodsburg. The Southern train runs from Louisville to Danville, and there connects with the train running from Cincinnati to Atlanta. While she was talking to the Pullman conductor, the passenger conductor also came in. They told her there was a Chattanooga sleeper on that train, and she could go into it and get a reservation at once, advising her to do so as the other train was frequently late, and she might have to sit up some time if she waited for the Atlanta sleeper. She had her little boy, about

six years old, with her, and, when she learned that she would have to get up about 6 o'clock in the morning if she did this, she decided not to take the Chattanooga sleeper. They then advised her to sit in the Chattanooga sleeper until she got to Danville, telling her that, when they reached Danville, that sleeper would be put next to the Atlanta sleeper, and she would only have to walk from one car to the other, while the Knoxville sleeper, in which she was then, would be put at some distance from the Chattanooga sleeper. She said that she would stay in the Knoxville sleeper with some friends, and they agreed for her to do so. When they reached Danville, the train from Cincinnati was forty minutes late. When she saw it come in, she went to the Pullman conductor, and asked him if he would not go and get her reservation for her. He answered that he was not allowed to leave his sleeper while it was standing at the station; that, as soon as they were out of Danville, he would see about it; that there would be plenty of time. When her car was attached to the other train, she again made the same request of him, and he made in effect the same answer. When the train pulled out of Danville, she and the Pullman conductor went forward and learned there was no Atlanta sleeper on that train; that the Cincinnati train had on that night been divided into two sections, the Atlanta sleeper being in the first section, and the Knoxville sleeper, in which she had been sitting, having been put in the second section. The first section was 10 miles ahead of them. She then said to the Pullman conductor: "Now, see what you have done by not attending to my reservation in Danville." He said: "Madam, I am not to blame. My clothes are on that section too." The train had only been running to Danville a month, and this Pullman conductor had never known the Cincinnati train before to run in two sections, although it happened from time to time when travel was heavy. The Chattanooga sleeper had been put in the first section, and if Mrs. Raine had taken a seat in that sleeper, instead of staying with her friends, there would have been no trouble. The section which she was in went to Knoxville. She talked the matter over with the conductor of the train. He told her that he would wire to Somerset, which was about 50 miles below, and ask that the first section be held there for her. At the next stop, at Junction City, he held his train 10 minutes and did wire to Somerset, but was unable to get an answer. When he was unable to get an answer, he came in and told Mrs. Raine the facts, and they then consulted as to what she had better do. The Pullman conductor had in his pockets the tickets of all the passengers in the Chattanooga sleeper. The Knoxville train would turn off from the main line at Oakdale, a sta-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion about half way between Somerset and Chattanooga. Mrs. Raine did not want to sit up all night, and finally concluded that she would get off there and go back to Harrodsburg, and wait there for the next train. The conductor she says advised her to do this. The conductor says she proposed it; but, however this may be, she got off voluntarily at the station, and went over to a hotel about 66 feet from the station. It was then about 1 o'clock in the morning. She was assigned to a room by the clerk, but declined at first to have a fire made. Afterwards she had a fire made, but did not go to bed. At 4 o'clock she took the train for Harrodsburg, and went back to her father's, and that evening took the train for Atlanta, and went through without trouble. But she had taken a violent cold, and this cold produced a very bad nervous condition approaching hysteria. The bad nervous condition may have been due also in part to the excitement incident to her leaving the train and sitting up all night. After she got home, she was sick for two months, and at the trial, a year or more later, her health was still infirm. She brought this suit to recover damages against the Pullman Car Company, the Southern Railway in Kentucky, and the Cincinnati, New Orleans & Texas Pacific Railway Company. On a trial of the case a judgment was rendered in her favor against all the defendants for the sum of \$4,000, and they appeal.

The only questions we deem it necessary to consider on the appeal are, first, should the jury have been instructed peremptorily to find for the defendants; second, if not, what is the proper measure of damages?

1. When Mrs. Raine came upon the sleeper, she had nothing but a railroad ticket. She had no sleeping car ticket, and she had nothing to show that she had any reservation in any sleeper. She remained in the Knoxville sleeper entirely by the courtesy of the conductor. She paid nothing for her seat in that sleeper, and it is evident that he allowed her to remain because she had her little boy with her, and she decided to stay there and talk to her friends until she got to Danville. When the servants of a carrier know that a passenger is in the wrong car and that he must go into another car, they may simply tell him what to do, and ordinarily leave him to follow their directions; but, when they tell him to keep his seat, and that they will at the proper time transfer him to the other car, and fail to do so, the company which they represent is liable. Mrs. Raine was not a passenger of the Pullman Car Company, for she had not been received as a passenger. She had simply been allowed to sit in the sleeper with her friends, and the Pullman Car Company is not answerable to her because its conductor failed to get her in the right car; for he did not represent the company as to the Atlanta sleeper and she had made no contract with the Pullman Car Company, and it owed her

no duty. But, while this is so, the Pullman conductor in dealing with Mrs. Raine, who had a railroad ticket, was discharging a duty which the railroad company owed her. The train conductor was with him, and assented to what the Pullman conductor said. In undertaking to transfer Mrs. Raine at Danville to the proper sleeper, and in telling her that she might remain in the Knoxville sleeper until he so transferred her, the Pullman conductor was discharging a duty which devolved upon the Southern Railroad Company. While he might have told Mrs. Raine what to do and left her to follow his directions, a very different state of case is presented when he told her that he would transfer her to the other sleeper, and for her to sit where she was, that there was plenty of time, and he would attend to it. The passenger conductor was present when the arrangement was made, and he left her in the care of the Pullman conductor. It was incumbent on these men under the circumstances to see that the lady was transferred to the proper train. The servants of a carrier cannot mislead a passenger, to his prejudice. It is proper that a passenger should obey the instructions which he receives from them; and when they tell a passenger to keep his seat, and they will at the proper time transfer him, he has the right to trust implicitly their directions. If Mrs. Raine had not been told to keep her seat, that there was plenty of time, she might have protected herself from the consequences that followed.

We therefore conclude that the jury should have been instructed peremptorily to find for the Pullman Car Company, but that the motion for a peremptory instruction as to the Southern Railway in Kentucky was properly refused. It remains to consider whether any liability was shown on the part of the Cincinnati, New Orleans & Texas Pacific Railway Company. Mrs. Raine did not see the conductor of this train until after it had pulled out of Danville. He did not take up her ticket, and evidently did all in his power to rectify the mistake that had occurred, for which he was in no wise responsible. She had remained in the Knoxville sleeper with the consent of the conductor of the Southern Railway, and she had come into the custody of the second line when that sleeper was attached to its train. Junction City was a proper place for her to alight, and, as said, she got off there voluntarily. We therefore conclude that there was no liability on the part of the second line; for it had perfect right to run its train in two sections and to attach the sleepers which came to it from the other line to that section, which best suited its convenience. It had no notice of Mrs. Raine's situation until she saw the conductor after the train pulled out from Danville.

2. It remains to consider what is the measure of damages as against the Southern

Railway Company. Mrs. Raine by its negligence missed her train, and was delayed 24 hours in returning home. In *Illinois Central R. R. Co. v. Head*, 119 Ky. 812, 84 S. W. 752, this court said: "The evidence presents simply a case where the railroad company agreed to furnish transportation, and failed to do so promptly, if Rupert Head was not guilty of contributory negligence in going to the wrong place for his ticket, and of this the jury must judge. But, if the railroad company was negligent in furnishing the transportation, the measures of damages is simply a reasonable compensation for the time lost by Rupert Head and any expenses he incurred by reason thereof." Mrs. Raine testifies that nobody was on the platform when she got off and that she made her way to the hotel alone, but she did not request the conductor to go with her or to furnish anybody to accompany her, or make any objection to his leaving her. The hotel was near by, and it is evident that she went directly to it. The trouble with her was not that she did not go to the hotel without difficulty, but that after she got there she went into a cold room, and stayed there for some time without a fire. Her nervousness was perhaps largely due to the fact that she remained up all night. But neither one of these things was the proximate result of the negligence of the Southern Railway in Kentucky in failing to transfer her to her train. She no doubt acted as she did without realizing the danger; but her remaining in the cold room was not due to the act of the railroad company, and all of the consequences which followed would seem to be due primarily to the violent cold which she took afterwards settling upon her stomach and impairing her digestion. A passenger who, by the negligence of a railroad company, fails to make a connection, cannot hold the railroad company responsible for consequences which a person of ordinary prudence might not reasonably anticipate as the result. A person of ordinary prudence might reasonably anticipate that one who missed his connection would have to pay a hotel bill and would have to wait until the next train, but, a well-regulated hotel being right at hand, other consequences such as these proved here should not be anticipated. Under all the circumstances, we conclude that the proper measure of damages is such expense as Mrs. Raine incurred and the value of the time which she lost by reason of her not being transferred to the Atlanta sleeper. The rule for the measure of damages in such cases is the same for both men and women; and, if this had been a man, manifestly no other damages would be allowed. There was nothing in Mrs. Raine's condition or appearance to show that she was not capable of taking care of herself, or to apprise a person of ordinary prudence that it was not safe

to leave her at Junction City within a few feet of a well-regulated hotel. No recovery can be had for vexation or personal inconvenience by reason of the delay. *Robinson v. Western Union Telegraph Co.*, 68 S. W. 24 Ky. Law Rep. 452, 57 L. R. A. 611. Mrs. Raine was treated with courtesy and kindness by all the conductors. The mistake was due to a misapprehension, the Pullman conductor not being allowed to leave his car and the railroad conductor assuming that the Pullman conductor would get her to the proper sleeper at Danville. The mistake would not have occurred had the Cincinnati train run in one section as it usually did, if the Pullman conductor had known it was liable to run in two sections. There is no rule in the case to take it out of the general rule as to the measure of damages for delay on a journey.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

STARK v. KELLEY et al.

(Court of Appeals of Kentucky. Nov. 18, 1907.)

1. GIFTS (§ 18*)—"GIFTS INTER VIVOS"—ESSENTIALS.

To constitute a gift inter vivos, the property must be delivered absolutely, and the donor must give up immediate effect, and, while the donor retains control over the property remains in the donor until his death, there is no valid gift inter vivos (citing 4 Words and Phrases, p. 374).

[Ed. Note.—For other cases, see Gifts, Causa Mortis, Dig. § 31; Dec. Dig. § 18.*]

2. GIFTS (§ 53*)—"GIFTS CAUSA MORTIS"—ESSENTIALS.

A gift causa mortis exists where property is given in the donor's last sickness or in imminent peril, and takes effect only on the death through the disorder or peril, and is revocable during his life.

[Ed. Note.—For other cases, see Gifts, Causa Mortis, Dig. § 104; Dec. Dig. § 53.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3087-3091; vol. 8, p. 7670.]

3. GIFTS (§ 64*)—GIFTS CAUSA MORTIS—TRANSACTION NOT CONSTITUTING.

That several months before dying decedent gave notes to defendant excludes the idea of gift causa mortis.

[Ed. Note.—For other cases, see Gifts, Causa Mortis, Dig. §§ 139, 143; Dec. Dig. § 64.*]

4. GIFTS (§ 49*)—GIFTS INTER VIVOS—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to show a gift of notes inter vivos.

[Ed. Note.—For other cases, see Gifts, Causa Mortis, Dig. §§ 95-100; Dec. Dig. § 49.*]

Appeal from Circuit Court, Warren County. "To be officially reported."

Action by C. W. Kelley and others against J. W. Stark. From a judgment for plaintiff defendant appeals. Affirmed.

Wright & McElroy and Lindsay & Edelen for appellant. Sims, Du Bose & Rodes and Jno. B. Grider, for appellees.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

HOBSON, J. J. C. Kelley died testate in December, 1906, a resident of Warren county. His will was duly admitted to probate, and J. W. Stark, the executor named in the will, qualified. Stark claimed that the testator had given him in his lifetime \$8,000 worth of notes, and these notes he did not list in the appraisement of the estate. This suit was brought by the devisees seeking to charge him with the notes. The chancellor entered judgment in their favor, and Stark appeals.

The testator was a bachelor 78 years old at his death. He had no own brothers and sisters, but four half-brothers and a sister, the children of his father by a second marriage. By his will, which he made in the year 1892, he devised his whole estate to these brothers and the sister. He had at his death an estate consisting of land worth about \$10,000, and notes and personal property, including the \$8,000 in controversy, amounting to \$10,000 or \$11,000.

The proof for Stark is briefly as follows: D. W. Wright, who was his attorney and had written his will, testified that in February or March, 1906, Kelley was talking to him about his estate, and asked him whether he could make a gift of his notes, and whether the delivery of his notes to a person he wanted to have them would be good. Wright told him that it would be. Dr. A. C. Wright, who was his physician and old friend, testified that in March, 1906, he received a message through J. W. Stark that Kelley wanted to see him; and he and Stark went to Kelley's house in a buggy. After they had taken dinner, Kelley went to his desk, got his pocket-book, sat down between them, and commenced taking out some notes, and handing them to Stark to read and approximate the interest. Stark would take up a note and examine it, and Kelley would take another. They kept on in that way until the notes in the pocket-book were exhausted. Mr. Stark then said: "All right, Jim, I will take care of them and put them in the bank; and, when you are ready for them, they will be forthcoming." Kelley replied: "No; they are yours. I don't want them. I don't want to have anything more to do with them. They are yours absolutely. I sent for you for that, and they are yours." All the notes claimed by Stark were not handed to him in March at the time referred to by Dr. Wright, but Dr. Wright testified that he and Stark were there in May, that at the visit in March, Kelley said there were some other notes which he would hunt up and hand over to him, and that, when they were there in May, Kelley handed Stark some notes saying: "Here are those notes." Dr. Wright also testified that Kelley gave Stark his bank passbook at the time he gave him these notes. J. E. Potter testified that Stark was a first cousin of Kelley, and that they were very close and intimate friends, and had been for years, and so did several other witnesses, who also testified that Kelley spoke of John Stark and his father being the best

friends that he ever had; that when he had nothing they helped him; that he had about paid them back now, but would remember them for their kindness. The kindness consisted in their lending him money without security when he had been forced into bankruptcy, by means of which he had accumulated the property he then had. W. D. Hays, who had given some notes to Kelley, testified that Kelley said to him shortly before his death that he need not be uneasy about the notes; that he had given them to Stark, the person who had done more for him than anybody else; and that, if he needed any more money, Mr. Stark might let him have it. Robert Bunch, who lived on the place with Kelley, testified that he heard Kelley say that he had given his notes to Mr. Stark; but, on cross-examination, this witness leaves it uncertain whether the notes were given for collection or as a gift.

The proof for the devisee is briefly as follows: On May 29th Stark's son borrowed of Kelley \$3,000, and J. W. Stark signed the note as his surety. This \$3,000 was checked out of bank by J. C. Kelley. The note was payable 12 months after date, and is one of the notes now claimed by Stark. On August 20, 1906, Stark collected from E. D. Thomas the amount of one of the notes handed to him by Kelley, and made this indorsement on it: "Paid to me for J. C. Kelley and deposited to his credit." He made a similar indorsement on the same day upon a note executed by Crit Smith. Another of the notes claimed by Stark is one for \$1,400, dated February 29, 1904, given by his son with Stark as surety. On the back of this note is this indorsement: "Paid in check \$84.60 this March 26, 1906." On June 6, 1906, Stark collected on one of the notes handed to him \$219.50 in a check which he wrote himself, and which was made payable to J. C. Kelley. Another note included in those handed to him when Dr. Wright was present was collected by Stark the following summer, and the money was handed by him to Kelley, who in his presence paid it over to Dr. Wright on his doctor's bill. The other sums collected by Stark on the notes were all deposited to Kelley's account in the bank, and Kelley continued to draw checks upon the account as long as he lived, leaving a moderate balance to his credit at his death. When Stark did not include these notes in his appraisement, there was a hearing before the county court, and on that hearing Stark was asked to explain why, if these notes had been given to him, he deposited all the money he collected on them to Kelley's credit, and Kelley checked it out of the bank. His answer was in these words: "It was done because I understood the gift from other conversations that had occurred between Kelley and me to be complete at his death. I construed it that way myself." A negro man named John Lelley and his two sisters were old family servants. J. C. Kelley, shortly before his death, wished to make them a pres-

ent of \$500 each. He gave them a check for \$500, and gave a note for \$1,000 due December 1st, which Stark signed as his surety. After this had been done, John Kelley wanted to sell J. C. Kelley a piece of land for \$200, and the latter said that he did not have any more money in bank. Stark then said: "Buy it, Jim; and Willie will advance that much, \$200, on what he owes you." J. C. Kelley then said that he would take the land, and instructed John Kelley to have the deed made. On another occasion a neighbor who wanted to pay a note went over to pay it. Kelley said that Stark had his note, and that he would get it. In a day or two the neighbor came back. Kelley had the note, collected the money, and used it.

We have no doubt of the truthfulness of Dr. Wright's testimony, and we are satisfied that every fact he states occurred as he states it. We are also satisfied that J. C. Kelley intended that Stark should have the notes or so much of them as were left at his death; but the evidence leaves no room for doubt that Kelley actually controlled the funds as long as he lived. While what occurred in Dr. Wright's presence would be sufficient to show a gift if it stood alone, that conversation must be taken in connection with other conversations between the two parties and their subsequent conduct when we come to determine its legal effect. While it would seem that Kelley was willing to give this property to Stark, Stark did not accept the gift, but held the notes for Kelley, acting no doubt upon what he considered to be his old friend's real purpose. In other words, he did not consider that Kelley meant to strip himself then of a large part of his estate, but he understood that he meant that he was to have this property when Kelley died; and this is manifestly shown by Kelley's subsequent conduct. It is evident that the \$1,000 that was given to the two old servants, as well as the \$200 to be paid for the land, was to come out of the \$3,000 note which Stark's son had executed with his father as surety.

To constitute a gift *inter vivos*, the property must be delivered absolutely, and the gift must go into immediate effect. Where future control over the property remains in the donor until his death, there is no valid gift *inter vivos*. 20 Cyc. 1211; 14 Am. & Eng. Encyc. of Law, 1015; 4 Words and Phrases, 3092. In *Duncan v. Duncan*, 5 Litt. 12, this court said: "It is perfectly clear that the court below was mistaken in supposing that the transaction in this case amounted to a valid gift *inter vivos*. To the validity of such a gift it is essential that there should be a delivery to the donee, and that the property of the thing given should immediately pass and be irrevocable by the donor." In *Knott's Adm'r v. Hogan*, 4 Metc. 100, the court again said: "In relation to the various requisites of a valid gift, a vast amount of obstruse learning is to be found

in the decisions of the courts, English and American, upon this subject. And, conflicting as those opinions are upon most other points, it seems to be agreed, on all hands, that it is essential to every gift of this class that it should be irrevocable by the donor."

But it is insisted that the gift may be sustained as a gift *causa mortis*. A gift *causa mortis* exists where property is given by the donor in his last sickness, or in other imminent peril. It takes effect only in the event of his death by the existing disorder or peril. The answer in this case does not plead any facts to show a gift *causa mortis*. In a gift *causa mortis* the gift becomes absolute at the death of the donor, and not before. It is revocable by him at any time during life. The answer alleges simply that the decedent several months prior to his death gave the notes to the defendant, and then and there delivered them into his hands as an absolute gift which he then and there accepted. The allegations of the pleading exclude the idea of a gift *causa mortis*. Not only so, but the proof is insufficient to show a gift *causa mortis*. When Dr. Wright and Stark were there in March, Kelley was up and going about the house. He had no physician. He did not need Dr. Wright as a physician. His mind was as clear as a bell. In April he had an attack of pneumonia, but after he recovered from that in May he went off to the springs, and during the summer and fall after his return from the springs he attended to his business as usual. In the case of *Duncan v. Duncan* above referred to the court, after showing that the transaction then before the court could not be sustained as a gift *causa mortis*, said: "The transaction has, however, a still greater analogy to a nuncupative will than it has to either a gift *inter vivos* or a donatio *mortis causa*. It was undoubtedly the intention of the intestate that the property of the bonds in question should at his death be vested in the defendants, and this intention seems never to have been revoked in his lifetime. As a nuncupative will, the transaction might, therefore, have taken effect, we apprehend according to the principles of the common law. But, by the statute of this country concerning wills, certain requisites are made essential to the validity of a nuncupative will, no one of which has been complied with in this instance, and the transaction, as a nuncupative will, is therefore void." We think that this applies equally to the case before us. The testator did not relinquish control over the property in his lifetime. He made a verbal arrangement which was intended to take effect at his death, and to sustain such a transaction would be practically to enforce a nuncupative will.

The conclusion we have reached on the merits of the controversy makes it unnecessary for us to consider what notes were handed by the testator to Stark, or to pass on the question whether Dr. Wright's testi-

mony, taken as a whole, is sufficient to show that all the notes in controversy were handed to Stark by the testator. The testimony on Stark's behalf would warrant a judgment in his favor, but for his own frank admission that he held the notes for the testator because of other conversations between them when Dr. Wright was not present.

Judgment affirmed.

MOREHEAD v. CITIZENS' DEPOSIT BANK.

(Court of Appeals of Kentucky. Nov. 17, 1908.)

1. EVIDENCE (§ 423*)—PAROL EVIDENCE—PARTIES TO NOTE—NATURE OF LIABILITY.

In determining whether one occupied the relation of surety on a note, the court may, as between the original parties, consider parol testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1864; Dec. Dig. § 423.*]

2. BILLS AND NOTES (§ 519*)—LIABILITIES OF PARTIES—SURETY—EVIDENCE.

Evidence held to show that one was a surety on a note.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 519.*]

3. BILLS AND NOTES (§ 122*) — ACCOMMODATION PAPER—LIABILITY OF MAKER.

As between himself and the party accommodated, the maker of accommodation paper is a surety, and his right to recourse against the party accommodated is that of a surety against his principal, and as to other holders of the paper his liability is in general that of a similar party, maker, acceptor, or indorser, who receives value, but he is so far a surety, as to holders with notice of his accommodation character, that he is discharged by arrangements made to his prejudice with the principal debtor without his knowledge.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 255, 259; Dec. Dig. § 122.*]

4. BILLS AND NOTES (§ 122*) — ACCOMMODATION PAPER—LIABILITY OF MAKER.

A person who executed a collateral note simply as accommodation paper, with a distinct understanding with the payee that he was a surety only for a third person executing a note to the payee, is released under circumstances that will release any other surety.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 122.*]

5. PLEDGES (§ 25*)—ACCOMMODATION PAPER—LIABILITY OF MAKER.

The general doctrine is that the renewal of a note secured by collateral security does not release the collateral.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 60; Dec. Dig. § 25; Bills and Notes, Cent. Dig. § 357.]

6. PRINCIPAL AND SURETY (§ 105*)—ACCOMMODATION PAPER—LIABILITY OF MAKER.

A payee who accepts from the maker a renewal note in consideration of the payment of interest in advance cannot sue the maker until the maturity of the renewal note, and a surety of the maker, having no knowledge of the renewal note, is therefore released from liability, especially where the maker at the time of the renewal was solvent and has since become a bankrupt.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 191; Dec. Dig. § 105.*]

7. PRINCIPAL AND SURETY (§ 129*)—LIABILITY OF SURETY—ESTOPPEL.

Evidence held not to estop the surety on a note from relying on his release from liability because of the payee's acceptance from the maker of a renewal note in consideration of the payment of interest in advance.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 129.*]

8. PRINCIPAL AND SURETY (§ 129*) — LIABILITY OF SURETY—ESTOPPEL.

The fact that an attorney of a surety on a note offered to pay the note under the mistaken belief that the surety was liable, when, as a matter of fact, he had been released, did not estop the surety from defending on the ground that he had been released.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 129.*]

Appeal from Circuit Court, McLean County.

"To be officially reported."

Action by the Citizens' Deposit Bank against J. T. Morehead. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Wm. B. Noe and J. W. Boston, for appellant. Ben D. Ringo and Joe H. Miller, for appellee.

CLAY, C. J. W. Morehead, a son of appellant, was indebted to the Citizens' Deposit Bank in the sum of \$750. The bank agreed that, if he would execute a note for this sum and secure the note by proper collateral, he could have further time within which to pay his debt. He then went to his father, J. T. Morehead, and brought him to the bank. There the president of the bank explained to him that it was necessary to have a surety for the note executed by his son, and appellant, after some hesitation, acquiesced in the arrangement. For the purpose of carrying out the arrangement, he executed a note payable one day after date for the sum of \$750 to J. T. Morehead Company, the firm name under which J. W. Morehead was doing business. This note was then indorsed by J. W. Morehead for the firm, and delivered to the bank. The note of J. W. Morehead was not paid at maturity, but was renewed some three or four times thereafter, and the interest paid thereon. After all these renewals were made, and after the expiration of about two years and a half, the bank sued J. T. Morehead on the collateral note held by it. He defended on the ground that he was in effect a surety for his son, J. W. Morehead, on the original note of \$750 executed by him to the bank; that after J. W. Morehead's note became due it was renewed three or four times, and the interest paid thereon; that this was done without his knowledge or consent; that such renewals operated to his prejudice, and served to release him from his liability as surety. The court rendered judgment for plaintiff below, and the defendant appeals.

The first question is: Did J. T. Morehead

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

occupy the relation of surety on the note of J. W. Morehead? For the purpose of determining this question, we are not confined solely to the instrument executed, but may consider parol evidence. 1 Am. & Eng. Ency. of Law (2d Ed.) p. 343. According to the testimony of appellant, he signed the note as collateral security for the note executed by his son. The president of the Citizens' Deposit Bank testified as follows: "J. W. Morehead at that time was indebted to the bank in the sum of \$750, which amount was then due. I requested of him that said note or debt herein be paid or secured in some manner; if he desired to get any extension of time on it, it must be secured. Some time after I had informed him of that fact he and his father came to the bank—it was not in my office—and he proposed the execution of this note at that time by his father, J. T. Morehead, to be given as collateral security to be executed by his father, J. T. Morehead, to him, and which note he assigned to the bank as collateral security, at the same time executing his note with which this was filed as collateral security for \$750, and he was given four months' time from that date by the execution of those notes. Q. What conversation did you have with Mr. J. T. Morehead at that time about this transaction? A. They came in, and it is a fact that when the nature of the case was stated that we required a surety for the execution of this note Mr. J. T. Morehead did have some hesitancy in signing the note, and eventually he said he would sign it as it was his boy, and he wanted to help him out, and he was willing to do that much for him." It is manifest from the foregoing that J. T. Morehead regarded himself in the light of a surety upon the \$750 note of his son, and that the president of the bank regarded him in the same light and accepted the collateral note with full knowledge of the relation which J. T. Morehead sustained to the note of his son. We think the rule is now well established that, as between himself and the party accommodated, the accommodation party is in effect a surety, and his right to recourse against the party accommodated is that of a surety against the principal debtor. As to other holders of the paper, his liability is in general that of a similar party (maker, acceptor, or indorser) who receives value, but he is so far a surety as to holders with notice of his accommodation character that he will be discharged by arrangements made to his prejudice with the principal debtor without his knowledge. 7 Cyc. 725; *Guild v. Butler*, 127 Mass. 386; *Price County Bank v. McKenzie*, 91 Wis. 658, 65 N. W. 507. Applying this principle to the case under consideration, we find that the collateral note was simply an accommodation paper; that it was executed with the distinct understanding with the bank that J. T. Morehead was in effect a surety on the \$750 note executed by his son to the bank. This arrange-

ment was effected, not only with the knowledge of the bank, but by agreement with

Counsel for appellee insist, however, that the rule is that the renewal of a note secured by collateral security does not have the effect to release any of the collateral pledged to secure it. There can be no doubt that this is the general doctrine and is recognized in this court in *Bank of America v. McNeill*, 10 Bush, 54, and *Koehler v. Hussey*, 57 S. W. 241, 22 Ky. Law Rep. 317; but the facts in those cases bear no similarity to the case under consideration. The note in this case was not merely collateral deposited to secure the payment of a debt from J. W. Morehead to the bank, but was a note executed and by virtue of an arrangement with the bank whereby it was agreed that J. T. Morehead was a surety upon the note of his son. We therefore conclude that he should be released under the same circumstances and conditions that any other surety should be released.

The record in this case shows that the original note was renewed some three or four times. The last renewal which is filed with the petition in this case, is for the sum of only \$750, with interest from the date of maturity. This indicates, not only that the interest on the note was paid, but that it was paid in advance. The acceptance of the interest thus paid was sufficient consideration for the renewal of the note. By accepting the new note under such circumstances, the bank put it out of its power to sue the principal debtor until the renewed note became due. This was true in the case of each of the renewals. Therefore, during each period of renewal, appellant could not have paid off the indebtedness of his son and taken steps to protect himself. We therefore conclude that he was prejudiced by the renewals made without his knowledge or consent, and that such action on the part of the bank released him from liability on the collateral note sued on in this action. *Stegman v. Jackson*, Sr., 102 S. W. 329, 31 Ky. Law Rep. 434; *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *Perley v. Loney*, 17 U. C. Q. B. 279; *Alley v. Hopkins*, 98 Ky. 668, 34 S. W. 13, 56 Am. St. Rep. 382. Especially should we hold this in view of the further fact that there is proof tending to show that J. W. Morehead was solvent at the time of the first renewal, and appellant might, if the bank had not made such renewals, take steps to protect himself.

But appellee insists that a note, amounting to \$1,000, was filed against the estate of J. W. Morehead, who was adjudged a bankrupt, in favor of appellant, and that a note of \$200 was also filed in favor of his attorney, which notes were filed for the purpose of securing appellant in the payment of the collateral note of \$750 sued on in this action; that such action was a recognition by appellant of his liability to appellee, and constitutes an act of estoppel. Appellant an-

his son both swear that the latter was indebted to the former in the sum of \$1,200 to \$1,400. Opposed to this testimony is that of certain statements made by the son to the effect that he owed his father nothing. There is also the circumstance that, when appellant's attorney collected appellant's pro rata on the notes filed in the bankruptcy proceedings, he went to the bank and deposited the proceeds with it, to be applied on the note of \$750. A few minutes thereafter, however, he returned to the bank and agreed to pay the money on the note of \$750 executed by appellant, provided the bank would release appellant from further liability thereon. He claims that he reconsidered his action because he realized the fact that, in paying the money absolutely in the first instance, he was acting without authority. We do not think these facts are sufficient to estop appellant from setting up the defense made to the note sued on. The preponderance of evidence is to the effect that the son did owe the father. Even if appellant's attorney, under the mistaken belief that he was still liable as surety, had offered to make a payment on the note, this fact alone would not estop him from defending on the ground that he had been released, when, as a matter of fact, he had been released. *Brandt on Suretyship*, § 160; *Robinson v. Offutt*, etc., 7 T. B. Mon. 540.

Being of the opinion that the collateral note sued on is simply accommodation paper, that it was accepted by the bank with the full knowledge and understanding that appellant was a mere surety on the note executed by his son, that the bank, without the knowledge or consent of appellant and for a valuable consideration, renewed the son's note on three or four occasions, and that appellee has shown no facts which would estop appellant from setting up the defense relied on, we therefore conclude that appellant has been released from all liability.

The judgment is reversed, and cause remanded, with directions to dismiss the petition.

WILLIAMS, KOHLER & BARRIER v. YATES.

(Court of Appeals of Kentucky. Nov. 18, 1908.)

1. CONTRACTS (§ 303*)—BREACH.

Where plaintiff agreed to set piling for new railroad construction to be furnished on the ground by defendants, who failed to furnish them as needed, so that plaintiff was delayed and finally refused to work until the piles were put on the ground, which was not done within the time specified in the contract, plaintiff was entitled to recover the damages sustained.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1432; Dec. Dig. § 303.*]

2. DAMAGES (§ 124*)—BREACH OF CONTRACT—PROFITS—DELAY.

Plaintiff contracted to drive all the piling along a new railroad, defendants agreeing to

furnish the material on the ground. Defendants failed to furnish the material promptly, so that plaintiff was delayed in setting the piles on a portion of the road and was prevented altogether from setting them on another portion. *Held*, that plaintiff could recover his loss of profits on the work he was prevented from doing, measured by the difference between the reasonable cost of the work and the contract price and the necessary loss and any expense necessarily incurred on the work he actually did.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 326-338; Dec. Dig. § 124.*]

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by J. A. Yates against Williams, Kohler & Barrier. Judgment for plaintiff, and defendants appeal. Affirmed.

Heavrin & Woodward, for appellants. H. P. Taylor, for appellee.

HOBSON, J. Williams, Kohler & Barrier, as contractors, undertook the building of a part of the Madisonville, Hartford & Eastern Railroad. J. A. Yates was a subcontractor under them by a written contract with them by which he agreed to drive all the piles, and they were to furnish the material on the ground; he undertaking to have the work finished by the 10th day of November, 1907. On February 20, 1908, he brought this suit against them, alleging that he had entered upon the work, but that they had failed to furnish him the material on the ground, and had thus delayed him and his men, and kept them idle for many days, and that they had finally refused to allow him to prosecute the contract, and had discharged him in violation of the contract. They filed an answer, controverting the allegations of the petition, and charging, in substance, that he had abandoned the contract and refused to complete it. A trial was had before a jury, who found a verdict for the plaintiff in the sum of \$400, on which judgment was entered, and the defendants appeal.

The evidence was very conflicting. That for the plaintiff tended to show that he was greatly delayed in the work by the failure of the defendants to furnish him the piles as they were needed, that he finally refused to work until the piles were put on the ground, and that this was not done within the time stipulated by the contract. His testimony also tended to show that, if the material had been furnished him, he could have done the work in the time limited. On the other hand, the proof for the defendants tended to show that he did his work unskillfully, that he lost money on what he did, and that the defendants lost money by his not doing the work, as they had to pay more to have it done than they would have paid him. But we think the evidence does show that the piles were not furnished as provided by the contract, and that Yates was, in fact, delayed by the failure of the defendants

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to furnish him the piles. The court instructed the jury in substance as follows:

(1) If the defendants failed to place the piling on the right of way, and as a consequence the plaintiff was delayed in the work, they should find for the plaintiff the damages he sustained.

(2) If they refused to comply with the contract, and as a consequence the plaintiff was unreasonably delayed in the work beyond the contract limit, or if the defendants let the contract to another, or refused to permit him to further prosecute it, they should find for him the damages he thereby sustained.

(3) If they found for the plaintiff under No. 1, the measure of damages would be the fair value of actual time lost or expense incurred by reason of the defendant's failure to place the piles on the ground in the proper time.

(4) If they found for the plaintiff under No. 2, the measure of their finding would be the difference between the cost of doing the work and the sum to be realized under the contract for it when completed.

If the material had been placed on the right of way in time, all that Yates could have made out of the contract would have been the profit on the work. It is insisted that he was not entitled to both the profit on the work and the value of the time lost while he was waiting for the piles. In *Blood v. Herring*, 61 S. W. 273, 22 Ky. Law Rep. 1725, the plaintiff sued for damages for being deprived of his contract to saw a large quantity of lumber, alleging that he would have realized a large profit therefrom, and also alleging that his teams and mules remained idle by reason of his not being able to do the sawing. He sought judgment both for the profit he would have made on the sawing and damages for his teams and mules being idle. The court held that the latter claim could not be considered; and all that could be recovered was the reasonable profit on the contract. That is not this case. Here Yates did a part of the work, and then quit. If he was delayed in doing the work he did, he may recover a reasonable compensation for any time that he necessarily lost or any expenses he had necessarily incurred by reason of the failure of the defendant to furnish him the material on the right of way as specified in the contract. And, if he was prevented from performing the remainder of the contract by the failure of the defendants to furnish him the material as required by the contract, he may recover on so much of the work as he did not perform, the profit which he thus lost, the measure of recovery being the difference between the reasonable cost of doing the work and the contract price. The proof shows that Yates put in the piles east of Green river, but that he put in none on that part of the railroad which was west

of Green river. He was delayed in doing the work east of Green river by the piles not being furnished in time, and for the delay thus caused he was permitted to recover under instructions 1 and 3. He was prevented from doing any of the work west of Green river, and for his loss of profits on this work he was allowed to recover under instructions 2 and 4. He was not allowed to recover for his loss of time and loss of profits on the same work, but he was allowed to recover only for his loss of time on the work he did and his loss of profits on the work he was prevented from doing. Manifestly, if he suffered a loss on the work he did east of Green river from the defendants failing to furnish him the material in time, his right to recover for this loss cannot be affected by their subsequent conduct preventing him from doing the work west of that river.

The court gave the jury the instructions which the defendants asked, and, when these instructions are read in connection with those above referred to, the whole law of the case was fairly presented to the jury. While the evidence might well have justified a different verdict, we cannot say the verdict is so against the evidence as to warrant us in disturbing it.

Judgment affirmed.

CONLEY et al. v. BREATHITT COAL, IRON & LUMBER CO.

(Court of Appeals of Kentucky. Nov. 18, 1908.)

1. EVIDENCE (§ 366*)—DOCUMENTARY EVIDENCE—COMMISSIONER'S DEED.

Where a judgment authorized a commissioner to make a conveyance, a deed by the commissioner bearing the court's approval was properly admitted in evidence without a copy of the order approving the deed.

[Ed. Note.—For other cases, see Evidence Cent. Dig. § 1534; Dec. Dig. § 366.*]

2. VENDOR AND PURCHASER (§ 212*)—SUBSEQUENT CONVEYANCES.

Where all of a father's interest in land in controversy passed from him by a commissioner's deed, subsequent conveyances of portions of the land by the father to certain of his sons passed no title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 436, 437; Dec. Dig. § 212.*]

3. ADVERSE POSSESSION (§ 13*)—ELEMENTS.

One who had been in adverse possession of land under color of title, claiming to own the same to a well-marked boundary, for more than 50 years, had a complete title to the land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65-76; Dec. Dig. § 13.*]

4. PUBLIC LANDS (§ 151*)—PATENTS.

Where the commonwealth in 1872 had issued a patent for a boundary of land, subsequent patents issued to others for land within such boundary were void.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 431; Dec. Dig. § 151.*]

Appeal from Circuit Court, Knott County.

"Not to be officially reported."

Action by J. M. Conley and others against the Breathitt Coal, Iron & Lumber Company.

Judgment for defendant, and plaintiffs appeal. Affirmed.

James Goble, May & May, and G. W. Fleenor, for appellants. J. J. C. Bach and J. H. Hazelrigg, for appellee.

NUNN, J. In the year 1846 one Enoch Stone was in possession of between 4,000 and 5,000 acres of land on Quicksand creek, then in Breathitt county, Ky., now Knott county, claiming to a well-defined and marked boundary extending to the tops of the ridges on each side of the creek. In that year he conveyed this boundary of land to John Conley, Sr., who took possession of and resided on it, claiming it as his own to the outer boundary, until the year 1898. It appears that between the years 1850 and 1858 Conley became doubtful about his title, not being able to find any title to Stone, and obtained eight or ten small patents, several for 200 acres and several for 50 acres each. These patents included his dwelling and inclosures, but he still continued to claim to the boundary called for in his deed from Stone. In the year 1872 there was granted unto one Stephen G. Reid a patent from the commonwealth for 154,000 acres of land, lying and being in what was then Breathitt county, Ky. In this patent the following words were used: "This survey contains 25,800 acres of patented and otherwise appropriated land, which is deducted from the calculation." It is agreed by all the parties to this action that the land in controversy, to wit, the John Conley, Sr., survey, as purchased from Stone, is situated within the Stephen G. Reid patent boundary. In the year 1886, while Conley was confined to his bed with sickness, he caused all his children, ten in number, to be assembled in his home, and while lying on his bed he took a pencil and drew upon a slate a division of this survey of land among nine of his children, and executed a title bond to each of them for their respective portion. He gave the bonds to his wife, and directed her to place them in a tin box in her trunk. After Conley recovered from that sickness, and during that year or the next, he sold this survey of land to one J. M. Bailey at the price of \$2 per acre, and executed to Bailey a bond for title upon the payment of the purchase money. In the year 1888 it appears that John Conley's sons, to wit, John M. Conley, Reuben Conley, and Robert Conley, each obtained patents from the commonwealth for 200 acres of land, each of which covered land lying with the survey sold by their father to Bailey, and also covered their father's home and inclosures. After this, and about the year 1890, their father, John Conley, Sr., sued Bailey for the purchase price which he had agreed to pay Conley for the land. Bailey made defense, stating that various persons claimed considerable parts of the survey which he had bought, and that their claims were situated on the outside bound-

ary of the survey. During the pendency of that action Bailey and Conley compromised, Bailey agreeing to pay Conley \$5,000, and Conley was to make him a perfect title to the land. Bailey then sold about 3,700 timber trees from the land, Conley agreeing to it upon the condition that he was to be paid \$1 for each tree so sold and delivered. This agreement was performed, and Bailey paid him the balance of the purchase price in money, as was adjudged by the circuit court in another action brought by Conley against Bailey for the purchase price. In this second action Bailey was contending that his vendor, John Conley, Sr., was not able to make him a good title to this land, for the reason that his three sons, above named, had patented 200 acres each of it. There was then filed in this second action a deed purporting to have been executed and acknowledged by these boys and all the children of John Conley, Sr., by which they released to their father all interest and claims they had in the survey of land. The court then adjudged that Conley's title was perfect, and directed the court's commissioner to execute to Bailey a deed to this survey of land. The commissioner complied with this order, describing the land as described in the deed from Enoch Stone to John Conley, Sr. Within a year or two after this John Conley, Sr., and one or two of his sons, were in possession of the land, and Bailey instituted an action in ejectment against them, and obtained a judgment by default. Then John Conley, Sr., with such of his children as resided with him, moved off of the land over on to Salt Lick creek, where he resided until his death in 1905. In the year 1903 Bailey sold and conveyed the land to one F. W. Fletcher, who afterwards sold and conveyed to appellee.

The record before us contains the papers in three actions. One of them is the record of the action of the Conley children, whose names appear to the deed to John Conley, Sr., releasing and conveying all their interest of every kind they owned or claimed in the survey of land described, and which deed was filed in the second action of John Conley, Sr., against Bailey and which was sought to be canceled in an action by the children against their father and Bailey, for the reason, as they alleged, their names were forged to it. The second action was brought by the children of John Conley, Sr., against J. M. Bailey, by which they sought to have set aside the default judgment in ejectment, the suit referred to in which Bailey recovered from John Conley, Sr., and his children the tract of land in controversy. The reason for setting aside the judgment, as alleged, was because it was obtained by the fraud of Bailey. The third action is the one of appellee against one of the children, Reuben Conley, of John Conley, Sr., and a son-in-law of his, Ira Howard, and two others, Wiley Howard and Jasper Mann. That

action was brought in ejectment, and the defendants answered. Reuben Conley claimed only a small part of the land, to wit, the boundary of his patent dated in 1888. The other defendants stated that they were tenants of the other children of Conley, Sr. Robert Conley and John M. Conley, Jr., filed their petition in the action and asked to be made a party defendant, and alleged that they were the owners of all the boundary of land conveyed by Stone to their father. They claimed under a conveyance made by their father to them of date the 25th day of May, 1908. Several courts passed, and they filed an amended answer by which they set up claim to a portion of the Stone boundary covered by their patents of 200 acres each issued to them by the commonwealth in 1888. By this amendment they apparently abandoned their claim to the whole of the land under the deed from their father. Several more terms of court elapsed and they filed another amended answer, in which they were joined by seven other brothers and sisters, by which they claimed all the boundary of land, conveyed by Stone to their father under the title bonds executed by their father to them in the year 1886. These bonds were never recorded. They alleged that Bailey knew the fact that these bonds had been executed by their father when he purchased the land. Appellee filed a reply, alleging that the bonds were a forgery, and that, if executed by their father, they were never delivered in his lifetime, and denied that Bailey had any knowledge of them at the time he purchased the land from their father. There was much proof taken in the three cases. The testimony taken in the action to cancel the deed from the children to their father for the alleged reason that it was a forgery, and in the action to vacate the default judgment in the case of J. M. Bailey against two or three of the children and their father, was very conflicting, much of it conducing to show that the deed was forged and that the judgment was obtained by fraud. But it is unnecessary for us to pass upon these questions, having arrived at the conclusion that they do not affect the real question in the case.

As stated before, the judgment of 1898, in the action between Conley and Bailey, adjudged that John Conley, Sr., had a good title to this survey of land, and directed the court's commissioner to convey it to J. M. Bailey. On the next day after the judgment was rendered, to wit, November 9th, 1898, the commissioner, George Clark, presented in open court a deed executed by himself, as commissioner, to J. M. Bailey in accordance with the judgment rendered on the previous day. On this deed the following indorsement appears: "Acknowledged by George Clark, Commissioner. Examined and approved in open court, this 19th day of November, 1898. A. J. Auxler, Judge." By this deed J. M. Bailey became possessed of all the title John

Conley, Sr., had to the survey of land. Appellants contend that the lower court erred in allowing this deed to be read as evidence of title in Bailey, for the reason that no copy of the order of court approving the deed was presented as evidence. Under the authority of the case of *Helton v. Belcher*, 114 Ky. 17, 70 S. W. 295, this was not required. In this case the court said: "But when, under the statute, the approval of the court is indorsed on the deed, this evidences the authority of the commissioner to make it. There is a presumption in favor of the regularity of judicial proceedings, and the deed so indorsed is therefore prima facie regular. The production of the judgment would show nothing more than the indorsement of the court's approval on the deed shows. This indorsement entitles the deed to be recorded, and a copy of this record is prima facie evidence under the statute." In this case there was filed as evidence a copy of the judgment authorizing and directing the commissioner to make the conveyance and the deed to Bailey with the approval and indorsement thereon made by the judge of the court. Therefore the court properly allowed it to be read as evidence.

John M. Conley, Jr., and Reuben Conley obtained no interest in this land by reason of the conveyances from their father to them of date 1908, for the reason that whatever interest their father had in the land passed from him at the date of the commissioner's deed, to wit, November 19, 1898, and therefore he had no title to pass to his sons, Reuben and John. We are of the opinion, also, that at the date of the commissioner's deed John Conley, Sr., had a good title to this land; for he had been in possession of it claiming it as his own to a well-marked and defined boundary, under the Stone deed from the year 1846, for a period of more than 50 years. The patents of 200 acres each, originally issued to John Conley, Jr., one to Reuben Conley and one to E. L. Conley in the year 1888, are void, for the reason that the commonwealth had prior to that date, to wit, in 1872, issued a patent to Reid covering every foot of the land their patents contained.

With reference to the claims of the children of John Conley, Sr., under the bonds for title executed by John Conley, Sr., we feel that it is unnecessary to consider the evidence in detail. It is sufficient to say, after a careful examination of the evidence, that we are of the opinion that the bonds were never delivered in the lifetime of John Conley, Sr., to his children; and, if delivered, they were never recorded, and the evidence is equivoquant upon the question as to whether Bailey had actual notice of the existence of the bonds when he purchased the land from Conley. E. L. Conley, one of the children, testified that Bailey did know of them, and Bailey swears that he did not. We are therefore of the opinion that the claims of the children under these title bonds

cannot affect the title of Bailey, his vendee, or the appellee, Breathitt Coal, Iron & Lumber Company.

Appellants also plead the champerty statute, claiming that the defendants to the Breathitt Coal, Iron & Lumber Company's action were in possession of the land claiming it adversely when Bailey sold it to Fletcher, and also when Fletcher sold it to appellee. The proof upon this question is also conflicting. The preponderance of it, however, shows that the Howards and Mann were each on the land as tenants of Bailey, that Reuben Conley left the land about the time his father did, and returned to it about the time, or just after appellee instituted this action.

For these reasons, the judgment of the lower court is affirmed.

SCHWEIRMAN v. TOWN OF HIGHLAND PARK et al.

(Court of Appeals of Kentucky. Nov. 19, 1908.)

1. EVIDENCE (§ 12*)—JUDICIAL NOTICE—POPULATION OF TOWNS.

Under Const. § 156, providing that towns with a population of less than 1,000 shall be assigned to the sixth class, the court will take judicial notice that the population of a town of that class does not exceed 1,000.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 17; Dec. Dig. § 12.*]

2. INTOXICATING LIQUORS (§ 69*)—LICENSES—DISCRETION—STATUTES.

Ky. St. 1903, § 3704, provides that, in any town of the sixth class having voted for the sale of liquor, the board of trustees shall have no right to refuse licenses until another election is held and a vote returned against such sale. *Held*, that the board of trustees of a town of the sixth class, which had voted to permit the sale of liquor, still had discretion as to the number of licenses to be granted, and, having already granted four licenses, properly refused to grant a fifth application, though there was no objection against the applicant or his proposed place of business.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 73; Dec. Dig. § 69.*]

3. INTOXICATING LIQUORS (§ 69*)—NATURE OF LICENSE.

A liquor license is not a right or privilege that any citizen may demand, but is in the nature of a favor that may or may not be granted according to the discretion of those in authority.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 73; Dec. Dig. § 69.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "To be officially reported."

Mandamus by J. F. Schweirman against the board of trustees of the town of Highland Park and others. From an order dismissing the writ, petitioner appeals. Affirmed.

Arthur B. Bessinger and Wm. Perry, for appellant. A. W. Dorsey, W. T. McNally, and T. A. McDonald, for appellees.

CARROLL, J. The appellant Schweirman sought in this proceeding to compel by man-

damus the board of trustees of Highland Park, a town of the sixth class, to grant him a license to sell by retail intoxicating liquors. The judge before whom the application was made refused to grant the relief sought, and as a result this appeal was prosecuted. In September, 1906, the town of Highland Park, at an election held for the purpose of ascertaining the sense of the people as to whether or not they wished spirituous, vinous, and malt liquors sold, voted in favor of the sale. Ky. St. 1903, § 3704, subd. 4, provides in part that:

"No licenses for any business or to any person shall be granted for a longer time than one year, and the granting of licenses shall be under the exclusive control of the board of trustees who may refuse to grant licenses in its discretion, provided: that in any town of the sixth class in which the question as to whether or not spirituous, vinous and malt liquors might or should be sold has been since September first, one thousand, eight hundred and ninety two, or shall hereafter be submitted to the voters thereof, and a majority of the votes cast thereat were or shall be in favor of the sale of such liquors therein, then the said board of trustees of such town shall have no right, power, privilege or discretion to refuse to grant licenses to sell such liquors therein until another election is held therein as provided by general laws and a majority of the voters in said town have voted against the sale of such liquors."

It is the contention of appellant that under this statute the board of trustees have no discretion to exercise in the matter of whether or not licenses shall be granted if the application is made in the proper way, the applicant a person of good moral character, and the place at which he desires to establish his business is suitable for the purpose, but must grant the license.

The argument for appellee is that, although the applicant may be a person of good moral character, and his application be presented at the proper time and place, and there be no substantial objection to the locality in which it is proposed to carry on the business, yet the board of trustees for other reasons, in the exercise of a reasonable discretion, may refuse to grant a license. For the purposes of what we desire to say, it may be conceded that the record shows that the applicant possessed the necessary qualifications to entitle him to a license, that he applied for the license in the manner provided by law, and that the place where he desired to carry on and conduct his business was not objectionable. So that it narrows down to the question whether or not, in a state of case like this, the board of trustees have any discretion.

At the time the application for license was made there were four saloons in the town

at which intoxicating liquors were sold by retail. The record does not disclose the population of the place, but in view of the fact that it is a sixth-class town we may take judicial notice of the fact that the population does not exceed 1,000. The Constitution, § 156, provides that towns with a population of less than 1,000 shall be assigned to the sixth class, and towns with a population of 1,000 or more, and less than 3,000, to the fifth class. But, if the board of trustees have no discretion at all in the matter, the number of existing saloons would not give them the right to deny a license to any person or persons possessing the necessary qualifications who made application in the proper manner to sell at a suitable place. We do not, however, think that it was intended by the statute to limit the right of the board of trustees to refuse licenses only to such persons as do not possess the necessary personal qualifications, or who do not apply in the regular way, or who desire to set up in business at a place to which substantial objection might be made. The board, on the one hand, is not authorized, under the statute, to arbitrarily or capriciously refuse to grant a license, nor, on the other hand, is it deprived of all discretion. The trustees have not the power of prohibition, but, in our opinion, have the right to decide how many saloons are required for the convenience and needs of the town, whose people have said they wanted them.

In *Riley v. Rowe*, 112 Ky. 817, 66 S. W. 999, the court had under consideration a case similar to this, and in the course of the opinion it was said: "The language, 'then the said board of trustees of said town shall have no right, power, privilege or discretion to refuse to grant licenses to sell such liquors therein until another election is held,' does not aptly convey the idea that the trustees are to have no discretion as to what applicant shall be licensed. The terms used simply deny them power to refuse to grant licenses. * * * It has long been the settled legislative policy in the state to regulate the sale of spirituous liquors and to grant licenses only to persons of good moral character, at such places as were reasonably suitable, in such numbers as the public service probably required. Experience has shown that the selling of whisky by persons of bad character is especially injurious to the community, and most likely to bring about fraud and imposition on those who drink. It has also been shown by experience that the multiplication of saloons beyond the demands of the community also leads to bad results. * * * The vote in favor of the sale does not have the effect to invest in every party the right to open and run a saloon who will pay the license fee, regardless of his fitness, or the judgment of the trustees as to the necessity of the saloon or the wishes of the neighborhood. The vote only settles the question that they must issue licenses. They

have no discretion to refuse to grant licenses—that is, to license nobody. But neither the language used, nor the context, requires the construction that they were to license all applicants without regard to their character, the needs of the community, or the wishes of the neighborhood in which the saloon was to be located."

The principles announced in this case were reaffirmed in *George v. Winchester*, 118 Ky. 428, 80 S. W. 1158; *Conlee v. Clay City*, 102 S. W. 862, 31 Ky. Law Rep. 533.

The board of trustees in these towns are elected by the people for the purpose of managing and controlling the affairs of the town within statutory limits. It is to be presumed that they will perform faithfully their duties by carrying out the reasonable will and wish of the people in respect to municipal affairs. It was not intended by the statute to take from these boards the exercise of all discretion, and to compel them, although it might be manifestly detrimental to the growth and prosperity of the town, hurtful to its morals, and injurious to its business, to issue licenses to every applicant who possesses the statutory qualifications and complied with the other requisites. But, as well said in *Riley v. Rowe*, supra, the object of the statute was to deny these boards the right to refuse to grant licenses to any person, thereby defeating the will of the people after they had declared in favor of the sale of liquor at an election held for that purpose. Of course, it is difficult to say how many saloons shall do business in a town, or what number of licenses the board may be compelled to grant, or at what point the mandatory requirements of the statute shall be satisfied, so that each case must be adjudged by the facts and circumstances applicable to it. But manifestly there is a point in respect to numbers alone beyond which the statute does not enjoin upon the trustees the imperative duty of issuing licenses. There is a place at which in this particular their discretion begins, and this discretion the courts will not interfere with or seek to control unless it is clearly abused. Although the board in cases like this cannot refuse to grant any licenses, we hold that they may exercise a reasonable discretion in determining how many saloons are necessary to afford the citizens of the town the privilege they obtained by voting in favor of the sale of liquor. It is also well to keep in mind that it is the interest of the town and its people, and not the interest of the applicant or the particular citizen, not only in respect to liquor licenses but concerning municipal affairs generally, that the board of trustees is charged with the duty of looking after. When the people in Highland Park voted in favor of the sale of whisky, they simply meant to assert that they were in favor of licensed saloons and the sale of liquor thereat; not that they wished to fix the

number of saloons or designate the persons who should obtain licenses. Nor does the statute undertake to declare how many persons shall be licensed, but only that licenses must be granted to some person. If the board of trustees of a little town in which there are four licensed saloons have no discretion to refuse licenses to other applicants, then every person possessing the proper qualifications who is willing to pay the license fee must upon proper application be granted a license, without regard to the convenience, necessities, or demands of the people, and although the number might greatly exceed the needs of the community and be a positive disadvantage to all persons engaged in the business, to say nothing of the inhabitants generally, or some applicant must be discriminated against. Along this line the argument is made that if the trustees have the authority to limit the number of licenses, and the persons to whom they may be granted, it will result in favoritism—that licenses will only be granted to those who have the ear of the board. This may in some instances be true, but we know of no scheme that has ever been devised that will prevent this sort of inequality. In every case in which boards or bodies of men are vested with the discretion to appoint persons to office or place or give them privileges not enjoyed by the body of the people, there is an occasional abuse of discretion, but this is not an argument against the power. It is merely a manifestation of one of the infirmities of government that cannot be remedied or cured. If there are a number of applicants for a place or privilege, and all cannot be satisfied, one or more of them in the very necessity of things must be refused; and this, everything else being equal, amounts to discrimination. And so in the granting of liquor licenses, except that in respect of these, the discrimination cannot be so pronounced as in other cases, because such a license is not a privilege or right that any citizen may demand or have for the asking. It is rather in the nature of a favor that may or may not be granted by those in authority. There is no disagreement among the authorities on this point. Hence we have little difficulty in reaching the conclusion that the argument in respect to discrimination and favoritism that might be urged with great force as to other harmless employments or pursuits, is weakened when it is attempted to be extended to a business that has always been the subject of police regulation and is generally regarded as a tolerable evil. This idea is well illustrated by the fact that it is always competent to inquire into the character of the applicant for license to retail liquor, and to refuse license if his reputation is immoral or objectionable. And so in respect to the locality at which it is proposed

to conduct the business. Here, a reasonable discretion may be exercised and license refused if it would not be proper to have a saloon at the proposed place. There are localities in every town in which it would be offensive to the common sense of all good people to have saloons, as, for instance, near by or adjacent to schools or churches or in residence neighborhoods; and boards in the exercise of a discretion may refuse to license a grogshop next door to a schoolhouse, in front of a church, or in the center of a street set apart for residential purposes. Following out this theory, we see no reason why this discretion may not be extended to numbers as well as to persons and localities. When it is agreed upon all hands that the business of retailing liquor is of such a nature as to authorize license boards to exercise discretion as to persons and places, it would seem logically to follow that they should also have some discretion as to numbers. If it is needful to the welfare of the community to place the traffic in the hands of proper persons located at suitable places, why is it not equally essential that some control should be exercised as to the number of persons who may be granted the privilege? If discrimination can be lawfully exercised in selecting persons and localities, why may not there be a reasonable discretion, although it involves discrimination, as to the number of saloons. The retail liquor business has always been placed in a class by itself, and dealt with by special laws; so that the reasons that might deny the boards the right to discriminate between persons applying for licenses to engage in any other legitimate occupation and pursuit regulated and controlled by general laws have little or no application to this business. Although, recognized legitimate and under the protection of the law, it stands apart from other lawful occupations, and must be treated in a class by itself.

We are unwilling to hold that the action of the board of trustees in the case before us was arbitrary or capricious, or that it was beyond their authority. On the contrary, we should say that they acted well within the limits of a reasonable discretion in refusing under the circumstances to grant appellant a license, and the judgment of the lower court is affirmed.

ROGERS v. SLATON.

(Court of Appeals of Kentucky. Nov. 17, 1908.)

1. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)—COMPENSATION.

A county attorney is not entitled to compensation, in addition to his salary, for services in the state courts, in suits to collect taxes due the county, but he should be credited with such sums as he actually pays to associate counsel, and such further sums as were expended by him in looking after the tax collections in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

courts in counties other than his own, and for his personal services in suits in the federal courts.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.*]

2. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)—COMPENSATION.

The fiscal court made an order authorizing the county attorney to institute proceedings to collect back taxes on property not listed or assessed for taxation, and directed that he be allowed a sum equal to 25 per cent. of the amount he collected. The county attorney was in the receipt of a salary of \$500 a year, and continued to receive this amount during the term of his office, and for a subsequent term to which he was elected. *Held*, that by this order the court attempted to increase the compensation of the county attorney who was then in office, and did not attempt to fix the annual compensation of the county attorney who should thereafter be elected.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.*]

3. DISTRICT AND PROSECUTING ATTORNEYS (§ 5*)—COMPENSATION.

Where the fiscal court by an invalid order attempts to allow the county attorney a percentage of all back taxes collected, that the attorney accepted from the fiscal court a sum less than that to which, under the contract, he was entitled constitutes no defense in an action to recover the amount paid him.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 18-25; Dec. Dig. § 5.*]

Appeal from Circuit Court, Muhlenberg County.

"To be officially reported."

Action by T. J. Slaton against J. L. Rogers. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Thos. W. Thomas, Lewis Nuckols, and T. L. Edelen, for appellant. Willis & Meredith and Hazelrigg, Chenault & Hazelrigg, for appellee.

LASSING, J. J. L. Rogers was the county attorney of Muhlenberg county. On October 10, 1900, the fiscal court of said county made the following order: "Ordered that county attorney, J. L. Rogers, be and he is hereby authorized to institute any legal proceedings he may deem proper to collect back taxes upon property not heretofore listed, certified or assessed for taxation, and that he be allowed a sum equal to 25 per cent. of the amount he may cause to be collected for the county by any motion, suit, proceeding or otherwise, heretofore or hereafter begun." Under this authority he collected a large sum of money for the county, and for said services under his contract he was paid the sum of \$4,801.22. Thereafter appellee, T. J. Slaton, a taxpayer, suing in his own behalf and in behalf of all other taxpayers of the county, filed suit against said county attorney and the members of the fiscal court, in which he recited the fact that at the time this contract was entered into the said Rogers was the regularly elected and qualified county attor-

ney for Muhlenberg county, and that during each year that he held the office he was paid an annual salary out of the general expense fund of said county, and that the annual salary so paid to him was a reasonable salary for the services which he rendered, that he had no right to receive the additional compensation, and that the orders making the employment and paying for same were illegal and void. He prayed judgment against the county attorney for the amount which he had received under said orders, with interest from the date of its payment. The defendant, Rogers, demurred to the petition and, pending the demurrer, filed an answer in three paragraphs. In the first paragraph he pleaded that the annual salary of \$500 which he received was intended to be his compensation for the discharge of the ordinary duties pertaining to his office as county attorney, and was not intended to be a general compensation for the performance of the services mentioned in the petition. That, taking these services into consideration, the annual compensation was not at all adequate or reasonable. That at the time the contract was made with the county it was understood he would associate other counsel with him in his effort to collect these taxes, and it was agreed between himself and the fiscal court that W. O. Davis should be such counsel, but by mistake and oversight on the part of the draftsman this part of the understanding and agreement of the fiscal court was omitted from the order. That later, however, the orders of the fiscal court in dealing with this matter recognized that said Davis had been so employed, and was assisting the county attorney in his efforts to collect this tax, that the services were reasonably worth more than the price which the fiscal court paid to himself and Davis; that a large part of the money received by him was paid to Mr. Davis for his services; that in addition to this he was compelled to and did expend large sums of money in going to courts, state and federal, in other counties, in his efforts to collect the tax referred to in the order under which he was acting. He denied that the orders were void, or that any money had been wrongfully paid to him. In the second paragraph he recited that he had collected for the county \$24,405, and that under the contract he should have received \$6,601.22, but that by agreement between himself and associate counsel and the fiscal court he had accepted the sum of \$4,801.22 in satisfaction of their claim for services, and he pleaded this settlement in bar to plaintiff's right to recover. In the third paragraph he pleaded that on October 10, 1900, when the contract was entered into, he had not been elected to office for the second term, and that the contract for the contingent compensation was made prior to his election for the second term in 1902, that therefore he entered upon

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

his second term of office in 1902 with this contingent contract in full force and effect, that a large part of the services rendered in his efforts to collect this money were rendered during the second term of office; and that the entire amount collected for the county was actually collected during that term, and the amount paid to him was paid during that term. To this answer a general demurrer was filed. The case was submitted upon the demurrers to the petition and the answer, and the demurrer to the petition was overruled and sustained as to the answer. The defendant, the county attorney, having declined to plead further, judgment was entered against him for the full amount of the claim sued for, and he appeals.

Questions similar to these have recently been before the court in the cases of *Terrill v. Trimble County*, 108 S. W. 848, 33 Ky. Law Rep. 364, and *Spalding v. Thornbury*, 108 S. W. 906, 33 Ky. Law Rep. 362. In these cases, after full consideration, it was held that the county attorney was entitled to no extra compensation whatever for services which he rendered in person in the state courts, in his efforts to collect taxes due the county, as this was clearly a part of his official duty, but that he should be credited with such sum as he actually paid to associate counsel, and such further sums as were expended by him in looking after the collection of this tax in courts in counties other than his own. He is also entitled to pay for his personal services in looking after litigation in the federal courts. The first paragraph of the answer, therefore, presented a defense to at least a part of plaintiff's claim, and the county attorney should have been permitted to show what sums he paid to Davis, his associate counsel, and what expenses he incurred in attending courts in counties other than his own in his efforts to collect this tax. No defense is presented in either the second or third paragraph of the answer.

On October 10th, when the contract under which this special service was rendered, was entered into, appellant was in office discharging the duties of county attorney, under a salary that had theretofore been fixed at \$500 per annum. If any additional compensation whatever could be allowed him for this service, it would have to be under this contract of date October 10th. It cannot be said that in making this order the fiscal court of Muhlenberg county was attempting to fix the annual compensation of the county attorney who should thereafter be elected and inducted into office. On the contrary, it is plain that the attention of the members of the fiscal court having been called to the fact that certain corporations had not been paying to the county taxes to which she was entitled, they were willing to pay to the county attorney an additional compensation for his efforts to collect this tax, and this additional sum agreed upon, as evidenced by the order,

was one-fourth of what he might recover. The best evidence that neither the county attorney nor the fiscal court looked upon this order of October 10th as in no wise changing the order which had theretofore been made, fixing the compensation of the county attorney is found in the fact that they continued to pay him and he continued to receive the same annual salary as had heretofore been paid him. This order must be construed as an attempt, on the part of the fiscal court, to pay to the county attorney an extra compensation for the collection of this tax. Both appellant and the fiscal court regarded the effort of the county attorney to collect this money as a special service for which they attempted to give him extra compensation. That such was the understanding between the parties at the time the contract was made and the order entered there can be no doubt. This being true, it cannot now be claimed that the order was in fact intended to enlarge the compensation of the county attorney who should be elected in 1902, and we are of opinion that the court did not err in holding that this paragraph of the answer presented no defense. The fact that appellant accepted from the fiscal court a sum less than that to which, under the contract, he was entitled, affords him no protection, for the order itself was, so far as he was concerned, void.

He is permitted to take credit for the sums paid to associate counsel and incurred as expenses, not under the contract, but because, as the representative of the county, he expended these sums in his efforts to collect the tax, and for this reason they should properly be allowed to him. As county attorney, he owed to the county his best services in his efforts to collect this tax, but it was in no wise incumbent upon him to pay his own expenses in going into other counties to look after the collection of same, nor was he called upon to employ counsel to assist him. Hence these items of expense are proper charges against the county, and the trial court erred in requiring him to pay back to the county the full amount he had received in attempting to collect this tax. If he was called upon to appear in the federal court, he should be allowed to show the reasonable value of such service, and for this he is entitled to pay, for under his duty to the county he was only required to look after the interests of the county in litigation in the state courts. The court should have required him to pay only so much of the full amount received as remained after deducting the fee which he paid to associate counsel, and the legitimate expenses which he had incurred in looking after the litigation in counties other than his own, and a reasonable fee for his services, if any, in the federal court.

For the reasons indicated the judgment is reversed and cause remanded, for further proceedings consistent with this opinion.

SHOTWELL v. CHESAPEAKE & O. RY. CO.
(Court of Appeals of Kentucky. Nov. 20, 1908.)

JUDGMENT (§ 654*)—BAR OF CAUSES OF ACTION—JUDGMENT ON DISCONTINUANCE.

The dismissal of an action either on motion of plaintiff or on motion of defendant for want of prosecution, after its removal from a state circuit court to a federal circuit court, is not a bar to a subsequent action for the same cause begun in the state circuit court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1165; Dec. Dig. § 654.*]

Appeal from Circuit Court, Kenton County.
"To be officially reported."

Action by Joseph Shotwell against the Chesapeake & Ohio Railway Company. From a judgment dismissing the action, plaintiff appeals. Reversed and remanded.

Frederich W. Schmitz, for appellant. E. J. Tracy and Galvin & Galvin, for appellee.

HOBSON, J. In March, 1905, Joseph Shotwell brought a suit against the Chesapeake & Ohio Railway Company to recover for personal injuries in the Kenton circuit court. On April 3d, the railroad company filed its petition, and on its motion the cause was removed to the Circuit Court of the United States. The plaintiff appeared in that court and entered a motion to dismiss his action without prejudice. Without any disposition of this motion, the defendant, on October 30th, moved the court to dismiss the petition for want of prosecution. The motion was sustained, and a judgment was entered dismissing the petition for want of prosecution. Shotwell after this, on January 17, 1906, brought this suit against the railroad company to recover for the same injuries. The defendant pleaded the judgment entered in the Circuit Court of the United States dismissing the former action for want of prosecution in bar of this action. The court sustained the plea and dismissed the action. The plaintiff appeals.

In Freeman on Judgments, § 261, the rule is thus stated: "Judgments of nonsuit, of non prosecutur, of nolle prosequi, of dismissal, and of discontinuance are exceptions to the general rule that, when the pleadings, the court, and the parties are such as to permit of a trial on the merits, the judgment will be considered as final and conclusive of all matters which could have been so tried. A nonsuit is but like the blowing out of a candle, which a man at his own pleasure may light again. Under no circumstances will such a judgment be deemed final, whether entered before or at the trial."

In 23 Cyc. 1138, the rule is thus stated: "A judgment of non prosecutur has no greater effect as an estoppel than a judgment of nonsuit, and does not bar another action for the same cause." See also 2 Black on Judgments, § 702; 24 Am. & Eng. Encyc. 803.

We have found no contrary authority. That the plaintiff may dismiss his action after it has been removed to the federal court and bring a second suit in the state court has been held in a number of cases. See Adams Express Company v. Schofield, 11 Ky. 832, 64 S. W. 903; Stevenson's Adm'r v. I. C. R. R. Co., 117 Ky. 859, 79 S. W. 76; Dana v. Blackburn, 121 Ky. 706, 90 S. W. 237, and cases cited.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

HOWES & HOWES v. UNION MFG. CO.
(Court of Appeals of Kentucky. Nov. 19, 1908.)

1. SALES (§ 87*)—CONSTRUCTION OF CONTRACT—EVIDENCE TO AID CONSTRUCTION.

Testimony was admissible to show the construction given by merchants to such terms of sale as "May 1st, 2 per cent., or July net."

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 241; Dec. Dig. § 87.*]

2. SALES (§ 82*)—TERMS—CONTRACT CONSTRUED—"MAY 1ST, 2 PER CENT. OR JULY NET."

Terms of sale, "May 1st, 2 per cent., July net," mean that the purchaser may pay or before the earlier date and save the discount that if he does not care to do so, by losing the discount he has additional time within which to pay, and that the bill is not due except at option of purchaser until July 1st.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 229; Dec. Dig. § 82.*]

3. DISMISSAL AND NONSUIT (§ 75*)—WITHOUT PREJUDICE—PREMATURITY.

An account not being due when sued on an ordinary action, the action should have been dismissed without prejudice.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 169; Dec. Dig. § 75.*]

Appeal from Circuit Court, Johnson County.

"Not to be officially reported."

Action by the Union Manufacturing Company against Howes & Howes. From a judgment for plaintiff, defendants appeal. Reversed, with instructions to dismiss without prejudice.

Vaughn, Howes & Howes, for appellant. C. B. Wheeler, for appellee.

LASSING, J. Appellants, Howes & Howes purchased of the appellee, the Union Manufacturing Company, a bill of goods amounting to \$462.25. By the terms of the sale, as appears from the invoice, these goods were to be paid for "May 1st, 2 per cent., or July net." The goods were shipped, and on May 17th following appellee filed suit in the Johnson circuit court to recover the value of the goods. Howes & Howes answered, denying any indebtedness whatever to the plaintiff and pleading affirmatively that the account sued on was not due, and was not to become due, until July 1st thereafter. The reply traversed the affirmative matter in the answer, and completed the issue. A jury trial

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was waived, and upon hearing the evidence the court rendered a judgment in favor of plaintiff for the amount sued for. Defendants filed a motion and grounds for new trial, which were overruled, and they appeal.

It appears from the evidence that, at the time the appellants purchased the goods from appellee, they were delivered a duplicate of the order, and this duplicate states the terms of the sale as to payment as follows: "Terms, May 1st, 2 per cent., or July net." For appellee it is insisted that the account became due May 1st, and it filed with its petition what purports to be the original statement of this account, and from it there are omitted the words "or July net," and it is urged for appellee that these words were added to the copy which appellants filed. An examination of what purports to be the original and the copy discloses the fact that the one is in no sense a duplicate of the other. The account filed with the petition is a mere statement of account, and does not show who took the order, how the goods were to be shipped, or when to be shipped, whereas the carbon-copy duplicate filed by appellants has all the earmarks of an order, which it purports to be, for the bill of goods sued for. It is dated November 25, 1906, and signed "Union Manufacturing Company, Knoxville, Tenn., per O. M. Carnahan, London, Ky." The exhibit filed with the petition is a mere statement of account, whereas the carbon copy filed by appellants evidences the real contract which was made by appellee, through its agent, with appellants, at the time they ordered the goods.

Appellants contend that, under the terms of their contract, they had until July 1st to pay this bill; that if they paid it on or before May 1st, they were entitled to a discount of 2 per cent., but if paid after May 1st, then they had to pay the full face of the claim. This construction of the contract was disputed by appellee, and appellants offered to introduce merchants familiar with the terms of the trade, by whom, if they had been permitted to testify, appellants claim they would have shown that the terms regulating the payment for this bill of goods, as used in the order, were well understood by the trade, and that the purchaser had the option to pay on or before May 1st, and take the benefit of a 2 per cent. discount; or, failing to do this, he had in any event until July 1st to pay the bill; and that the bill was not due, except at the option of the purchaser, before July 1st. The court below refused to permit this testimony to be introduced, and of its action in so doing appellants complain, for they insist that, had the court permitted this evidence to be introduced, he could not have avoided giving to the contract that construction which the appellants themselves gave to it, and which they insist is the only construction of which it is

susceptible. After July 1, 1907, but before the case was submitted for judgment, appellee asked to have an order entered, in which it was suggested that the entire debt had become due after the commencement of the action. The court, upon objection being made by appellants, refused to permit this order to be made.

The whole case turns upon the construction that is to be placed upon the words, "May 1st, 2 per cent., or July net." If, as appellants insist, they had until July 1st to pay this bill, with the right to take advantage of a 2 per cent. discount if they desired to pay it sooner, then at the institution of this action their debt was not due, and appellee had no cause of action. If, on the other hand, the proper construction to be placed on these words is that suggested by appellee, that the entire debt was due May 1st, then the suit was not prematurely brought, and the court did not err in entering the judgment as he did. If the bill was due, as appellee insists, on May 1st, the addition of the words "or July net" was superfluous, and the words were meaningless. The testimony which appellants offered bearing upon the construction which merchants place upon terms of this character in contracts of purchase and sale was clearly competent, and the avowals show that these terms have a fixed and definite meaning; that they mean that the purchaser has the option, if he desires to exercise it, of paying the bill on or before the first date named, and saving the discount; but, if he does not desire to exercise this right under this option of paying the bill on or before the first date named, then by losing the discount he would have the advantage of the additional time within which to meet the bill, and in any event the bill is not due until the expiration of the time limit fixed in the order, which in this case was July 1st.

The bill not being due at the time of the institution of the suit, and it being an ordinary action, the court should have, upon this showing, dismissed the suit without prejudice (*Butler v. Butler*, 4 Litt. 202), and the judgment is reversed, with instructions so to do.

STRINGFIELD v. LOUISVILLE RY. CO.
(Court of Appeals of Kentucky. Nov. 18, 1908.)
1. TRIAL (§ 25*)—RIGHT TO CLOSE—AFFIRMATIVE DENIAL—BURDEN OF PROOF.

Where a petition alleged that, while plaintiff was a passenger on defendant's car, he was willfully assaulted by the conductor, and seized and thrown from the car while it was in motion, and injured, and one paragraph of the answer was a traverse and the other a plea of justification, stating that plaintiff was boisterous, and the conductor stopped the car and put him off without violence or injury to him, the answer with the first paragraph stricken was an affirmative denial of the allegations of the

petition, leaving the burden of proof on plaintiff, and giving him the right to close the argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 47; Dec. Dig. § 25.*]

2. APPEAL AND ERROR (§ 1096*)—REVIEW—SUBSEQUENT APPEALS—SCOPE OF REVIEW—ERRORS EXISTING BUT NOT PRESENTED ON FORMER REVIEW.

Where the court erroneously gave defendant the opening and closing, and the error was shown in the record on a first appeal, but was not presented to the appellate court, and the court did not pass upon it, error in a similar ruling on the second trial after reversal cannot be raised on a second appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4355-4357; Dec. Dig. § 1096.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"To be officially reported."

Personal injury action by Charles E. Stringfield against the Louisville Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 105 S. W. 1190.

Popham & Webster and Morton K. Yonts, for appellant. Fairleigh, Straus & Fairleigh, Kohn, Baird, Sloss & Kohn, Howard B. Lee, and Greene & Van Winkle, for appellee.

NUNN, J. This is the second appeal of this case; the plaintiff in the court below being the appellant on each appeal. Appellant claimed in his petition that, on July 18, 1906, while he was a passenger on one of the cars of appellee, he was willfully and maliciously assaulted by the conductor; was seized by the back of the neck, and thrown from the car while it was in motion; that because of this act he was severely and permanently injured. The answer filed by appellee contained two paragraphs, the first being a traverse, and the second a plea of justification, by stating, in substance, that appellant was boisterous, and its conductor stopped the car and put him off without violence or injury to him. In our opinion the answer of appellee should only be considered as an affirmative denial of the allegations of the petition. If not, appellant was entitled to a peremptory instruction to the jury to find for him the damages he had sustained. We are of the opinion, however, that the answer, with the first paragraph stricken, operated as an affirmative denial of the petition. Consequently, the burden of proof rested upon him, and he had the right to close the argument. There is no bill of exceptions filed on this appeal showing the evidence heard upon the trial, nor are the instructions given by the lower court a part of the record. The only error complained of on this appeal is that the court erred in giving the burden of proof to appellee, and allowing it the closing argument. This question was not presented by appellant as error to this court on the

first appeal, although on the first trial the lower court made a similar ruling over objection of appellant, and allowed appellee the burden of proof and the concluding argument. This appears on the first page of transcript of the first trial. The transcript begins with the following statement: "The case coming on to be heard before his honor Walter P. Lincoln, special judge, and a jury the jury being duly impaneled and sworn, and the case stated by counsel for respective parties, the defendant moved the court to award it the burden of proof and closing argument, to which the plaintiff objected, the court overruled the objection, and awarded to the defendant the burden of proof and the closing argument, to which plaintiff excepted."

The transcript further shows that the testimony of appellee was introduced first, that it assumed the burden of proof, and that the court had so ruled over the objection of appellant, and that appellant assigned to the court as error in his ground filed for a new trial. The verdict resulted in favor of appellee on the first trial, and an appeal was then taken, but the question of burden of proof was presented to this court, and the court did not pass upon it. However, it could have been raised, and it is too late now for him to contend that the lower court erred in its ruling on the question of burden of proof. This court has invariably held that when an error occurs in the progress of a case, and the case goes to the Court of Appeals, this error is not presented for its consideration, then the party who is claiming an error cannot take advantage of such error on a subsequent appeal. It is his duty to present to the court on the first appeal all errors in the record occurring prior to the taking of the appeal, and if advantage is taken of this fact, and the alleged error not presented to this court, and the court fails to pass upon the question, all parties who claim to have been injured thereby are estopped from presenting the alleged error on any subsequent consideration of the case in this court. See the case of Davis, etc., 14 Bush, 746, and also the case of Mason v. Mason, 5 Bush, 187. In the latter mentioned case this court said: "Many of the cases assigned for review and rehearing may be disposed of by a general statement that all the errors and irregularities appearing in the original record, and which could have been corrected by the appeal, must now be regarded as settled and adjudicated, and can afford neither a cause for a review, nor a rehearing in the court below, nor for correction now in this court. If they were then discovered and presented by appellants and their counsel, and escaped the attention of this court, it only shows the wisdom of the law in precluding a subsequent investigation, by way of repose to litigants, and per-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

ty for laches in not presenting, in proper time and manner, errors then existing and apparent in the record." See, also, the case of *Boone v. Gleason*, 4 Ky. Law Rep. 1001.

For these reasons the judgment of the lower court is affirmed.

SLEET v. FARMERS' MUT. FIRE INS. CO. OF BOONE COUNTY.

(Court of Appeals of Kentucky. Nov. 13, 1908.)

1. INSURANCE (§ 423*)—CAUSE OF LOSS—LOSS BY LIGHTNING.

A policy provided for the insurance of plaintiff against fire, and her barn having thereafter been knocked down by lightning, but not burned, she sued on the policy, and alleged that it had been defendant's custom for years to pay for damage caused by lightning in such cases as well as by fire, and the custom was known to defendant and formed a part of the contract, and that since the execution of the contract defendant had levied assessments for similar losses by lightning, of which assessments plaintiff had paid her part. *Held*, that plaintiff was not entitled to recover for the damage to the property by lightning, and the alleged custom was immaterial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1127; Dec. Dig. § 423.*]

2. PLEADING (§ 214*)—DEMURBER—EFFECT—ADMISSION.

In an action on an insurance policy, allegations that the company by uniform custom had paid damage caused by lightning, though the policy covered only loss or damage by fire, were admitted by a demurber to the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

3. CUSTOMS AND USAGES (§ 16*)—INCORPORATION IN CONTRACT—VALIDITY.

A prior uniform custom of an insurance company of paying damage caused by lightning which did not burn the property, though the policy covered only loss or damage by fire, did not constitute a custom of the business or of the community which was binding on the company, but only showed that it had theretofore paid invalid claims.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 27; Dec. Dig. § 16.*]

4. CORPORATIONS (§ 312*)—OFFICERS—LIABILITIES AS TO CORPORATION—MISAPPROPRIATION OF CORPORATE FUNDS.

A policy insuring against loss or damage by fire not covering a loss caused by lightning which did not burn the building, payment of the policy by the officers for such loss would have been a misapplication of the corporation's money.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 312.*]

Appeal from Circuit Court, Boone County.
"Not to be officially reported."

Action by B. A. Sleet against the Farmers' Mutual Fire Insurance Company of Boone County, Ky. From a judgment dismissing the petition, plaintiff appealed. Affirmed.

J. G. Tomlin and J. L. Vest, for appellant.
Sidney Gaines and Clore, Dickerson & Clayton, for appellee.

BARKER, J. On the 5th day of February, 1906, the appellee, the Farmers' Mutual Fire

Insurance Company, issued a policy of insurance to the appellant, Mrs. B. A. Sleet, the material parts of which are as follows: "By this policy of insurance, and for and in consideration of four and $\frac{72}{100}$ dollars, and a premium note of ninety-four and $\frac{40}{100}$ dollars, by said company received, do insure Mrs. B. A. Sleet, of Boone county, Kentucky, against loss or damage by fire to the amount of two thousand three hundred and sixty dollars on the following property, as described in application and survey No. 5053, as follows, to-wit: * * * "The amount of the insurance is then distributed over the dwelling house and the various barns and sheds and other buildings upon the farm, among which was a barn 60 by 40 by 18, which was insured for \$500. As this was the only building destroyed, it is not necessary to set forth the particular distribution of the remainder. The covenant of the company is as follows: "And the said company do promise and agree, to and with the insured, to make unto her, her executors, administrators and assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property above specified during the term of five years from the 2d day of March, one thousand nine hundred and six at 12 o'clock (noon) unto the 2d day of March, one thousand nine hundred and eleven at 12 o'clock (noon)." Prior to the institution of this action, and during the insurance contract period, the barn in question was struck by lightning, and knocked down, but not burned. Thereupon the appellant demanded payment from the company of the sum of \$500, and, upon its refusal to pay her, she instituted this action.

The plaintiff in her petition sets forth the insurance contract as hereinbefore stated, the destruction of the barn by lightning, the demand of payment and refusal, and alleges that at the time of the execution and delivery of the policy of insurance it was and had been for many years the uniform practice and custom of the defendant, the Farmers' Mutual Fire Insurance Company, to pay for all losses or damage done to buildings insured in the company when insured or destroyed by lightning, the same as though injured or destroyed by fire; that this custom was well known to the defendant at the time of the execution of the policy of insurance, and had been practiced and observed by it at all times before and since the execution of the policy; that the custom on the part of the defendant insurance company entered into and formed a part of the contract of insurance herein sued on, and since the execution and delivery of the policy the defendant company had made assessments on all losses by lightning, and plaintiff has paid all assessments when called upon by the company, and contributed to the payment of all losses by lightning which were insured by the de-

fendant company and occurred since the issue of the policy. Afterwards she amended her petition, and alleged that the defendant is a mutual company, and all of the losses and other expenses that are now or ever have been paid by it are paid from funds derived by assessments on the several policy holders insured by it according to the amounts of their respective policies. A general demurrer was interposed by the defendant to the petition as amended, and sustained by the court, and, the plaintiff declining to plead further, her petition was dismissed. The trial court was clearly right in sustaining the demurrer. The policy is filed as an exhibit, and its essential parts are copied above. The covenant of the defendant with the plaintiff was to indemnify her against loss occasioned by fire. She was not entitled to recover for loss by lightning which did not burn, but merely knocked down, the barn, any more than she would have been entitled to recover under the policy if it had been blown down by a windstorm. If the officers of the company had paid the plaintiff, it would have been a misappropriation of the money of the corporation. The plaintiff's position is not aided by the allegation that other losses occasioned by lightning had been paid under contracts similar to that sued on. If this be true—and the demurrer, for the purpose of testing the petition, admits it—it would only show that the officers in charge of the corporate funds had been guilty of the payment of erroneous claims. The prior errors of the defendant company do not constitute a custom of the trade or of the community. The plaintiff's right must stand or fall by the written contract; and this clearly shows that the loss accruing to her was not occasioned by fire, and therefore not within the terms of the contract of indemnity purchased by her.

Judgment affirmed.

HALLER v. BARBER ASPHALT PAVING CO.

(Court of Appeals of Kentucky. Nov. 19, 1908.)

1. MUNICIPAL CORPORATIONS (§ 429*)—STREET IMPROVEMENTS—ASSESSMENTS—LAND SUBJECT TO.

A lot widening from a 50-foot frontage to 175 feet at the rear, and lying within the quarter square, is wholly taxable for an abutting street improvement, and not merely the part lying between parallel lines extending back at right angles to the street 50 feet apart.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 429.*]

2. MUNICIPAL CORPORATIONS (§ 467*)—STREET IMPROVEMENTS—ASSESSMENTS—SPOILIATION—DETERMINATION.

Whether a street improvement assessment amounts to spoliation depends, not upon the value of the lot alone, but upon the value of the lot and improvements thereon after construction of the street improvement; and, if the assessment of the improvement does not equal the

value of the property to be taxed, it will be enforced.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1111; Dec. Dig. § 467.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action by the Barber Asphalt Paving Company against George Haller. From a judgment for plaintiff, defendant appeals. Affirmed.

Burnett & Burnett, for appellant. Furlong Woodbury & Furlong, for appellee.

CLAY, C. The plaintiff, Barber Asphalt Paving Company, brought this action to enforce an apportionment lien, amounting to \$688.16, against the property of the defendant, George Haller, for the improvement of Twenty-Sixth street from Dumesnil to Cane Run Road. Judgment was rendered in favor of plaintiff, and defendant appeals.

Appellant's lot lies on the northwest corner of the intersection of Twenty-Sixth street with Cane Run Road. It has a frontage of 50 feet on Twenty-Sixth street, but widens until it reaches an alley, where its width is 175 feet. The southeast line of the property borders on the northwest line of Cane Run Road. The only defense made to the action was that the amount of the apportionment warrant was equal to or exceeded the value of the property, and to enforce the same would amount to spoliation. It is the contention of appellant that a portion of the lot does not lie within the taxing district, and, in determining whether or not the enforcement of the lien would amount to spoliation, the value of the lot alone is to be taken into consideration. There is nothing in the record showing that the rear end of the lot extends beyond the taxing district, but, even conceding that it does to the extent of some 7 or 8 feet, as claimed by appellant, we do not think this would materially affect the value of the lot. The lot itself lies on the corner and within the quarter square. We, therefore, conclude that the entire lot is within the taxing district, and not merely that portion of it lying between parallel lines, extending back at right angles to Twenty-Sixth street, and 50 feet apart.

Furthermore, the question of spoliation does not depend upon the value of the lot alone, but upon the value of the lot with the improvements thereon after the construction of the street, as required by ordinance. Appellant's testimony is to the effect that the lot, prior to the improvement, taken by itself, was not worth the amount of the apportionment warrant. For this purpose he had the witnesses testify to the value of the 50 feet extending back at right angles, and then the value of the triangle bordering on Cane Run Road; also to the value of the small strip

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

bordering on the alley, which it was contended was not embraced in the taxing district. Measured in this way, the value of the lot was fixed by several witnesses at \$500 or \$600; but, as said before, this is not the proper way to determine the question of spoliation. It depends, not upon the value of the lot by itself, but upon the value of the property, including the improvements. Considered from this standpoint, appellant himself fixed the value of the property at \$1,500; others placed it much in excess of that. The rule established in this state in regard to spoliation is that it is only where the cost of the improvement equals the value of the property sought to be taxed that the enforcement of the lien for the improvement amounts to spoliation. If the cost of the improvement does not equal the value of the property sought to be taxed, the courts will uphold the assessment, and enforce its collection. *Otter v. Barber Asphalt Paving Company*, 96 S. W. 862, 29 Ky. Law Rep. 1157.

As the value of the property after the improvement of the street is far in excess of the cost of such improvement, we are of the opinion that the circuit court properly held that the cost of the improvement did not amount to spoliation.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 17, 1908.)

1. INDICTMENT AND INFORMATION (§ 63*) — CONCLUSIONS OF LAW—PUBLIC NUISANCES.

An indictment for maintaining a public nuisance which charges defendant with the offense of permitting a public nuisance charges a mere conclusion of law, and must be supported by allegations of fact showing how the offense charged was committed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 185; Dec. Dig. § 63.*]

2. NUISANCE (§ 91*) — PUBLIC NUISANCES — CRIMINAL PROSECUTIONS—INDICTMENT.

In a prosecution of a railroad company for maintaining a public nuisance, the indictment charged that the company had failed to keep in repair a public bridge extending over its track, but there was no allegation of fact showing that it was the duty of the railroad company to repair the bridge, except a recitation that the defendant did "suffer and permit its said bridge to become and remain out of repair and dangerous." *Held*, that the indictment did not sufficiently charge a duty to keep the bridge in repair.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 91.*]

Appeal from Circuit Court, McLean County.

"To be officially reported."

The Louisville & Nashville Railroad Company was convicted of maintaining a public

nuisance, and appeals. Reversed, with directions to dismiss the indictment.

Benjamin D. Warfield, Wilbur F. Browder, and R. A. Miller, for appellant. Jas. Breathitt, Atty. Gen., Chas. H. Morris, T. B. McGregor, and Ben D. Ringo, for the Commonwealth.

BARKER, J. The grand jury of McLean county returned the following indictment against the appellant, the Louisville & Nashville Railroad Company: "The grand jury of McLean county, in the name and by the authority of the commonwealth of Kentucky, accuse defendant, the Louisville & Nashville Railroad Company, of the offense of willfully suffering, permitting, and keeping on premises in their occupation and under their control a common public nuisance, committed in manner and form as follows: Said defendant is, and was at all times and dates hereinafter mentioned, an incorporated railroad company engaged in operating a railroad in and through this county over which many trains are run, and was incorporated by and exists under the laws of the state of Kentucky, and at a point on its right of way, in the county aforesaid, in or near the village of Island, there was many years ago a bridge erected over, above, and across the track, on which the cars and trains of defendant are run, and said bridge is sufficiently high above the defendant's track at that point to permit the trains and cars of defendant to pass below and under said bridge. This bridge is on and makes a part of the Hartford and Sacramento Road, which is a public and a much used road and thoroughfare in McLean county at that point, and is, and has been for many years and more than fifteen years, used for public travel by a large number of the good people of the county and state who pass and repass and have the right to pass upon and over said bridge of defendant, and heretofore, on the ——— day of ———, 190—, and continuously for twelve months last past, and during all of said time the said defendant did, in the county aforesaid and at the point aforesaid suffer and permit its said bridge to become and remain out of repair and dangerous to the safety of all the good people of the commonwealth then and there passing upon and over said bridge, and having the right to then and there pass and repass upon and over same, and has suffered the floor, supports, sides, ends, approaches, timbers, railings, and foundations of said bridge to be and become and remain insecure and out of repair and dangerous to those passing upon and over same, and such unsafe and dangerous condition has been by defendant suffered and permitted to continue for a long and unreasonable length of time, and during the whole of the twelve months next before the finding of this indictment, to the com-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mon public nuisance of all the good people in the neighborhood residing, passing and being, and especially of those passing upon and over said bridge and having the right then and there to pass and repass, and against the peace and dignity of the commonwealth of Kentucky." A general demurrer was filed by the defendant to this indictment and overruled by the court, whereupon a trial was had by a jury, with the result that the defendant was found guilty as charged, and a fine of \$200 inflicted as a punishment for permitting the nuisance complained of.

On appeal the railroad company complains of the following errors: First, that the court erred in overruling its demurrer to the indictment; second, that its motion for a peremptory instruction to the jury to find it not guilty should have been sustained; third, that the court erred in instructing the jury as to the law of the case.

The first question with which we are confronted is the sufficiency of the indictment. The accusatory part of it charges the defendant with the offense of suffering and permitting a common nuisance; but this is a mere conclusion of law, and must be supported by allegations of fact showing how the offense charged was committed. The pleading in no way connects the defendant with the bridge alleged to have been allowed to become unsafe, except the recitation that the defendant did "suffer and permit its said bridge to become and remain out of repair and dangerous," etc. No duty on the part of the defendant to repair or maintain the bridge for the benefit of the public is charged; nor are there any allegations of fact from which such a duty would necessarily flow. The indictment alleges that the bridge constitutes a part of a public highway, over which the traveling public has a right to pass and repass at will. From this it must be concluded that the public right is equal, if not superior, to that of the appellant in the use of the structure. For aught that appears to the contrary, the defendant may have many years ago built this bridge for its own private purposes, and the county afterwards constructed the highway which runs across the right of way of the defendant and over its bridge. The right of way may have been condemned by the county or granted by the railroad; but surely the public may not take a corporation's bridge and wear it out, and then require the owner to repair it. Suppose the bridge should be blown down by a storm, or washed away by a freshet, would the railroad, in the absence of a contract or a statute requiring it so to do, be under any duty to rebuild it? In order to view the problem from a different angle, suppose a farmer has a deep ravine across his farm; that for his own purposes he has constructed a substantial bridge over the ravine; that afterwards the county should construct a public high-

way across the farm, and over the bridge either condemning the right of way or obtaining a grant of it from the owner—what face might the public, under the facts, require the farmer to keep the bridge in repair simply because he owned the ultimate property or reversionary right in the timbers of the structure? And yet that is the very proposition presented by the indictment under discussion. The title of the bridge is alleged to be in the defendant. The use of it as a part of the public highway is alleged to be in the public. In the absence of any allegation showing a duty on the part of the defendant corporation to repair it must be presumed that this duty rests upon the county. This being true, it follows that the indictment fails to state an offense on the part of appellant, and its general demurrer should have been sustained. The conclusion makes it unnecessary to examine or decide the other questions presented by the assignment of errors.

Judgment reversed, with directions to dismiss the indictment.

MILLER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 20, 1907.)

1. NUISANCE (§ 91*)—PUBLIC NUISANCE—INDICTMENT.

An indictment charging defendant with maintaining a common nuisance on the 1st day of May, 1907, and up to and including the date of the finding of the indictment, sufficient charges a continuing offense.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 210; Dec. Dig. § 91.*]

2. INTOXICATING LIQUORS (§ 213*)—LIQUOR—NUISANCE—INDICTMENT.

An indictment for maintaining a common nuisance in a certain house, which charges that defendant suffered persons to congregate there and become boisterous and disorderly, and suffered the sale of spirituous, vinous, and mallicuous there contrary to the statute, is not defective for failing to charge that the disorder was such as to disturb the peace of the neighborhood.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 256; Dec. Dig. § 213.*]

3. INTOXICATING LIQUORS (§ 223*)—LIQUOR—NUISANCE—EVIDENCE.

On a trial of an indictment for maintaining a public nuisance in a certain house by suffering persons to congregate there and become boisterous and disorderly, and by suffering the sale of liquor there contrary to the statute, evidence of a sale of liquor about two years before the trial, but within one year preceding the date at which the indictment was returned, is admissible, but evidence of a sale of liquor three years before the trial is inadmissible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 267, 273; Dec. Dig. 223.*]

4. CRIMINAL LAW (§ 400*)—BEST EVIDENCE.

In a prosecution for maintaining a common nuisance in a certain house by suffering persons to congregate there and become disorderly and suffering the sale of liquor, evidence by a police judge that defendant was convicted before him within a year before the finding of the indict-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

ment, on the charge of having liquors in his possession for the purpose of selling them, is inadmissible, as the conviction should have been proved by the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879, 882-884; Dec. Dig. § 400.*]

5. CRIMINAL LAW (§ 1119*)—APPEAL AND ERROR—BILL OF EXCEPTIONS.

Complaint, made of a statement by the attorney for the commonwealth in arguing a case to the jury, which is not shown by the bill of exceptions, will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2929; Dec. Dig. § 1119.*]

Appeal from Circuit Court, Rockcastle County.

"Not to be officially reported."

John Miller was convicted of maintaining a common nuisance, and appeals. Reversed and remanded.

C. C. Williams, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

HOBSON, J. John Miller was indicted in the Rockcastle circuit court for maintaining a common nuisance. He was found guilty, and his punishment fixed at a fine of \$50 and 60 days' confinement in the county jail at labor, and he appeals.

The indictment charges that Miller committed the offense by maintaining a common nuisance on the 1st day of May, 1907, before the finding of the indictment, and up to and including the day of the finding of the indictment. This was a sufficient charge of a continuing offense. *Ashbrook v. Commonwealth*, 1 Bush. 139, 89 Am. Dec. 616; *Roberson*, Criminal Law, § 629. The local option law is in effect in Rockcastle county. It was charged in the indictment that Miller maintained a common nuisance in a certain house which he held, by suffering persons to congregate there and become boisterous and disorderly, and by suffering the sale of spirituous, vinous, and malt liquors there contrary to the statute. It is not essential that there be such disorder as to disturb the peace of the neighborhood. It is a disorderly house when the acts done there, from time to time, are contrary to law. 2 *Roberson* on Criminal Law, § 639; *Walker v. Commonwealth*, 117 Ky. 727, 79 S. W. 191.

The court allowed James Johnson to testify that he bought a quart of whisky from Miller about two years before the trial, which was held at the June term, 1908. This evidence was admissible, as the indictment was returned at the April term, 1907, and the two years would not go back as far as one year before the finding of the indictment. Charley Johnson was allowed to state that he purchased some whisky from Miller, he thought, about three years ago. This evidence should have been excluded, as this was not within one year before the finding of the

indictment. J. T. Adams, the police judge, was allowed to testify that Miller was convicted before him, within a year before the finding of the indictment, on the charge of having spirituous, vinous, and malt liquors in his possession for the purpose of selling them. This evidence should have been excluded. The conviction should have been proved by the record, and not by parol, and the evidence was incompetent in any event, unless it was shown that he had the spirituous, vinous, and malt liquors referred to in the house named in the indictment within one year before it was found, and there was no proof of this.

There was some evidence to the effect that Miller allowed persons to congregate in his house, and to be there drinking and drunk, and that he was in the habit of selling spirituous, vinous, and malt liquors there contrary to the local option law. There was sufficient evidence to go to the jury; but, on account of the improper evidence that was admitted over the defendant's objection above set out, a new trial must be granted. Complaint is made of a statement made by the commonwealth attorney in arguing the case to the jury, but this is not shown by the bill of exceptions. The only way in which a matter of this sort can be presented to this court is by the bill of exceptions. *Stagg v. Brightwell*, 92 S. W. 8, 28 Ky. Law Rep. 1220.

Judgment reversed, and cause remanded for a new trial.

MCDOWELL v. LOUISVILLE & N. R. CO.
(Court of Appeals of Kentucky. Nov. 19, 1908.)

CARRIERS (§ 228*)—LIVE STOCK—UNEXPLAINED DEATH—LIABILITY.

A carrier is not liable for the death of stock several days after its arrival, where it does not appear whether the death was caused by disease contracted before or after carriage or from injury in transit.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.*]

Appeal from Circuit Court, Hardin County.

"Not to be officially reported."

Action by R. E. McDowell against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

H. L. James, for appellant. L. A. Faurest, Benjamin D. Warfield, and C. H. Moorman, for appellee.

LASSING, J. Appellant, R. E. McDowell, shipped a car load of mules from Elizabethtown to Columbia, Tenn. When the mules were unloaded at Columbia, one of them lagged behind the others and had to be whipped to make it keep up with them. It refused to eat or drink that evening. The next day it appeared to be better and was sold as a sound mule; it being the opinion of those

conducting the sale that its jaded appearance was due to the fatigue brought on by being shipped some 200 or 300 miles. It was sold two or three times within two days after its arrival at Columbia, and was taken some 16 miles into the country, and when it was again sold the last purchaser discovered, upon attempting to take the mule home, that it was not well, and he attempted to treat it, but without success, and it died in three or four days. Having been sold under a guaranty, appellant, McDowell, refunded to the purchaser the cost price of the mule and instituted suit against the railroad company to recover its value, alleging that its death was the result of injuries received while in transit between Elizabethtown and Columbia. The company answered, traversing the allegations of the petition. At the conclusion of the plaintiff's testimony, the court instructed the jury to find for the defendant, and of his ruling in so doing the plaintiff complains and prosecutes this appeal.

It appears from the evidence that appellant lived about 9½ miles from Elizabethtown, that he was a handler of mules, and that in September, 1906, he put this mule, along with others, in a shed adjoining his barn, for the purpose of fattening them. They remained in this inclosure until early in March of 1907, when they were taken out and driven to Elizabethtown, for the purpose of shipment. At that time the mule in suit was fat and had had no exercise for six months. It appears that it showed no signs of being sick before it was shipped. When taken from the car at Columbia, it bore no marks evidencing any injury that it had received while in transit. It did appear sluggish when taken from the car, but it was

the opinion of all the witnesses who testified upon this point that this condition was brought about by fatigue incident to the journey. There is no proof whatever that at the points between Elizabethtown and Columbia the car in which these mules were shipped was not handled in a proper manner. All of the other mules included in the shipment were in first-class condition. It is shown that at the time the mules were shipped the weather was unusually warm for the season, and it is in evidence that the mule's death may have been produced by a disease brought on by being overheated while being driven from appellant's place of residence at Elizabethtown, or from Columbia to the home of his third purchaser, some 16 miles in the country.

Inasmuch as it was not developed by the testimony what caused the death of the mule—whether it resulted from a disease contracted before it was shipped, or after it reached Columbia, or whether it was the result of an injury received while being shipped—the jury had nothing upon which to base a verdict, and it has repeatedly been held by this court that in such cases the jury will not be permitted to speculate as to the cause of the injury. *Louisville Gas Company v. Kaufman, Straus & Co.*, 105 Ky. 13, 48 S. W. 434; *Hurt v. L. & N. R. R. Company*, 116 Ky. 545, 76 S. W. 502; *L. & N. R. R. Company v. Wathen*, 49 S. W. 185, Ky. Law Rep. 82; *L. & N. R. R. Company v. Warfield*, 98 S. W. 313, 30 Ky. Law Rep. 352.

Under the facts proven, we are of opinion that the court did not err in taking the case from the jury, and the judgment is affirmed.

SNYDER et al. v. BAIRD INDEPENDENT SCHOOL DIST.

(Supreme Court of Texas. Nov. 18, 1908.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—ISSUE OF BONDS.

Where a tax levied by a school district was illegal because, in excess of 20 cents on \$100 of taxable values, bonds proposed to be issued upon such illegal levy will be enjoined.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 225; Dec. Dig. § 97.*]

2. APPEAL AND ERROR (§ 861*)—CASE CERTIFIED—REVIEW.

Where a case is certified by a Court of Civil Appeals to the Supreme Court, the latter court will not decide questions not presented by the certificate.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8447, 3448; Dec. Dig. § 861.*]

On motion for rehearing. Motion overruled.

For former opinion, see 111 S. W. 723.

BROWN, J. An amended certificate was filed in this case, by which the honorable Court of Civil Appeals added to their former certificate that the majority of the court held "that such districts are without authority to issue bonds based upon a greater annual tax rate and levy than 20 cents on the \$100 of taxable valuation." There is nothing in the record to show that bonds which had been previously issued by the Baird independent school district were in question in this case, but it appears that the issue was whether or not that district should issue bonds based upon the levy greater than 20 cents on the \$100 of taxable values. We adhere to our former ruling and hold that the majority of the Court of Civil Appeals were right in holding that the Baird independent school district had not authority to levy a tax exceeding 20 cents on the \$100 valuation of property within the district. We now hold that the majority of the court correctly held that the bonds proposed to be issued based upon the illegal levy should not be issued, and that the injunction should be made perpetual as against the issue of those bonds.

The certificate does not present to this court the question of the power of the Baird independent school district, nor of any other district, to levy a tax of 20 cents on the \$100, and we have never decided that question with reference to the Baird district, or any other district. The certificate does not present the question of the validity of any bonds which have been issued by any school district in the state and, this court has not decided that such bonds would be invalid, or to what extent they might be held valid. Neither of the questions suggested have been brought within the jurisdiction of this court. Therefore neither has been, nor can either be,

decided by this court in the present proceeding.

The motion for rehearing is therefore overruled.

GALVESTON, H. & S. A. RY. CO. v. HERRING.

(Supreme Court of Texas. Nov. 18, 1908.)

1. COURTS (§ 247*)—TEXAS SUPREME COURT—APPELLATE JURISDICTION—DETERMINATION.

In determining whether a decision of the Court of Civil Appeals overrules other appellate decisions, so as to give the Supreme Court jurisdiction of the case, the decision must be considered as a whole.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 247.*]

2. COURTS (§ 247*)—JURISDICTION—TEXAS APPELLATE COURTS—CONFLICTING DECISIONS.

A conflict between a decision of the Court of Civil Appeals reversing and remanding and other appellate decisions, which have been overruled, does not give the Supreme Court jurisdiction of the cause in which such decision is made.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 247.*]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by W. V. Herring against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment of the Court of Civil Appeals (108 S. W. 977) reversing a judgment for defendant, defendant brings error. Dismissed.

Baker, Botta, Parker & Garwood, Jno. C. Box, De Montel & Fly, and W. B. Teagarden, for plaintiff in error. **V. H. Blocker, L. J. Brucks, H. C. Carter, P. J. Lewis, and Geo. Powell,** for defendant in error.

WILLIAMS, J. In the Court of Civil Appeals the judgment of the district court was reversed, and the cause remanded for a new trial. Jurisdiction of this court to grant the writ of error is invoked upon the ground that the decision of the Court of Civil Appeals upon questions of law overrules decisions of this court and other decisions of the Courts of Civil Appeals.

The first reason for which the Court of Civil Appeals reversed the judgment was that the charge of the trial court imposed upon plaintiff the burden of showing that he was not guilty of contributory negligence and had not assumed the risk. The application for writ of error takes the position that the charge was improperly construed, and that in this the decision of the Court of Civil Appeals overrules those of this court in the cases of *Brown v. Sullivan*, 71 Tex. 478, 10 S. W. 288, and *G. & S. F. Ry. Co. v. Hill*, 95 Tex. 629, 69 S. W. 136. In the present case the court gave the following instruction: "If you believe from the evidence that on or about the 29th day of August, 1906, while

plaintiff was a passenger riding on the caboose of one of defendant's freight trains, said train and caboose came to a stop at a point on defendant's road near the station of Glidden, in Colorado county, and if you further believe from the evidence that, while said caboose was standing still, an engine and cars operated by defendant struck said caboose and cars with unusual force and violence, and if you further find from the evidence that plaintiff was not warned or notified that said caboose and cars would be struck, if you find they were, and if you further find from the evidence that by reason of said cars or engine striking said caboose and cars, if you find they did so, the plaintiff was thrown down and injured as alleged in his petition, and if you further find from the evidence that it was negligence on the part of the defendant to permit the said caboose and cars attached thereto to be struck with unusual force and violence, if you find they were struck with unusual force and violence, and that such negligence directly caused plaintiff's injuries, if any, and if you further find from the evidence that plaintiff was not guilty of any contributory negligence which contributed to his injuries, if any, and if he did not assume the risk, then your verdict should be for the plaintiff." And, further, that "the burden of proof is upon the plaintiff to establish his case by a preponderance of evidence." And the court gave no other instruction concerning the burden of proof. The Court of Civil Appeals, in the opinion, argues that the first instruction alone put the burden of proof as to contributory negligence and assumed risk upon the plaintiff, but also bases its decision partly upon the combined effect of the two instructions. We must take the decision as a whole, and, when so considered, it is a construction of charges in this case which are materially different from those held to present no reversible error in the cases cited, as will plainly appear from a comparison.

It is also urged that the question of contributory negligence arose out of and depended upon plaintiff's own testimony, and that it was such as to impose upon him the burden of rebutting a conclusion of contributory negligence which would arise from the facts stated by him if left unexplained, and that the charge, if construed as the Court of Civil Appeals construed it, was correct in its application to this case, and that the decision that it was incorrect overrules those in such cases as *T. & N. O. Ry. Co. v. Crowder*, 63 Tex. 503; *G., C. & S. F. Ry. Co. v. Riordan* (Tex. Civ. App.) 22 S. W. 522; *Murray v. Railway Co.*, 73 Tex. 2, 11 S. W. 125. If all that is said in these cases tending to the proposition that the burden of proof is ever on plaintiff on the question of contributory negligence remained unaffected by later decisions of this court, it still could not be maintained that the conclusion of the Court of Civil Appeals in this case overrules them. They

were based upon facts there under consideration bearing no resemblance to those here passed upon by the Court of Civil Appeals. The latter holding is that plaintiff's testimony in this case did not raise such question as to his contributory negligence as to put the burden of proof on him to show that he was not guilty of it. Certainly this cannot be held to overrule decisions announcing different conclusions based on different facts, but the expressions on the subject in these cases relied on have been explained and ruled as to the burden of proof otherwise settled in later decisions of this court, and if a conflict existed between those expressions and the holding of the Court of Civil Appeals, this would not be sufficient to give jurisdiction to this court in a cause reversed and remanded by the Court of Civil Appeals. *G., C. & S. F. Ry. Co. v. Shieder*, 88 Tex. 130 S. W. 902, 28 L. R. A. 538; *Sullivan Insurance Co.*, 89 Tex. 665, 36 S. W. 73.

Another particular wherein it is claimed the decision of the Court of Civil Appeals overrules other decisions is in that part of the opinion which holds that there was no question in the case of plaintiff having assumed the risk of the defendant's negligence in the management of the train, if there was such negligence. This holding conflicts with no decision relied on. The only risks which plaintiff in error contends the plaintiff believed to assume were those inseparable from the mode of transportation by freight train. The opinion of the Court of Civil Appeals admits this contention throughout its opinion, but holds that this assumption did not include risks resulting from the negligent management of the train, a holding which does not overrule any case. The part of the charge of the trial court upon this subject held by the Court of Civil Appeals to be erroneous is not the one on which the third specification of error is based. What the court decided was that the charge puts upon the plaintiff the assumption of the risk "of the ordinary and usual movements of said train," which the court held to mean the particular train on which plaintiff was riding. This is a mere construction of the charge which overrules no case cited.

The other grounds of error are based upon mere language in different parts of the opinion under consideration concerning the degree of care required of carriers of passengers on freight trains. The court concludes its discussion by a statement of the rule by which it expresses the care required, and its holding upon the subject is thus shown. If the rule stated differs otherwise than in form from the expression from that contended for by plaintiff in error, we are unable to discern the difference. Certainly this part of the opinion does not overrule any case relied on by plaintiff in error.

Finding nothing upon which the jurisdiction of this court can rest, the question as to the correctness of the decision of the

Court of Civil Appeals is not before us, and the writ of error must be dismissed.

Writ of error dismissed.

CREWS v. CORTEZ et ux.

(Supreme Court of Texas. Nov. 18, 1908.)

1. LANDLORD AND TENANT (§ 331*)—RENTAL ON SHARES—BREACH OF CONTRACT—DAMAGES.

A contract for the rental of a farm on shares so far partakes of the nature of contracts for personal service as to make it just to take into consideration the principles by which damages for breaches of contracts for personal service are ascertained, and where, by the breach by the landlord of a contract, the tenant and those to whose services he is entitled are thrown into enforced idleness, only such sums as the tenant, and those to whose services he is entitled, may by reasonable diligence subsequently earn, can be deducted from the value of the tenant's share of crop growing at the time of the breach.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1361; Dec. Dig. § 331.*]

2. LANDLORD AND TENANT (§ 331*)—RENTAL ON SHARES—BREACH OF CONTRACT—DAMAGES.

A tenant of a farm on shares, wrongfully forced by the landlord to abandon the premises while a crop was growing, was entitled to recover the value of his share, less the sums he, and those to whose services he was entitled, could subsequently earn by reasonable diligence, together with all other expenses, including those for hired labor which he would have incurred in performing his contract; but the expense incurred by the landlord for labor in maturing and harvesting the crop could not be deducted.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1361; Dec. Dig. § 331.*]

3. LANDLORD AND TENANT (§ 331*)—RENTAL ON SHARES—BREACH OF CONTRACT—DAMAGES—EVIDENCE.

The expenses incurred by a landlord in maturing and harvesting a crop growing at the time he wrongfully evicted the tenant on shares may be taken as evidence of the expense which he would have incurred, provided there is no discernible difference in the results of the management of the landlord and tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 331.*]

4. LANDLORD AND TENANT (§ 331*)—RENTAL ON SHARES—BREACH OF CONTRACT—DAMAGES.

The doctrine applicable to the ascertainment of damages, when property of one is wrongfully converted by another, is not the rule for the measurement of damages for the wrongful eviction by a landlord of his tenant of a farm on shares; the rights of the parties being founded on contract.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1361; Dec. Dig. § 331.*]

Certified Question from Court of Civil Appeals of Third Supreme Judicial District.

Action by Ramon Cortez and wife against Cullen Crews. From a judgment for plaintiffs, defendant appeals, and the Court of Civil Appeals certifies a question to the Supreme Court. Question answered.

A. B. Storey and M. C. Jeffrey, for appellant. McNeal & Ellis, for appellees.

WILLIAMS, J. Certified question from the Court of Civil Appeals for the Third District as follows:

"Preliminary to certifying the hereinafter stated question, we certify that the above styled and numbered cause is now pending in this court, and that it is a suit brought by the appellee, Ramon Cortez, and his wife, Amanda Cortez, against the appellant, Cullen Crews, to recover damages to the extent of one-half the value of a crop planted and raised on about 400 acres of land rented by appellee Ramon Cortez from the appellant, Cullen Crews, for the year 1905; also, an additional sum of \$100 salary, claimed by plaintiff, about which no other statement is necessary, as the question certified has no relation to it. The case was tried in the court below before a jury, and verdict and judgment resulted in favor of plaintiff in the sum of \$1,500, from which the appellant has perfected this appeal.

"The case made by the plaintiff's petition is substantially as follows: Plaintiff alleged that he rented from the appellant, Crews, 400 acres of farm land with the necessary rent houses. He was to take possession of the premises and cultivate the land for one-half of the crop to be raised thereon; the appellant agreeing to furnish the necessary tools, teams, and feed for the same for the cultivation of the land, and also to furnish necessary seed to plant the same. This contract was alleged to have been made on or about the 1st day of January, 1905, and the plaintiff alleges that he went into possession of the farm, planted and cultivated the same in a proper manner, that on or about the 5th day of June of that year the defendant, through his agent, whose conduct he consented to and ratified, by threats and violence deprived the appellees of possession of the premises and the growing crops, and that they were forced to abandon the same. It is then substantially alleged that the appellant appropriated the crop and converted the same to his own use, and that the total value of the plaintiff's interest in the crop so gathered by the appellant and appropriated was the sum of \$3,230, for which amount he sues as actual damages in addition to the \$100 before stated. He further alleges that, since the breach of the contract, he (plaintiff), who was a farmer, was not able to procure work of the same kind except to the value of \$25 per month, which he admits he is willing to have deducted from the actual damages that he might be entitled to recover. The suit was brought on October 10, 1906. The defendant by answer generally denied the averments of the plaintiff's petition, and denied that he employed the plaintiff to oversee the premises, or gave him control or management of the same, but that he had employed one Flores to attend to his business, including the supervision of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

farm which the plaintiff was to cultivate, that plaintiff voluntarily abandoned the premises and the crops, that one of the reasons why he did so was that the merchant who was furnishing supplies refused to further continue to do so, and that he had become liable and bound for an amount of supplies which would consume his interest in the crops to be raised, that, after plaintiff had abandoned the premises and crops, the defendant took possession and cultivated, gathered, and marketed the same at the reasonable expenditure of \$2,712, which amount he pleaded as an offset to plaintiff's demand, on the theory that the plaintiff would only be entitled to a one-half interest in the crop, less his proportionate share of the costs and expenses necessarily incurred by the defendant after he took possession. Other facts are stated in the answer, which it is unnecessary to repeat.

"In deference to the verdict of the jury, and in view of the fact that there is evidence to support it, we find the following facts, although there is upon some of the material questions a conflict of evidence: We find that the appellant and appellee did enter into the contract substantially as pleaded by the plaintiff; that the plaintiff took possession of the farming lands, planted the crops, and properly cultivated the same, which consisted principally of corn and cotton, and which was in a fair state of cultivation and in a fairly prosperous condition on or about the 5th day of June, 1905, when the defendant, through his agent and manager, Flores, and with the knowledge and subsequent ratification of the conduct of Flores, by threats and violence forced the plaintiff and his family and his hired hands to abandon the premises and the crops, and by such unlawful and wrongful means the defendant then and thereafter took possession of the premises and crops and caused the crops to be cultivated and gathered, and appropriated to his own use the proceeds. There is evidence which tends to show that the value thereof was about the amount alleged by the plaintiff, which was a sum more than that awarded to him by the verdict of the jury. On the other hand, we find that there is some evidence in the record on behalf of the defendant tending to show that the plaintiff did not abandon and leave the premises and crops on account of the fact that in safety to himself and family he was forced so to do, but that he voluntarily abandoned the same, and the defendant's evidence shows that the entire value of the crop so produced on the premises amounted to about \$2,498, and that in order to properly cultivate, gather, and market the crop after it was abandoned by the plaintiff, it was necessary for the defendant to expend a considerable sum of money, near the amount alleged by him in his answer, and there is some evidence from which the conclusion can be reached that such amount so expended was necessary and rea-

sonable. These are all the facts and evidence we find it necessary to state in order to understand and properly give answer to the question certified.

"The trial court, on the measure of damages, and in accordance with the measure pleaded by the plaintiff, instructed the jury that if the plaintiff was, on the grounds alleged, forced to abandon the premises and crops, and thereby the defendant wrongfully deprived him of possession of the same, then the plaintiff would be entitled to recover one-half of the value of the entire crop cultivated, matured, and raised upon the premises, less such a sum as the jury might believe from the evidence the plaintiff and family could have earned during the period they were deprived of the possession of the same. The court also instructed the jury that, if they believed that the plaintiff voluntarily abandoned the premises and crops and was not forced to do so, then the court should return a verdict in favor of the defendant.

"The defendant in the court below requested a charge substantially to the effect that, although the plaintiff was driven from the leased premises, as alleged, if the plaintiff was entitled to recover, the defendant would be entitled to recover on his cross action or offset against the plaintiff the reasonable amount expended for the cultivation, gathering, and marketing of the crop at the time the defendant took possession. This charge was refused. By proper assignment of error the defendant complains of the action of the court in refusing this charge. It has also by assignments, complained of the action of the court on the measure of damages, as stated, on the ground that the plaintiff is only entitled to compensation for the value of his part of the crop, less the reasonable cost and amount expended by the defendant in cultivating, gathering, and marketing the same.

"In deciding similar questions in cases of this character, there is an apparent conflict between the decisions of the Courts of Civil Appeals upon this subject. This conflict is illustrated, on the one hand, by the case of *Fagan v. Vogt*, 35 Tex. Civ. App. 528, 80 S. W. 665, and, on the other, by the case of *Waggoner v. Moore & Stephens*, 101 S. W. 1058, 18 Tex. Ct. Rep. 491, the first case mentioned decided by the Court of Civil Appeals of the First District, and the second case mentioned decided by the Court of Civil Appeals of the Second District, and, in this connection, we desire to call the court's attention to another line of cases which may have some bearing upon this question: *M. K. T. Ry. Co. v. Starr*, 22 Tex. Civ. App. 313, 25 S. W. 393; *Brown v. Pope*, 27 Tex. Civ. App. 225, 65 S. W. 42; *Cummings v. Masters* (Tex. Civ. App.) 93 S. W. 508.

"We do not intend to certify the conflict of decision, but we propound to the Supreme Court the following question: In view of

facts as found by us as sustaining the verdict in favor of the plaintiff on the ground that he was illegally and wrongfully deprived of possession of the premises and the crops produced thereon, did the trial court in its charge submit the correct measure of damages? Or, in other words, would the defendant in such a case be entitled to charge against the plaintiff any part of the reasonable cost and expense of cultivating, gathering, and marketing the crop after the time that the defendant wrongfully and illegally took possession of the same and forced the plaintiff to abandon the same?"

In the case of *Rogers v. McGuffey*, 96 Tex. 565, 74 S. W. 753, the question as to the measure of damages for the breach of such a contract as that now in question was discussed, and we said: "But contracts like the one in question have additional elements. The parties entering into them stipulate for shares in the crops to be produced as the benefit to be derived from them. The owner of the land expects the share reserved to himself as a return for the cultivation of his land and his other outlay. The benefits expected by the other party are employment and the stipulated return for his labor, and, sometimes, a home for the time. To deprive him of these benefits is to deprive him of that which, in the very contract, both parties to it contemplate he shall receive. It would seem to follow necessarily that his damages should be compensation for what he thus lost. In such a contract the parties enter into a joint business enterprise and stipulate what shall be the advantages to each. When one wrongfully deprives the other of those advantages, he should be required to compensate him for that which the contract stipulated he should have. The objects of the contract have a close analogy to those of a partnership, and, in so far as employment for the labor of one of the parties is one of the purposes, to the contract for personal service." Further in that opinion it is said: "It is true that the plaintiff is not necessarily entitled to recover as fully as if the contract had been performed; it often being necessary to make proper deductions in order to ascertain the true amount of his damages. But it is still true that the probable results of the contract, if executed, its 'value,' as Judge Wheeler calls it in *Hassell v. Nutt*, 14 Tex. 260, are to be the basis of the inquiry. *Hearne v. Garrett*, 49 Tex. 626. What deductions should be made must, as indicated by the opinion in the case last cited, depend upon the facts of particular cases." The views thus expressed are sustained by the following authorities: *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Depew v. Ket-chum*, 75 Hun, 227, 27 N. Y. Supp. 8; *Jewett v. Brooks*, 134 Mass. 505; *Bowers v. Graves*, 8 S. D. 385, 66 N. W. 931.

In *Rogers v. McGuffey*, and in *Waggoner v. Moore & Stephens*, 101 S. W. 1058, 18 Tex. Ct. Rep. 491, the contracts were broken before

any crops had been brought into existence, and therein they differ from *Fagan v. Vogt*, 35 Tex. Civ. App. 528, 80 S. W. 665, and *Tignor v. Toney*, 13 Tex. Civ. App. 518, 35 S. W. 881, in which the decisions were based on the doctrine of wrongful and intentional conversion of personal property, as expressed in the cases last cited in the present certificate. That doctrine is fully stated in *Wooden Ware Co. v. United States*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, and in the cases there cited. For reasons to be given further on, we are of the opinion that it does not apply to this case. The damages which the plaintiff in this case is entitled to recover on facts such as are found by the jury and by the Court of Civil Appeals are to be ascertained, as indicated in *Rogers v. McGuffey*, by finding the value of the contract to him, or, in other words, of the pecuniary benefits which would have accrued to him had he been allowed to perform it fully. The claim asserted seems to be for the value of the stipulated share of the matured crops, and we shall assume that it would have constituted the entire compensation to plaintiff for fully performing the contract had it been received as the result of such performance. He was thus to receive all the return contemplated for the labor and expense of making and harvesting the crops. The question arises: Is he to receive the value of all of it, when he was relieved of part of the labor and, perhaps, of other expense that would have been necessary to full performance? As was said in *Rogers v. McGuffey*, such contracts sometimes are intended to furnish employment for the labor of the tenant or cropper. The profit to be realized out of the crops over and above the value of the labor and other outlays expended in making them is therefore not all that is contemplated in such contracts. Employment for the tenant or cropper when so secured is valuable, whether a profit over and above such labor and other expenses is realized or not, and this may be true as to the labor of members of his family which he can control and utilize without extra expense.

By the breaking of the contract he and others whose services he is thus entitled to may be thrown into enforced idleness, and thus he may be denied one of the benefits contemplated in the making of the contract. Such contracts so far partake of the nature of those for personal service as to make it just to take into consideration the principles by which the damages for breaches of those contracts are ascertained, and, in cases where such results as we have just indicated have flowed from the breach, to deduct, not the entire value of the labor that was necessary to the making of the crop, but only such sums as those so thrown out of employment could by reasonable diligence have earned thereafter; but all other expenses, including those for hired labor, which the cropper would have incurred in performing his part

of the contract, should be deducted from the value of his share of such crops as he would have made, for the reason that he would have realized from the matured crops only the difference between the value of his share and the cost of their production. Whether or not other deductions should have been required besides that mentioned in the charge we cannot definitely determine, for the reason that the certificate does not state what the evidence was upon the subject.

The plaintiff did not have the right to recover the entire value of the stipulated share of the crops he would have made, if, in order to make them, further expenditures, such as we have indicated, would have been necessary on his part; but he had only the right to recover the difference between such value and the amount of such further outlays, added to the deductions to be made as for such earnings in other employment as are above indicated. Expenses incurred by defendant for labor, or other things, in maturing and harvesting the crops, are not to be deducted in estimating plaintiff's damages. The plaintiff, if the facts be as found, is not chargeable with expenses incurred by the defendant. *Burwell v. Brodie*, 134 N. C. 540, 47 S. E. 47; *Jefcoat v. Gunter*, 73 Miss. 539, 19 South. 94; *Foley v. S. W. Land Co.*, 94 Wis. 329, 68 N. W. 994. The crops, as we gather from the certificate, were to be made by the labor of plaintiff and of others employed by him. The expenses he would have incurred might have been more or less than those incurred by defendant, and the crops he would have raised might have been better or worse than those the defendant raised. Of course, in supposable cases there might be no discernible differences in the results of their management, in which case those obtained by the defendant might be taken as evidence of those which the plaintiff would have obtained; but at last the plaintiff's rights are to be judged by that which would have been the result of his performance of the contract.

It may be that the trial court proceeded upon the theory laid down in the cases of *Tignor v. Toney* and *Fagan v. Vogt*, *supra*. We have not found any other authority for the application of that doctrine to such cases as this, where the wrong committed was the breach of an executory contract for the raising of crops; the breach occurring when the crops were immature. The authorities cited above from other states lay down substantially the measure of damages as we have defined it, applied in cases where the crops were growing as well as in those in which they had not been sown when the breaches occurred.

The doctrine applicable where the property of one is taken and converted by another by a willful trespass and without bona fide claim of right does not furnish the rule for cases like this, where the wrong done con-

sists in the breach of a contract under which the crops are to be produced. The rights of the parties are founded on the contract, and the wrong done is compensated for when the injured party is allowed the full value which he would have produced, less the expense which he has been relieved. That difficulty exists in applying this measure of damages recognized by all, but it is the logical and just one, and the trouble encountered is not insuperable.

We have endeavored to so state the law as to answer the question certified substantially, without being able, for lack of full information as to the facts, to determine whether or not the charge given was correct. That question must depend upon whether or not the law as we state it to was properly applied to the evidence.

ATTEBERRY v. BURNETT et al.

(Supreme Court of Texas. Nov. 18, 1908.)

1. VENDOR AND PURCHASER (§ 261*)—RESERVATION OF VENDOR'S LIEN—LEGAL TITLE.

Where a vendor conveying land, but expressly reserving a lien to secure the purchase money note, transferred the note to a third person and died, the legal title vested in his heir in trust for the third person to enforce the note and for the purchaser on his paying the note.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 261.*]

2. VENDOR AND PURCHASER (§ 54*)—EFFECT OF EXECUTORY CONTRACT.

A vendor in an executory contract for the sale of land, who receives the purchase price and holds the legal title in trust for the purchaser, and on the death of the vendor the legal title descends to his heir for the benefit of the purchaser.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 85; Dec. Dig. § 54.*]

3. VENDOR AND PURCHASER (§ 54*)—EFFECT OF EXECUTORY CONTRACT.

A vendor in an executory contract for the sale of real estate who receives the price, or vendor conveying the premises and reserving a lien to secure the price, is divested of the equitable title to the premises, and he holds the legal title in trust for the purchaser, which trust he cannot terminate by a conveyance to another nor by purchasing the equitable title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 85; Dec. Dig. § 54.*]

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. P. Atteberry, administrator of O. W. Spradling, deceased, against Mrs. A. G. Burnett and others. From a judgment granting insufficient relief, plaintiff appeals, and the Court of Civil Appeals certify questions to the Supreme Court. Questions answered.

Certified questions from the Court of Civil Appeals of the Fifth Supreme Judicial District, as follows:

"Atteberry, as an administrator of the estate of O. W. Spradling, deceased, instituted this suit against the appellees, Mrs. A. G.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Burnett, W. F. Jones, and F. M. Newton, on the 19th day of January, 1907. The original petition, omitting its formal parts, is as follows:

"That on or about the 1st day of August, 1905, O. W. Spradling departed this life, and that thereafter, to wit, on the 7th day of September, 1906, letters of administration on the estate of said O. W. Spradling were duly granted to J. P. Atteberry, plaintiff, by the county court of Hunt county, Tex., and that thereupon plaintiff duly qualified as such administrator. That administration of the estate of said O. W. Spradling is still open and pending, and that plaintiff and defendants all reside in Hunt county, Tex. That heretofore, to wit, on the 10th day of February, 1898, the defendant Mrs. A. G. Burnett executed and delivered to C. A. Langford and A. Cameron her certain promissory note for \$1,025, payable at Greenville, Tex., both principal and interest. Said note was due on or before the 1st day of January, 1899, with interest from its date until paid at the rate of 10 per cent. per annum, the interest payable annually as it accrues, for value received. This note was given as part payment for a certain lot or parcel of land, situated in the city of Greenville, Hunt county, Tex., and being a part of the Epps Gibbons survey, and being the east half of a tract of land deeded by T. A. Ball to W. A. Mowery January 6, 1887, deed recorded in Book Q, p. 354, Hunt County Deed Records, and bounded as follows: Beginning at the southeast corner of said tract deeded by T. A. Ball to W. A. Mowery; thence north with E. B. line of same, 86 vrs.; thence east, 37½ vrs., to beginning. And it was agreed that if this note is placed in the hands of an attorney for collection, or if collected by suit, that said A. G. Burnett is to pay 10 per cent. additional as attorney's fees, both on principal and interest. That this note was given for a part of the purchase money of the above-described premises, and to secure the payment of the said note a vendor's lien was expressly retained on said land as shown in deed of conveyance, bearing even date of said note, from C. A. Langford and wife, E. C. Langford, and said A. Cameron to said Mrs. A. G. Burnett. That said note was, before maturity, transferred and delivered to said O. W. Spradling for a valuable consideration, whereby said O. W. Spradling became the legal owner and holder of said note. After the transfer of said note as aforesaid, said A. Cameron and C. A. Langford departed this life; said A. Cameron leaving all interest he held in the above-described land to his surviving widow, P. A. Cameron, and said C. A. Langford leaving as his only heirs J. D. Langford and his surviving widow, E. C. Langford, both of whom were 21 years of age on the 12th day of January, 1907, and long prior thereto. On the last date above mentioned there was no administration pending, nor

any necessity for one on the estate of either said A. Cameron or said C. A. Langford. That on January 12, 1907, said J. D. Langford, Mrs. E. C. Langford, and Mrs. P. A. Cameron executed a deed to J. P. Atteberry, administrator, plaintiff, conveying all their right, title, and interest to said J. P. Atteberry, administrator, in the above-described premises. That when said note was executed said F. M. Newton indorsed the above-described note, thereby becoming responsible for the payment of the same. That defendants, though often requested, have never paid said note, but a part thereof, as follows: On January 2, 1899, \$558.05; April 12, 1901, \$75; June 17, 1901, \$107.50; October 24, 1901, \$100. But the balance of remainder of said note remains still due and unpaid, to plaintiff's damage \$725, and defendants still refuse and fail to pay said balance. That said W. F. Jones is setting up some kind of a claim to the above-described land, which is a cloud on the title to plaintiff. Wherefore he prays that defendants be cited to answer this petition, that he have judgment for his debt, interest, and costs of suit, and 10 per cent. additional as attorney's fees, and for the foreclosure of his lien, on the above-described premises, and that they be decreed to be sold according to law, and that the sheriff or other officer executing said order of sale shall place the purchaser of the property sold under the same in possession thereof, within 30 days after the date of sale, and for general and equitable relief. But if the court should hold that plaintiff's note is barred by limitation, then plaintiff prays in the alternative for rescission of said sale and to recover said land from said defendants, and that all rights and title of said defendants be divested out of them and be vested in this plaintiff, and that all cloud be removed from plaintiff's title, and for such other and further relief as the court may deem right in law and equity."

"The defendant Mrs. Burnett answered by a general demurrer, general denial, and plea of the statute of limitation of four years in bar of the note sued on. The defendant Newton answered, confessing liability on said note. The defendant Jones pleaded a general demurrer, general denial, not guilty, and, among other things, that he became the owner, in fee simple, of the title to the land described in the plaintiff's petition March 30, 1899, and had held peaceable and adverse possession, etc., of the same under a deed duly recorded for more than five years, next before the commencement of this suit. He prayed that plaintiff take nothing, and that he be quieted in his title to the land. By supplemental petition appellant, after several special exceptions to appellee Jones' answer, pleaded: That in his capacity as administrator, as aforesaid, he was on, to wit, the — day of April, 1899, lawfully seised and possessed of the land in his original pe-

tition described, holding the same in fee simple; that on the day and year last aforesaid, the defendants entered upon said premises and ejected the plaintiff therefrom, and unlawfully withheld the possession thereof from this plaintiff, to his damage in the sum of \$100. Wherefore, he prays as in his original petition, and that, in the event the court should sustain the defendant Mrs. Burnett's pleas of limitation as to said note, he prays for cancellation and rescission of the contract of sale, and for restitution of said premises, for costs of suit, and all other relief, both general and special, to which he may be entitled in the premises. A trial by the court without a jury resulted as follows: Judgment in favor of plaintiff against F. M. Newton for the sum of \$748.97, and in favor of Mrs. Burnett and Jones, that plaintiff take nothing as against them on the note sued on, and that they recover their costs. The general demurrers of Mrs. Burnett and W. F. Jones to that portion of the plaintiff's petition seeking to rescind the sale of the land and to recover the same were sustained, and, plaintiff refusing to amend, it was held that Jones was the owner of the land, and judgment was rendered divesting all title out of plaintiff, Atteberry, as administrator of the estate of Spradling, deceased, and investing the same in Jones. From the judgment thus rendered appellant has appealed to this court and assigns the following errors: First, that 'the court erred in sustaining the general demurrer of defendant W. F. Jones to plaintiff's petition, filed herein.' Second, 'that the court erred in holding that the superior title to the land in controversy held by C. A. Langford and A. Cameron did not descend to their heirs at their death, and that the same could not by said heirs be transferred to plaintiff.'

"This court at a former day of the present term reversed and remanded this cause for trial, and it is again before us on motion for a rehearing. Our opinion appears to be in conflict with the decision of the Court of Civil Appeals for the Sixth Supreme Judicial District in the case of Bledsoe et al. v. Fitts, 105 S. W. 1142. Hence the necessity or advisability of certifying the question involved for the decision of the Supreme Court:

"Question 1. Did the trial court err in sustaining the general demurrer of W. F. Jones to that portion of the plaintiff's petition seeking to recover the land?

"Question 2. Does the superior title, which remains in the vendor of land where the vendor's lien is expressly reserved in the deed to secure the purchase-money note given therefor, and which note has been assigned to a third party, descend, upon the death of the vendor (he not having conveyed such title before his death) to his heirs, and will it, when conveyed by them to the assignee of such note after it is barred by the statute of limitation, support an action of trespass to try title by him to recover the land?"

Yates & Carpenter and Atteberry & Peterson for appellant. Neyland & Neyland, for appellees.

BROWN, J. The two questions submit the same proposition of law, to which we answer that, upon the death of C. A. Langford and A. Cameron, the legal title to the land in question descended to and vested in the heirs in trust for the holder of the vendor's lien note, and the conveyance made by the heirs of the said Langford and Cameron to J. P. Atteberry, administrator of Spradling, vested in the latter the legal title to the land for the benefit of the estate he represented.

The decision of the Court of Civil Appeals in the present case is not in conflict with Bledsoe v. Fitts, 105 S. W. 1142. In that case, the original vendor of the land still retained the ownership of the purchase-money note at the time of her death. She died without children, leaving a husband and sisters, and the issue presented was who inherited from her the vendor's lien note. Her sisters claimed that, as the legal title to the land remained in her, therefore the vendor's lien note would descend as if it were real estate, while the husband claimed that he inherited the note from her as personal property. That case was presented to the court on application for writ of error, and the writ refused for the reason that the note was personal property and descended to the husband. We see nothing in the opinion of Justice Levy which would justify the conclusion that it was intended by that court to decide the question here presented.

Langford and Cameron, the original vendors, having transferred the note to Spradling, held the legal title to the land in trust to secure the payment of the note. When Langford and Cameron died, the legal title must have passed to and vested in some one. It could not vest in the holder of the note unless it was conveyed to him by the original vendors of the land or their heirs. It could not vest in the vendee until the purchase money was paid. Therefore, to preserve the trust, the title must pass and vest by descent in the heir at law of the deceased vendors. 1 Perry on Trusts, § 342; Wainwright v. Bright, 1 J. & W. 195.

The trust in this case is similar to the one which exists in the vendor under an executory contract for the sale of land after the purchase money has been paid. In such case the vendor holds the legal title in trust for the vendee, and, the original vendor dying, the legal title descends to the heirs for the benefit of the cestui que trust. We can see no reason for a distinction between that class of cases and the one under consideration. In each the vendor is wholly divested of the equitable title to the land, and in neither case does the descent confer upon the heir a beneficial interest in the land; but the legal title is a valuable right

held by the vendor for the holder of the note. The vendor could not terminate this trust by conveying the land to another, nor by purchasing the equitable title. *Russell v. Kirkbride*, 62 Tex. 455. It can be united with the equitable estate only by payment of the purchase money. To hold that the legal title did not descend to the heir is to hold that it was extinguished, and that there is an estate in land to which there is no legal title in existence.

We have not been able to find any authority in point, but we believe that the application of the general principles above stated brings the correct solution of the question as expressed in our answer above.

PARKS et al. v. WEST et al.

(Supreme Court of Texas. Nov. 18, 1908.)

On motion for rehearing. Motion overruled. For former opinion, see 111 S. W. 728.

WILLIAMS, J. The argument in support of the motion contends that the original opinion is based entirely upon the word "within," and does not give proper weight to the whole of the phrase, "within all or any of the counties," and it is urged that the words "all or any" would be useless to express only the meaning which we have ascribed to the Constitution. It is very easy to see why those words were used. The power proposed in the constitutional amendment was to be one to provide for school districts either by general or special law—by general law "within all," or by special law "within any," of the counties. But in all cases the districts were to be within all or within some of the counties. As we pointed out in the original opinion, all of those words would have been wholly useless, and out of place, had the purpose been to give unlimited power to create districts out of any territory without regard to the division of the state and counties. We are treating, of course, of the creation of districts to be invested with the power of local taxation granted by the amendment to the Constitution, and our holding is that, as formed, the district of Mertens does not so conform to the Constitution as to have that power.

Motion overruled.

MATHIS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

CRIMINAL LAW (§ 1090*)—APPEAL—RECORD—NECESSITY FOR STATEMENT OF FACTS AND BILL OF EXCEPTIONS.

Where the record on appeal contains no statement of facts, bill of exceptions, or motion for new trial, the action of the lower court cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1090.*]

Appeal from District Court, Red River County; Ben H. Denton, Judge.

Henry Mathis was convicted of burglary, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the state.

RAMSEY, J. Appellant was indicted in the district court of Red River county on a charge of burglary. On trial he was convicted, and his punishment assessed at a term of four years in the penitentiary.

The record comes to us without statement of facts, without bill of exceptions, and without motion for a new trial. It is obvious that, under the well-settled rules of this court, we can grant him no relief.

It is therefore ordered that the judgment of the court below be, and the same is hereby, in all things affirmed.

WILSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

CRIMINAL LAW (§ 721*)—TRIAL—MISCONDUCT OF COUNSEL—COMMENTS ON ACCUSED'S FAILURE TO TESTIFY IN FORMER TRIAL.

Code Cr. Proc. 1895, art. 770, providing that failure of accused to testify shall not be considered, or commented on by counsel, applies where accused was testifying on the second trial of his case, but had not testified on the first trial and a question asked him on cross-examination by the county attorney as to whether his testimony then given was the same as on the former trial, and comments in his argument on accused's failure to testify in the former trial, constituted reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.*]

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

Charles T. Wilson was convicted of horse theft, and appeals. Reversed, and remanded for a new trial.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This is an appeal prosecuted from the district court of McLennan county on a conviction for theft of a horse. The trial resulted in a conviction of theft as charged, and the punishment of appellant was assessed at two years' confinement in the penitentiary.

There are a number of questions made by appellant; but as the case must be reversed on account of the argument of the county attorney, and as the other matters may not arise on another trial, we deem it unnecessary to discuss them.

The record shows this is the second trial of appellant on this same charge. On this trial appellant became a witness in his own behalf, and on cross-examination, over the protest of appellant, the county attorney asked him if his testimony on this trial was the same as on the former trial. This was objected to, because it was inadmissible, irrelevant, immaterial, and highly prejudicial to appellant, in that it disclosed to the jury the fact that there had been a former trial of said cause, and because the statute inhibits

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

any allusion to or comment on the fact that the defendant failed to take the stand in his own behalf in said cause. Following this objection, and in argument, counsel for the state said to the jury that the defendant on a former trial of said case failed to take the stand and swear to the alibi pleaded in said cause; that he failed to take the stand in his own behalf in said former trial; that this defense of alibi was an afterthought of defendant, and was a fabrication invented since said trial. These remarks of the county attorney were objected to, and the court requested to withdraw same from the jury, and to instruct the jury not to consider same, which objections and request were then and there by the court overruled.

Both the question asked and the argument made, as complained of, were improper, and should not have been allowed. Article 770 of the Code of Criminal Procedure of 1895 provides: "Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause." That this applies to comment on the failure of the defendant to testify in a case then on trial has been repeatedly held by us. See *Jordan v. State*, 29 Tex. Cr. App. 595, 16 S. W. 543, *Reed v. State*, 29 Tex. Cr. App. 449, 16 S. W. 99, *Hunt v. State*, 28 Tex. Cr. App. 149, 12 S. W. 737, 19 Am. St. Rep. 815, and numerous cases since then. It was held in the case of *Richardson v. State*, 33 Tex. Cr. R. 518, 27 S. W. 139, that the statute above quoted was comprehensive enough in its terms and covered a preceding trial, and that, though the defendant might testify in the case then being tried, if the same case had been tried at a former term of the court, and defendant had failed to testify on such trial, any allusion to his failure would constitute reversible error. A similar decision was rendered in the case of *Dorrs v. State* (Tex. Cr. App.) 40 S. W. 311. See, also, *Gainse v. State* (Tex. Cr. App.) 53 S. W. 623.

For the error indicated, the judgment of conviction is set aside, and the cause is remanded for another trial.

MALONE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

ASSAULT AND BATTERY (§ 91*)—SIMPLE ASSAULT—PROSECUTION—EVIDENCE.

Evidence held sufficient to support a conviction of simple assault.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 136; Dec. Dig. § 91.*]

Appeal from Bowle County Court; Sam H. Smelser, Judge.

Earnest Malone, charged with commit-

ting an aggravated assault, was convicted of a simple assault, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged in the county court of Bowle county with committing an aggravated assault upon one M. Smith. On trial he was found guilty of a simple assault, and his punishment assessed at a fine of \$5.

There is in the record, as it comes to neither charge of the court, nor bills of exception, nor any special charges requested. The only question which we can consider is the first assignment of error made in appellant's motion for a new trial, to the effect that the verdict of the jury is contrary to the law and the evidence, in that the evidence shows conclusively that defendant is not guilty of any violation of law, and that such verdict should not stand, for the reason that the testimony of the prosecuting witness, on whose evidence alone the conviction is based, shows that he was an excessive user of morphine, that his memory is impaired, that he relates things as occurring when in fact they did not occur, and that he is altogether too irresponsible to be believed. The case is rather a singular one, and a strong attack is made upon the memory of the prosecuting witness. He is, however, supported by the testimony of another witness to some extent, and we are not prepared to say, under all the circumstances, that he is so wholly unworthy of belief as to justify us in reversing the judgment of the court below. The jury who heard his testimony and the court who tried the case were in a better situation than ourselves to pass fairly on his credibility. We do not believe, as presented, we would be authorized to reverse the judgment on the sole ground that the evidence does not support the verdict.

Finding no error in the proceedings below, the judgment is affirmed.

PRESCOTT v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. HOMICIDE (§ 300*)—ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS.

A charge, on a trial for assault with intent to murder, that if from the acts of prosecuting witness or his words there was created in defendant's mind a reasonable apprehension that he was in danger of losing his life, or of serious bodily injury, then defendant had the right to defend himself from such danger, or apparent danger, as it reasonably appeared to him, and that a party unlawfully attacked is not bound to retreat to avoid the necessity of killing, and defendant committed the assault as a means of defense, believing that he was in danger of losing his life or serious bodily injury, he should be acquitted, did not limit the right of self-

fense to an actual attack by prosecuting witness upon defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 616, 617; Dec. Dig. § 300.*]

2. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

A charge, on a trial for assault with intent to murder, that if defendant assaulted prosecuting witness with a deadly weapon, to wit, a knife, but at the time was by some adequate cause moved to such a degree of anger, sudden resentment, or terror as to render him incapable of cool reflection, and in such a state of mind committed the assault, and such assault was not in defense of himself against unlawful attack, then to find defendant guilty of an aggravated assault, did not place upon defendant the burden to show the facts reducing the assault to an aggravated assault, where the court had theretofore clearly submitted the issue of assault with intent to murder, and had also charged that, if the jury believed defendant guilty of an assault, or had a reasonable doubt as to whether it was with intent to murder, then to acquit him of that offense and consider whether he was guilty of an aggravated assault, or was justified in his action, and in addition gave a general charge that defendant was presumed innocent until his guilt was established beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1900, 1904; Dec. Dig. § 822.*]

3. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Nor was the instruction subject to the criticism that it instructed that the knife used was, as a matter of law, a deadly weapon, where the court had previously defined a deadly weapon as one which from the manner used is calculated to produce death or serious bodily injury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1994; Dec. Dig. § 822.*]

4. HOMICIDE (§ 338*)—APPEAL—HARMLESS ERROR—PREJUDICE.

Where, on a trial for assault with intent to murder, it is shown beyond doubt that defendant struck and wounded prosecuting witness with a knife, and that the wounds, of which there were several, were both dangerous and well-nigh mortal, defendant cannot complain of a charge that the knife was, as a matter of law, a deadly weapon.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 338.*]

5. HOMICIDE (§ 300*)—ASSAULT WITH INTENT TO MURDER—EVIDENCE—INSTRUCTIONS.

A charge, on a trial for assault with intent to murder, that if defendant sought a meeting with prosecuting witness to slay him, and did some act, or used some language, with intent to produce the occasion and bring on the difficulty, and the same was reasonably calculated to provoke a difficulty, and on such account prosecuting witness attacked him, and defendant then attempted to slay prosecuting witness, defendant could not justify on the ground of self-defense, but such attack by defendant would be assault with intent to murder; but, if defendant had no such purpose in seeking the fatal meeting, and was attacked by prosecuting witness, then his right of self-defense would not be forfeited, and he could stand his ground and defend himself by the use of such means of defense as the circumstances indicated to be necessary to protect himself from danger or what reasonably appeared to him to be danger—did not shift the burden of proof to defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 632; Dec. Dig. § 300.*]

6. HOMICIDE (§ 300*)—ASSAULT WITH INTENT TO MURDER—INSTRUCTIONS.

Nor was the charge subject to the objection that it was limited, in its application of the law of self-defense, to an actual attack, since it expressly included apparent danger, and that as viewed from the standpoint of defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 629; Dec. Dig. § 300.*]

7. CRIMINAL LAW (§ 829*)—TRIAL—REQUESTED CHARGES COVERED BY CHARGE GIVEN.

Requested charges which, so far as applicable, have been covered by the general charge of the court are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from District Court, Armstrong County; J. N. Browning, Judge.

Will Prescott was convicted of assault with intent to murder, and he appeals. Affirmed.

L. C. Barrett, J. M. Jones, Geo. W. Wharton, and J. S. Stallings, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Potter county on a charge of assault with intent to murder. The trial from which this appeal results was had in Armstrong county, where the case was sent on change of venue on application of appellant. The case has twice been before this court, and the facts will appear with a reasonable fullness in the earlier opinions of the court in this case as found in 101 S. W. 215, and 105 S. W. 192. On this trial appellant was found guilty of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for two years. Appellant assigns a number of errors on which a reversal is sought.

1. Among other things, complaint is made of the charge of the court on the issue of self-defense, and the claim is made that the court's charge limits the right of self-defense to an actual attack made upon him by the prosecuting witness W. H. Reece. We think the charge of the court, taken altogether, is not subject to this complaint. On the law of self-defense the court instructed the jury as follows: "Upon the law of self-defense you are instructed that, if from the acts of the said W. H. Reece, or from his words coupled with his acts, there was created in the mind of defendant a reasonable apprehension that he (the defendant) was in danger of losing his life, or of suffering serious bodily injury at the hands of the said W. H. Reece, then the defendant had the right to defend himself from such danger, or apparent danger, as it reasonably appeared to him at the time, viewed from his standpoint. And a party so unlawfully attacked is not bound to retreat in order to avoid the necessity of killing his assailant. If you believe that the defendant committed the assault as a means of defense, believing at the time he did so (if he did so) that he was in danger

of losing his life, or of serious bodily injury at the hands of said W. H. Reece, then you will acquit the defendant." We think that the charge of the court taken altogether is not subject to any serious objection, but substantially charges the law as applied to the facts of the case.

2. Again complaint is made of the eighth paragraph of the court's charge. This paragraph is as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant in the county of Potter and state of Texas, on or about the time charged in the indictment, with a deadly weapon, to wit, a knife, did unlawfully assault the said W. H. Reece, as charged, but at the time of making such assault the defendant was by some adequate cause (as hereafter explained) moved to such a degree of anger, rage, sudden resentment, or terror as to render him for the time incapable of cool reflection, and in such a state of mind he committed said assault, and that such assault was not in defense of himself against an unlawful attack producing a reasonable expectation or fear of death or serious bodily injury, then you will find the defendant guilty of an aggravated assault, and assess his punishment at a fine not less than \$25, nor more than \$1,000, or by imprisonment in the county jail not less than one month, nor more than two years, or by such fine and imprisonment, as you may determine and state in your verdict." In respect to this paragraph of the court's charge two complaints are made. First, it is contended that this charge threw upon appellant the burden of proof to show the facts which would reduce the assault, if unlawful, to the grade of aggravated assault. Again it is claimed and contended that the effect of the court's charge is to instruct the jury in terms that the weapon (the knife) with which the assault was made was in fact, as in law, a deadly weapon. We do not believe that either of these contentions can be sustained. In paragraph 6 of the court's charge, preceding that complained of, the court had submitted very clearly the issue of assault with intent to murder, and grouped the facts necessary to be proven in order to sustain a verdict of such offense. In the seventh paragraph of the court's charge the following instruction is given: "If you believe from the evidence that the defendant is guilty of an assault, but have a reasonable doubt as to whether such assault was upon malice aforethought, with intent to murder (as hereinbefore explained to you), then you will acquit him of that offense, and next consider whether he is guilty of an aggravated assault, or whether he was justified in his action." In addition to this the court gave a general instruction, to the effect, in substance, that the defendant was presumed to be innocent until his guilt was established by legal evidence beyond a reasonable doubt, and that in case the jury should have a reasonable doubt as to his guilt, they would

acquit him. Nor do we think the charge complained of is subject to the criticism that it instructed the jury as a matter of fact that the knife used was a deadly weapon. The court in the third paragraph of the charge to the jury had thus instructed the jury: "An assault becomes aggravated when committed with a deadly weapon. A deadly weapon is one which, from the manner used, is calculated or likely to produce death or serious bodily injury." Construed in the light of this instruction, the statement of the court complained of did not undertake nor have the effect to declare, as a matter of fact, that the knife used was a deadly weapon, but merely stated the kind of weapon, and left it to be found as a fact as to whether it was in truth a deadly weapon as that term is used in the law. Nor do we believe in the event that appellant is in a situation to complain if it be conceded that the court's terms told the jury that the knife was such an instrument as from the manner of its use was likely to produce death or serious bodily injury. The evidence shows, beyond doubt or controversy, indeed, is admitted, that appellant struck and wounded prosecu-
 witness Reece with a knife. The evidence beyond dispute that the wounds of which there were several, were both dangerous and well-nigh mortal. *Logan v. State* (Tex. App.) 53 S. W. 694.

3. Complaint is also made of the charge of the court in respect to the issue of provocation, the difficulty, and the claim is made, in respect to this portion of the court's charge, that it shifts the burden of proof on the appellant. We do not think, considering the charge of the court altogether, that this contention can be sustained. The charge of the court complained of is as follows: "If further charge you that, if you believe from the evidence, beyond a reasonable doubt, that the defendant sought the meeting with the said W. H. Reece for the purpose of slaying said Reece, and, having found him, did so act, or used some language, or did both, with intent to produce the occasion and bring about the difficulty, and that the same, under the circumstances, was or were reasonably calculated to provoke a difficulty, and on such account the said W. H. Reece attacked him, and he then attempted to slay said Reece in pursuance of his original design, then the defendant cannot justify on the ground of self-defense, but such attack, on defendant's part, would be assault with intent to murder, provided, if said Reece had been killed under such circumstances, it would have been murder of either the first or second degree; but if defendant had no such purpose in seeking the fatal meeting, or, having had the meeting, did not act reasonably calculated to provoke the difficulty, and was attacked by the said W. H. Reece, then his right of self-defense would not be forfeited, and he could stand his ground and defend himself by the use of such means of defense as the facts

and circumstances indicated to be necessary to protect himself from danger, or what reasonably appeared to him at the time to be danger, viewed from his standpoint." Nor is this charge subject to the objection that it is limited, in its application of the law of self-defense, to an actual attack, since it expressly includes conditions of apparent danger, and that as viewed from the standpoint of appellant.

4. We have carefully considered the several special charges requested by appellant, and they seem to us, so far as applicable, to have been covered by the general charge of the court, and we do not believe there was any error in refusing same.

We have carefully examined the statement of facts, and believe that the testimony fully supports the verdict of conviction rendered in the case, and that there is no reason why we should interfere or intervene. It is therefore ordered that the judgment of the court below be, and the same is hereby, in all things affirmed.

SOMERS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. CRIMINAL LAW (§ 543*)—TRIAL—RECEPTION OF EVIDENCE—TESTIMONY AT EXAMINING TRIAL.

In a trial for theft, a sufficient predicate was laid for the admission of testimony of non-resident witnesses taken on the examining trial where it was shown that the witnesses, at the time of the alleged theft, were passing through the state when it occurred, and the district attorney testified that, in reply to a letter written to one of the witnesses at his address in Ohio, witness answered that he would be unable to attend the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1233, 1236; Dec. Dig. § 543.*]

2. CRIMINAL LAW (§ 662*)—TRIAL—RECEPTION OF EVIDENCE—RIGHT OF ACCUSED TO CONFRONT WITNESSES—CONSTITUTIONAL PROVISIONS.

Bill of Rights, § 10, guaranteeing that every person accused of crime shall be confronted with the witnesses against him is not contravened in a criminal case by the admission of testimony of nonresident witnesses taken at the examining trial; a sufficient predicate being laid therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1542; Dec. Dig. § 662.*]

3. CRIMINAL LAW (§ 545*)—EVIDENCE.

Where testimony is taken, in an examining trial before a magistrate on a charge of a different offense than the one being tried, such testimony in reference to the distinct offense is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1235; Dec. Dig. § 545.*]

Appeal from District Court, Webb County; F. Mullally, Judge.

Leo Somers was convicted of theft, and appeals. Reversed and remanded.

A. Winslow and Anderson & Belden, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Webb county on a charge that he did, on the 21st day of March, 1908, fraudulently and privately take from the possession of one Fritz Boehler one pocketbook of the value of \$20. On trial he was convicted, and his punishment assessed at confinement in the state penitentiary for a term of two years.

A number of reasons are assigned why the judgment of conviction should be set aside and the cause reversed. Some of these questions relate to matters which are not likely to arise on another trial of the case; and, in view of the fact that it is to be reversed, we shall discuss only the matters hereinafter referred to.

Counsel for appellant urge that the court erred in admitting in evidence the testimony of Christine Schneider and John Schneider, who were alleged to be nonresidents of the state. This testimony was objected to for many reasons. Among others, that the absence of these witnesses and their residence beyond the state were not sufficiently proven. We think, in view of the fact that it was shown that these witnesses at the time of the alleged theft were passing through Laredo, that their residence was Cleveland, Ohio, and that they were bound on a pleasure trip to Monterey, Mexico, in connection with the testimony of the district attorney that he had written a letter to John Schneider, to the address given him by said witness, at Cleveland, Ohio, and that he received a reply from him in substance and to the effect that he would be unable to attend the trial, furnish a sufficient predicate for the admission of the testimony taken on the examining trial, if the same had otherwise been admissible. The general objection is made that the court erred in admitting said testimony for the reason that same is in contravention of section 10 of the Bill of Rights in this state, which guarantees that every person shall be confronted with the witnesses against him. On full consideration this question was decided adversely to the contention of appellant in the case of Earl Hobbs v. State (Tex. Cr. App.) 112 S. W. 316. This further additional objection was made, however, which we think must be sustained: Because the admission of said written testimony of these witnesses by the court was error, because said testimony was given by them before a justice of the peace of Webb county holding an examining trial for an offense where appellant was charged by affidavit with the theft of property, to wit, one diamond stud from the possession of John Schneider, which said charge and case is a different and distinct transaction from the one in which this defendant

was on trial and of which he was convicted, to wit, the theft of one pocketbook and \$20 from the person of Fritz Boehler. We think the rule ought not to be extended beyond that laid down in the case of *Hobbs v. State*, supra, and where, as in this case, testimony is taken, in an examining trial before a magistrate, on a charge of another and different offense than the one being tried, that such testimony in reference to the distinct offense should not be admitted. We are not aware that this precise question has ever been passed on in this state, but in reason there seems to be no safe ground upon which the admission of such testimony can be sustained.

For the error pointed out, the judgment of the court below is reversed, and the cause is remanded.

Ex parte BLACK.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. CRIMINAL LAW (§ 149*)—LIMITATIONS—RAPE.

A prosecution for rape is barred by limitations, where the first intercourse charged occurred more than a year prior to the beginning of the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 149.*]

2. RAPE (§ 51*)—EVIDENCE.

Evidence in a prosecution for rape considered and held to show consent by the prosecutrix.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 51.*]

Appeal from District Court, Galveston County; Lewis Fisher, Judge.

Petition by J. H. Black for writ of habeas corpus was denied, and he appeals. Reversed, and relator ordered discharged.

R. H. & Alice S. Tiernan, for appellant.
F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Relator applied to the Honorable Lewis Fisher, judge of the Tenth judicial district of Texas, for a writ of habeas corpus, and upon hearing was remanded to the custody of the sheriff on a charge in the justice court of rape.

It appears from the record that relator had previously had an examining trial on the 21st of September, 1908, before the justice of the peace of said county, and remanded to custody in default of the giving of a \$5,000 bond. Upon a subsequent hearing the district judge fixed the bond at \$2,000.

The prosecuting witness swears that the first carnal intercourse took place in the month of May, 1907, more than a year prior to the beginning of the prosecution in this case. It follows therefore that the prosecution is barred by the statute of limitation. Furthermore, we do not think the evidence in this case shows the offense of rape, but, on the contrary, shows a clear consent on the

part of the prosecutrix. We do not deem it necessary to collate the evidence. Suffice it to say, the prosecutrix is 23 years of age and the circumstances show that the illicit intercourse occurred in the kitchen, with relator's family sitting on the gallery, and the intercourse occurred under such circumstances that showed clear consent on the part of the prosecutrix. Furthermore, she made no outcry and manifested no concern about the supposed outrage upon her until a year or more afterwards.

The judgment is, accordingly, reversed, and relator ordered discharged.

CASEY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. HOMICIDE (§ 110*)—EXCUSABLE HOMICIDE—SELF-DEFENSE.

If decedent attacked accused with a knife with threats to kill him, accused was justified in shooting him in self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 140-142; Dec. Dig. § 110.*]

2. HOMICIDE (§ 309*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the evidence tended to show that the killing was in self-defense, an instruction authorizing a conviction for manslaughter was improper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 651-654; Dec. Dig. § 309.*]

3. HOMICIDE (§ 39*)—MANSLAUGHTER—SUICIDE—PASSION.

If decedent was 8 or 10 feet from accused when he drew a knife with threats and turned as if to go to accused, when the latter shot him so that accused was in no real danger at the time, but the threatened attack inflamed his mind so as to prevent cool reflection, the killing could constitute manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 59-61; Dec. Dig. § 39.*]

4. HOMICIDE (§ 309*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the evidence showed that accused killed deceased because of a threatened attack which might have inflamed his mind beyond cool reflection but placed him in no real danger, a charge on manslaughter based on the theory of a real attack was error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 651-654; Dec. Dig. § 309.*]

5. HOMICIDE (§ 300*)—INSTRUCTIONS—SELF-DEFENSE—APPLICABILITY TO EVIDENCE.

Where the evidence showed that deceased made an actual attack on accused with threats to kill, a charge on self-defense based on the theory of an actual attack which caused accused to believe he was in danger of great bodily harm, etc., was proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

6. CRIMINAL LAW (§ 778*)—INSTRUCTIONS—BURDEN OF PROOF.

Where the state introduced accused's statements as to the manner of the killing, there being no other evidence of the occurrence, the court should have instructed that the state must disprove accused's statements to obtain a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1846; Dec. Dig. § 778.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

7. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR.

Accused having testified fully as to the manner of the killing, so that the state's case did not rest entirely on statements of accused as to killing proved by the state by other witnesses, the court's omission to charge that the state must disprove accused's statements to secure a conviction, if error, was not reversible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.*]

Appeal from District Court, Titus County; P. A. Turner, Judge.

John Casey was convicted of murder in the second degree, and he appealed. Reversed and remanded.

See, also, 51 Tex. Cr. R. 433, 102 S. W. 725.

R. T. Wilkinson, R. E. Davenport, Templeton, Crosby & Densmore, and Ralston & Ward, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, his punishment being assessed at five years' confinement in the penitentiary. The record does not contain any bills of exception. The errors assigned are directed against the charge of the court on manslaughter and self-defense.

1. In regard to manslaughter, the court charged as follows: "If you believe from the evidence, beyond a reasonable doubt, that the defendant shot and thereby killed the said J. F. Harrison, but you further believe from the evidence that, at the time he did so, the deceased had made an attack on him with a knife, and you further believe from the evidence, beyond a reasonable doubt, that the defendant was not justified in so doing, on the ground of self-defense as this law is given to you in this charge hereafter, but you do believe that such attack on defendant would commonly have produced a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection, then you may find that such attack is adequate cause to reduce the homicide to the grade of manslaughter." Then follows a general charge under which the jury were instructed that any condition or circumstance which, in their opinion, would commonly produce such degree of anger, rage, resentment, etc., might be adequate cause.

We are of opinion that the charge is incorrect. The facts upon which this charge was predicated arise out of a difficulty occurring at the time of the homicide. Appellant was the owner of the premises at the time the homicide occurred, deceased being his tenant or renter. Without going into a statement of the conversation, appellant was standing in the door that led onto the gallery—perhaps just outside of the door on the gallery—deceased was sitting on the steps that led up from the ground onto the gallery.

Deceased became sufficiently angered to arise from his seat, draw his knife and threatened to cut off the head of appellant, and turned around as if to start in the direction of appellant, who was, perhaps, some 8 or 10 feet away. Appellant reached up on the rack above the door, just on the inside, pulled down a gun and fired. Deceased ran out in the yard and died. This is substantially the evidence of the witness Hill as to the statements made to him by appellant shortly after the homicide.

Appellant took the stand and testified that an angry altercation occurred between them; that deceased got up, opened his knife, and started at him, and he reached up and got the gun, and deceased grabbed appellant's gun with his left hand, undertaking to cut him with the knife in his right hand; that he jerked loose and fired without taking aim, the shot resulting fatally; that deceased ran out in the yard, fell down and died. The evidence shows that there was considerable amount of blood on the steps, except perhaps the top step, and a few specks of blood on the gallery, and from the steps to where deceased fell there was quite a trail of blood. The wound evidently cut an artery from which the blood flowed very copiously.

Under the charge quoted above and criticised by appellant, a conviction for manslaughter was authorized by reason of the actual attack made by the deceased upon appellant. If deceased made any attack upon appellant at all, it was with a knife with a threat to kill. That was an actual attack, and justified appellant in shooting, and he would not be guilty under the law of self-defense. Therefore, manslaughter could not be predicated upon that state of case, for in giving this charge on manslaughter, from the standpoint of an actual or real attack made by deceased with his knife, accompanied by a threat to kill, the court authorized the jury to convict of manslaughter on a state of case under which appellant was justified by law, and a verdict should have been returned in his favor of acquittal. This charge was evidently wrong in submitting manslaughter on an actual or real attack under the facts of the case. There is but one theory, as we understand this record, upon which manslaughter could be predicated, and that is when deceased got up, pulled his knife, and turned as if to go to appellant, and appellant shot, he being in no real danger from the drawn knife of deceased—across the gallery 8 or 10 feet away from him. If this was the condition of things when appellant shot, there was no real danger. There was a threatened attack, which might have inflamed the mind of appellant beyond capacity for cool reflection, and under such circumstances, if he shot, it could constitute manslaughter. We are of opinion that the charge criticised is erroneous, based

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

upon a state of facts upon which self-defense alone could be predicated. We, therefore, are of opinion that this charge is incorrect, first, in basing the charge upon a real attack, and, second, in placing appellant's case before the jury so that he might be convicted of manslaughter on a case of self-defense.

2. The charge on self-defense is criticised wherein the court informed the jury that if appellant killed Harrison, but at the time he did so Harrison had made an attack on him, which, from the manner and character of it, etc., created in his mind or caused him to believe that he had a reasonable expectation or fear of death or serious bodily injury, and acting under such reasonable expectation the defendant killed deceased, they should acquit him. We have sufficiently stated the facts as testified by appellant. Under his testimony it showed an actual attack, and the court, therefore, was not in error in submitting the theory of self-defense on the idea of an actual attack.

3. There were no eyewitnesses to the transaction who testified on the trial, except appellant. The state, therefore, introduced appellant's statements through some of the witnesses as to how the transaction occurred. Had the case closed at this point, appellant's contention that the court should have informed the jury that the state would be required to disprove his statements in order to obtain a conviction, under the authority of *Jones v. State*, 29 Tex. App. 20, 13 S. W. 990, 25 Am. St. Rep. 715, *Pratt v. State*, 50 Tex. Cr. R. 227, 96 S. W. 8, and *Slade v. State*, 29 Tex. App. 381, 16 S. W. 253, would be correct. For a full discussion of the matter, in addition to the cases cited, see *Combs v. State* (Tex. Cr. App.) 108 S. W. 649, and *Pratt v. State* (Tex. Cr. App.) 109 S. W. 138. However, this charge may not be necessary in this case, inasmuch as the defendant took the stand in his own behalf and testified fully in regard to the facts of the case, and the case was not therefore one alone based upon the confessions or statements. As the case is presented, therefore, we would not feel called upon to reverse the judgment for this omission in the charge.

The judgment is reversed, and the cause is remanded.

THOMPSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. CRIMINAL LAW (§ 364*)—EVIDENCE—RES GESTÆ.

Where the breaking up of a dance by accused was what caused the difficulty leading to the assault for which he was on trial, evidence that he broke up the dance was admissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 813; Dec. Dig. § 364.*]

2. CRIMINAL LAW (§ 783*)—TRIAL—INSTRUCTIONS—IMPEACHING TESTIMONY.

Where the jury could not have considered impeaching testimony for any other purpose than for impeachment, the failure to so limit the testimony by charge was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1875; Dec. Dig. § 783.*]

Appeal from District Court, Caldwell County; L. W. Moore, Judge.

Buddie Thompson was convicted of assault to murder, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for State.

BROOKS, J. Appellant was convicted of assault to murder, and his punishment assessed at two years' confinement in the penitentiary.

Bill of exceptions No. 1 complains that the court erred in permitting the state's witness to testify that appellant broke up the dance, appellant's objection being that he was indicted for breaking up a dance or for disturbing the peace. The bill shows that this is the occasion that caused the difficulty, and is part of the *res gestæ*.

Bill of exceptions No. 2 complains that the court erred in permitting the state to prove that the reputation of the appellant was bad for truth and veracity, the objection being made that the witnesses had not qualified themselves to speak of the reputation. The bill of exceptions as well as the statement of facts show the witnesses did qualify themselves.

The next bill complains that the court erred in failing to instruct the jury in the charge in regard to impeaching testimony. The jury could not have used the impeaching testimony for any other purpose than impeachment. This being the case, it is unnecessary to limit same in the charge to impeachment. See *Givens v. State*, 35 Tex. Cr. R. 563, 34 S. W. 626.

The charge of the court presented every phase of the evidence. Appellant's special charges were properly covered in the main charge.

Finding no error in the record, the judgment is affirmed.

PANNELL v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. HOMICIDE (§ 340*)—INSTRUCTIONS—PREJUDICIAL ERROR.

Where the jury in convicting of manslaughter assessed the lowest punishment, all errors in the charge were eliminated, unless the charge on manslaughter induced the jury not to acquit on the ground of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 720; Dec. Dig. § 340.*]

2. CRIMINAL LAW (§ 1172*)—APPEAL—ERRORS IN CHARGE—ELIMINATION.

As a general rule, whatever errors there are in the charge are eliminated by reason

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

the acquittal of the offense to which the charge pertains.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3161; Dec. Dig. § 1172.*]

8. CRIMINAL LAW (§ 1172*)—APPEAL—ERRORS IN CHARGE—ELIMINATION.

As a general rule, all errors in the charge pertaining to the offense of which accused is convicted are eliminated where the minimum punishment is assessed and where the facts conclusively show guilt of such offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3161; Dec. Dig. § 1172.*]

4. CRIMINAL LAW (§ 1172*)—APPEAL—ERRORS IN CHARGE—ELIMINATION.

An error in the charge pertaining to the offense of which accused is convicted which injures accused as to a lower offense or self-defense, and which has a tendency to bring about a conviction of the higher offense instead of a lower one or an acquittal, is reversible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154, 3161; Dec. Dig. § 1172.*]

5. HOMICIDE (§ 309*)—MANSLAUGHTER—SELF-DEFENSE.

It is not permissible for the court to authorize a conviction for manslaughter on facts justifying the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 654, 655; Dec. Dig. § 309.*]

6. HOMICIDE (§ 309*)—MANSLAUGHTER—SELF-DEFENSE—INSTRUCTIONS.

Where the evidence showed that decedent had threatened the life of accused and had a few moments before the homicide threatened trouble with him, and that decedent at the time of the homicide approached accused using language indicating that he intended to have a difficulty and in which he called accused a vile name, and that decedent, as he approached, had his hands on his pistol pocket, and that after the shooting decedent's pistol struck the floor and was found by his side, an instruction that if the conduct of decedent at the time of the killing, in connection with previous circumstances, created in the mind of accused such a degree of rage or terror as to render him incapable of cool reflection, accused was guilty only of manslaughter, and an instruction on self-defense that if the acts of decedent produced in the mind of accused a reasonable apprehension of death, and if accused killed decedent to protect himself from danger, the killing was justifiable, placed accused before the jury on the same facts as to manslaughter, and self-defense, and gave the jury the option of convicting him of manslaughter or acquitting him on self-defense, and were erroneous as bringing about a conviction of manslaughter on facts authorizing an acquittal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 655; Dec. Dig. § 309.*]

7. HOMICIDE (§ 300*)—SELF-DEFENSE—THREATS—INSTRUCTIONS.

An instruction that if decedent made threats, and at the time of the difficulty made demonstrations as if to execute them, the jury should consider the fact with reference to self-defense, was erroneous as leaving the jury to find that threats were made, while they should have been told that the criterion was whether accused believed that threats had been made.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 629; Dec. Dig. § 300.*]

3. HOMICIDE (§ 166*)—EVIDENCE—MOTIVE.

Proof that accused had been criminally intimate with the wife of decedent was not admissible to show motive on the part of accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 327; Dec. Dig. § 166.*]

9. HOMICIDE (§ 112*)—SELF-DEFENSE—DEPRIVATION OF RIGHT.

That accused had been criminally intimate with the wife of decedent prior to the homicide did not deprive him of the right of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 147; Dec. Dig. § 112.*]

10. CRIMINAL LAW (§§ 763, 764*)—TRIAL—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction that the evidence that accused had been criminally intimate with the wife of decedent prior to the homicide could be considered only as showing motive on the part of accused was erroneous as on the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 763, 764.*]

11. CRIMINAL LAW (§ 811*)—SELF-DEFENSE—INSTRUCTIONS.

Where there was evidence that accused, relying on self-defense, had been criminally intimate with decedent's wife prior to the homicide, an instruction that evidence of that fact could be considered only to show motive on the part of decedent was erroneous for singling out a particular fact so as to tend to eliminate accused's right of self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1969-1972; Dec. Dig. § 811.*]

Appeal from District Court, Hopkins County; R. L. Porter, Judge.

Walter Pannell was convicted of manslaughter, and he appeals. Reversed and remanded.

C. O. James and C. E. Sheppard, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter, his punishment being assessed at two years' confinement in the penitentiary.

The substance of the evidence is that there were unkind feelings between appellant and deceased, deceased being jealous in regard to the relations that he believed existed between appellant and his wife, and which may, in fact, have existed. Deceased had conceived the idea, with perhaps evidence to justify his belief, that appellant had alienated to some extent the affections of his wife, and was suspicious, if not convinced, of the fact that they had been criminally intimate. This engendered in his mind an excited state of ill will towards appellant, so much so that on one or more occasions he had threatened to take the life of appellant. Some time previous to the homicide deceased armed himself and asked a friend to accompany him to the oilmills where he thought he would catch appellant and his, deceased's, wife in compromising relations. The friend did not accede to the request, but deceased went to the point and there found appellant. A witness testified that he heard part of the conversation between appellant and deceased at the oilmills in which deceased proposed to appellant to shoot it out or cut it out with him. Appellant declined. The wife of deceased, however, was not present with appel-

lant, nor is there any evidence tending to show, that she had been with appellant at that time and place. On the night of the homicide the negroes of the town had met at the residence of Jeff Sparks to engage in a "festival." Sparks expected to sell candles and other things to the assembled crowd, and was in a room in the house making preparations to this end. The crowd had congregated in one of the rooms of the house where they were playing and dancing. While engaged in dancing, deceased was dancing with his wife, and appellant was dancing with the sister-in-law of deceased, Lela Templeton. Deceased was "calling the set;" had called all around until he reached appellant and Lela Templeton. At this point he failed to call, and appellant asked if he did not intend to call his dance. Deceased inquired whether he liked it. Appellant indicated he did not. Lela Templeton testified at this point that she did not recollect just what was said between the parties, "but I think I said 'Harrison, mind out your business,' and he said, 'I thought you negroes had sense to know when your time come.' I don't know exactly what Gete said, but he said something like, 'If you are going to call this set, why don't you call us like the rest?' Then Harrison said something, asked if he did not like it or something like that, and Gete said, 'No, you God damn black bastard, I don't.' Then they both threw their hands to their pockets like they were going after their guns, and started towards each other. I caught hold of Gete, and Ellen took hold of Harrison. Gete turned around to Jim Nash, a boy they always called Monk, and said 'Monk, let's go home; I will get into trouble here.' Monk said, 'Let's be hitting the door,' and they started on out of the house. Harrison was trying to get loose, and I took hold of him and helped Ellen to hold him. He said, 'Turn me loose; I am not scared of the damn son of a bitch.' When Harrison said this Gete turned and said, 'If you follow me out of here with that little Harrington, I'll make you eat it up.' Gete is the nickname for appellant. Ellen is the wife of deceased, and witness was the dancing partner of appellant. This is practically the state's case of the transaction to that point. Lum Kay testified for the appellant that he knew the parties and was present at the time of the killing and saw both difficulties. "The first one came up over the dance. Harrison was calling the set, and Gete was dancing in it. Harrison called all the boys till it came Gete's time, and then he did not call him. Gete asked him why he didn't call him, and Harrison said, 'You damn negroes ought to know when your time comes'; and then he asked Gete if he didn't like it, and said, 'If you don't like it, rise up.' He then threw his hand to his right hip pocket and started towards Gete. Gete threw his hand towards his pocket, and Harrison's wife and Lela Templeton grabbed Harrison. Gete

walked off and said to Jim Nash, 'Come on and let's go; I will get into trouble here.' He then started on out, and Harrison was trying to get loose and said, 'Turn me loose, he's got his gun and I've got mine.' Gete said, 'Don't follow me out here with that little Saturday night gun or I'll make you eat it.' Gete then went on out. Directly Gete came back in the room where the dance was and was talking to Ada Bates by the fire. Harrison came in and looked straight at Gete. Joe Bates called him and said something to him about not having any trouble and Harrison spoke out loud enough for Gete to hear him that he was not afraid of the damn long black son of a bitch, and then he walked over in the corner close to Gete. Louis Templeton walked up to him and said something to him, and he again said he was not afraid of the son of a bitch, and then he said to Gete: 'Gete, do you think I am scared of you?' and Gete said, 'No, you are a man just like me.' Harrison was then walking over to the corner, and while he was doing so he had his right hand back to his hip pocket. About the time he said this Louis Templeton moved out of the way and the defendant shot. Harrison fell, and his pistol fell down on the floor right by him. Some of the evidence goes to show that the deceased approached appellant while he was standing in the corner, and while Louis Templeton was standing between them, appellant said, "Get out of the way," or "Clear the way." Templeton stepped out of the way, the shot was fired, and deceased fell. There is but little difference, if any, in regard to what was said and done in regard to the second difficulty. All the evidence shows that the deceased's pistol fell when he fell and was lying on the floor by him. Between the first and second difficulties, when appellant went out of the house with the expressed intention of leaving, he met the owner of the premises, Sparks, in the yard, and Sparks requested him to go or back, the trouble was over, and there would be no more trouble. Upon this statement appellant returned to the dancing room. Deceased came in the house directly after appellant returned, and the difficulty was renewed which ended in the tragedy. Without going into a further detailed statement of this matter, this sufficiently presents the case for a discussion of the questions involved.

The jury in convicting of manslaughter assessed the lowest punishment. Therefore all errors in regard to the charge passed out of the case, unless the charge on manslaughter as given, may have induced the jury to convict appellant of manslaughter and to refuse to acquit on the ground of self-defense. As a general rule, whatever errors there are in the charge are eliminated by reason of acquittal of the offense to which the charge pertains. It may be also stated, as a general rule, that all errors in the charge pertaining to the offense of which appellant

is convicted, also pass out if the minimum punishment is assessed, if the facts conclusively show him guilty of that particular offense. But there is another rule, equally well recognized, that if the error in the charge pertaining to the offense of which the jury convicted injured appellant's rights in respect to a lower offense or to the question of self-defense, and had a tendency to bring about a conviction for the offense of which he was convicted instead of a lower offense or an acquittal, then the charge would be reversibly erroneous.

The charge in request to manslaughter, and which seemed to be the basis of the conviction, was almost identical with that in respect to self-defense. After giving the usual stereotyped definition of adequate cause and sudden passion, the court charged the jury as follows: "If you should believe from the evidence that the defendant, Walter Pannell, killed the deceased, Harrison Carr, by shooting him with a pistol at the time, place, and in the manner alleged in the indictment, yet if you should further believe that by the acts or conduct, or words, if any, or both, of deceased, at the time of and immediately before the killing, as they appeared to the defendant from his standpoint, in connection with all previous facts and circumstances of whatever nature or character, and in connection with all the surrounding facts and circumstances as known to or believed by defendant and viewed from his standpoint, created in the mind of the defendant such a degree of anger, rage, sudden resentment, or terror as to render his mind incapable of cool reflection at the time of the killing, and because thereof the defendant shot and killed said Harrison Carr, and not in self-defense, then the defendant would not be guilty of any higher degree of homicide than manslaughter."

The charge on self-defense is as follows: "If you believe from the evidence that the defendant, Walter Pannell, shot and killed Harrison Carr on or about the 21st day of February, 1907, in Hopkins county, Texas, and if you further believe that at the time of the killing or shortly prior thereto the deceased was in the act of making an attack upon the defendant, or made some demonstration indicating an intention of inflicting death or serious bodily injury upon the defendant, or if deceased was doing some act or acts, which either alone or together with accompanying words, if any, produced in the mind of the defendant, as viewed from his standpoint, which, considered with all the facts and circumstances as known to the defendant or as believed by the defendant to exist, a reasonable apprehension of death or serious bodily injury at the hands of said Harrison Carr, then the defendant had the right to kill the deceased in self-defense; and if you believe that he did kill deceased to protect himself from said danger or ap-

parent danger, then such killing is in justifiable self-defense."

These charges, as we understand them, are practically the same, and put appellant in the attitude of standing before the jury upon the same facts in regard to manslaughter and self-defense. We have before stated the salient features of the evidence as given by the witnesses.

While it is sometimes a little difficult to draw the exact line between manslaughter and self-defense on the immediate facts, yet it is not permissible for the court to authorize a conviction for manslaughter upon the facts which justify a killing. All the facts and attending circumstances, viewed from the defendant's standpoint, and as exhibited by this record, show that a few moments before the tragedy there had been a threatened serious trouble between the parties, with the deceased rather in the wrong. He had threatened the life of appellant, and had on a prior occasion at the oilmills, proposed to fight it out with him to the death, either by shooting or by cutting. Upon the second difficulty, or meeting in the dancing room, the deceased approached appellant over the protest of his friends not to have trouble, using language indicating that he intended to have a difficulty, in which he called appellant a "son of a bitch," repeating the same language when again cautioned not to have a difficulty. In the meantime as he approached the deceased in the corner, he had his hands upon his pistol pocket, and was in that condition when he used the second insulting remark. The shooting came off, deceased's pistol was heard to strike the floor, and was found by his side. These were the facts upon which the jury were to predicate the finding of manslaughter or self-defense, both as set forth in the charges. These charges were so framed that the jury was left to understand that, upon the facts marshaled by the charge, appellant could be convicted of manslaughter, or acquitted on self-defense, at the option of the jury. We are of opinion this charge on manslaughter was of such erroneous character that it may have brought about a conviction of manslaughter on facts that authorized an acquittal.

The court's charge in regard to threats was also criticised in that it instructed the jury, if they believed deceased made threats, and at the time of the difficulty made demonstrations as if to execute the threats, to consider this with reference to the question of self-defense. The vice in the charge, as urged, is that it left the jury to find the threats were in fact made; whereas, they should have been told that the criterion was that if the appellant believed the threats were made. It makes no difference whether the threats were in fact made or not, if he was so informed and believed. The jury might, under the later developments of the case, have found that they were in fact made, or believed they were not in fact made. It does not seem to

be controverted, however, in this case that the threats were made and that appellant knew of the animosity and ill will, especially by reason of the fact of deceased's offer to fight him to the death at the meeting at the oilmills. Other threats were shown to have been made, but the record does not disclose them to have been communicated to appellant. The proposition of appellant is a correct theory of the law in a proper case. We call attention to this so that upon another trial the court will submit this question from the appellant's standpoint.

D. L. Palmer was called by the state in rebuttal, and testified as follows: "I was a member of the jury that tried the defendant in this case the last term of court. He testified in his own behalf at that trial. I remember that he swore then that he had had carnal intercourse with Harrison Carr's wife before the killing. I don't remember how many times he said he had intercourse with her, and don't remember whether he said it was while she and Harrison were separated or not." Objection was urged to the introduction of this testimony. It is not clear to our mind that this testimony was objectionable. Just why the state offered it, we are in doubt. It is evident, we think, from the record that deceased was not only jealous on account of his wife, but his feelings were very bitter, and that in fact this feeling of jealousy and anger led to the final tragedy. Deceased had expressed himself to the effect that he thought there was something wrong between them, and expressed a desire or purpose to kill both of them, and in one conversation expressed himself as anxious to meet appellant and kill him and go to hell with him. There had been no direct evidence, however, introduced to the fact of intercourse between the parties. The reason for the admission of this testimony may be found, however, in the court's charge to which an exception was reserved, and if that was the purpose for which it was introduced, then we are of opinion there was error. In any event, we are clearly of the opinion that the court's charge limiting this evidence was error and of serious import. The court gave the law as he understood it, as applicable to this evidence, in the following charge:

"You are further instructed that the evidence introduced in this case showing that defendant had been guilty of having carnal intercourse with the wife of the deceased prior to the time of the homicide can be considered by you only for the purpose of showing motive, if any, on the part of the defendant, and you will consider such evidence for no other purpose."

We are of opinion that this charge is erroneous. It assumes the fact that the intercourse occurred, and instructs the jury that they can consider the fact of such intercourse only as showing the motive of appellant in

the killing of deceased. The evidence shows that appellant had tried to evade difficulties with the deceased, and it may have been an account of the fact that he had wronged deceased; but from whatever motive it occurred he had declined to fight him, and sought to evade rather than bring on the difficulties. The deceased had pressed the matter which ended in his death. Appellant did not forfeit his right of self-defense under the circumstances of this case, if it be conceded he had been having intercourse with appellant's wife. While this was an adequate cause resulting in favor of the deceased, if accompanied by sudden passion, to reduce his killing of appellant, had it occurred, to manslaughter, still we have appellant and not deceased on trial, and the case must be viewed from appellant's standpoint. This would not require him to stand and be shot to death; his right of self-defense under the circumstances would be perfect. It may have left on the mind of appellant, and doubtless did, an impression that the deceased intended to press the difficulty to his (appellant's) death, and there was no other course left to him but to shoot, and the fact may have operated upon his mind most cogently that his life was at the time being sought by the deceased. It was a cogent reason in appellant's favor, under the law of self-defense, rather than against him, to show a criminal motive in the killing, under the facts.

Again, this charge singles out one fact and charges adversely to appellant upon it. This is a charge upon the weight of the evidence and in a very hurtful manner to appellant's cause before the jury. It had the tendency to eliminate his right of self-defense, and it selected this one single circumstance as the criterion of his motive for the homicide. Under the decisions as written in this state this is not only a charge upon the weight of the evidence, but the singling out of a fact and giving it undue prominence, and in such manner as to operate adversely to appellant's rights on the crucial point. See *Terry v. State*, 45 Tex. Cr. R. 264, 76 S. W. 923, and cases cited.

For the errors discussed, the judgment is reversed and the cause remanded.

FULLER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. HOMICIDE (§ 167*)—THREATS BY ACCUSED—ADMISSIBILITY.

The state could not show that about two weeks before the homicide accused declared that he was going "to kill a Dutchman or run him out of the country," where there was no reference to decedent nor to the trouble between them.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 334; Dec. Dig. § 167.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. HOMICIDE (§ 295*)—INSTRUCTIONS UNSUSTAINED BY EVIDENCE.

It was improper to submit an issue as to provocation given one accused of murder by one other than decedent where there was no claim or proof of such provocation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 608; Dec. Dig. § 295.*]

3. HOMICIDE (§ 271*)—"ADEQUATE CAUSE"—QUESTION OF LAW.

Since insulting words or conduct of decedent towards a female relation of accused is deemed in law adequate cause for the homicide so as to reduce it to manslaughter, it was improper to allow the jury to determine whether decedent's statement that accused's daughter was pregnant before her marriage to decedent was "adequate cause."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 565; Dec. Dig. § 271.*]

4. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—REASONABLE DOUBT.

It was error in a murder trial to omit to direct an acquittal if the jury had reasonable doubt as to the existence of facts essential to manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 789.*]

Brooks, J., dissenting.

Appeal from District Court, Angelina County; James I. Perkins, Judge.

George F. Fuller was convicted of murder in the second degree, and he appeals. Reversed and remanded.

E. B. Robb and Geo. S. King, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This is the second appeal of this case. On the trial from which this appeal results, appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for 15 years. A very full and substantially correct statement of the facts of the case will be found in volume 50 Tex. Cr. R. 14, 95 S. W. 541, where the case is discussed at length by Judge Henderson on the former appeal.

Many questions are raised in the record, some of which we shall deem it unnecessary to discuss.

1. Among other matters complained of is the action of the court in permitting the witness Muller to testify that some two or three weeks before the homicide appellant stated to him that he was going to kill a Dutchman, or run him out of the country. It is claimed that this conversation or threat so particularly identified the deceased as to make this general statement admissible. In the case of Goodwin v. State, 38 Tex. Cr. R. 466, 43 S. W. 336, we held the rule to be that evidence of general threats made by the defendant on trial for murder, when such threats are not shown to have been directed towards the person slain, or to embrace such person, are inadmissible. Again, in the case of Holley v. State, 39 Tex. Cr. R. 301, 46 S. W. 42, we said: "Now, upon whom is the

burden to show that the threat was directed towards the person slain, or embraced such person? Obviously upon the state, for no presumptions can be indulged against the appellant. Before the testimony can be admitted, it must appear that the threat was directed towards the person slain." The case of Garrett v. State (Tex. Cr. App.) 106 S. W. 389, is cited by appellant, and seems to be strongly relied on. In that case it seems that one Owens, who was testifying for the state, testified that he overheard the defendant talking with another party, in which conversation Garrett made threats to kill a "guinea," and that in the opinion of witness he meant this girl, but that he did not know what he meant by saying "guinea." It was, however, shown in the record by some of the testimony that the word "guinea" referred to negro women generally. Objection was urged to this testimony on the ground, as shown by the record, among other things, that it did not sufficiently identify deceased. In discussing this matter Davidson, P. J., speaking for the court, says: "Without going into a detailed statement of it and the grounds of objection, we are of opinion that this character of threat was not admissible. This has been decided so frequently we deem it unnecessary to cite authorities. Before a threat supposed to have been made by the accused can be used against him in his trial, the evidence must show that the threat was directed against and individuates the deceased. The fact that 'guinea' meant negro women is not sufficient." In this case, while the witness Fred Muller was on the witness stand, he testified that he knew appellant, and that about two or three weeks before the killing appellant met him in the town of Lufkin, and they went into a saloon together and took a drink, and that during this time appellant told him he was going to kill a Dutchman or run him out of the country. This testimony was objected to by appellant on the ground that it did not show any connection with the transaction under investigation or any of the parties, and was wholly irrelevant and immaterial, and highly calculated to prejudice the rights of appellant. Thereupon the court intervened, and the following colloquy occurred: "The Court: Your statement, as I understand you, is that he told you he was going to kill 'the' Dutchman or 'a' Dutchman, or run him out of the country? A. That is what he told me. Q. Did you say 'a' Dutchman, or 'the' Dutchman? A. A Dutchman. Q. That was how long before this killing? A. About two weeks, as well as I remember. The Court: It will be a question of fact for the jury as to what the meaning was." Thereupon the defendant again stated to the court that they desired to reserve a bill of exceptions to the admission of this testimony, and wanted the bill to further

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

show as to the court's interrogating him whether before or after the killing, and whether the statement referred to "a" Dutchman or "the" Dutchman; these being matters not elicited by the state. To this suggestion of counsel the court readily consented. We think probably this testimony was not admissible. It has occurred to us that the decisions of this court, at least in the language of some of them, have carried the rule rather further than as an original proposition the writer should have been inclined to go, but where, as in this case, there is no reference to the deceased, no suggestion in the testimony that his troubles with appellant were the subject of conversation and nothing in the language of the parties to constitute even a remote reference to or connection with the deceased, it would seem under the authorities, and in reason, that such a statement ought not to be received. We can well understand how the evident idea of the court below that it was a question for the jury might apply if there was enough in the testimony to leave it open to a fair inference that the threats introduced had reference to the deceased. We do not believe, however, that this contention is sustained in the record before us.

2. Serious complaint is made of the charge of the court on the subject of manslaughter. This charge in its entirety is as follows:

"Manslaughter" is voluntary homicide committed under the immediate influence of sudden passion, arising from an adequate cause, but neither excused nor justified by law. The act of killing must be directly caused by the passion arising out of the provocation. It is not enough that the mind is merely agitated by passion arising from some other provocation, or a provocation given by some other person than the party killed. The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection. By the expression 'adequate cause' is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. Insulting words or conduct of the person killed towards a female relation of the defendant would be adequate cause, such as above spoken of, provided the killing took place immediately upon the happening of the insulting words or conduct, or so soon thereafter as the party killing may meet with the party killed after having been informed of such insulting words or conduct. And any condition of circumstances which is capable of creating in the mind of a person of ordinary temper, and does create in the mind of defendant sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, is deemed adequate cause. And, where there are two or more causes to arouse passion, although no one of them alone would consti-

tute adequate cause, it is for you to determine whether or not all such causes combined, any there are, might be sufficient to reduce a voluntary killing to the grade of manslaughter, it is necessary only that adequate cause existed to reduce the state of mind referred to (but also that such state of mind did actually exist at the time of the commission of the offense). Now, applying the finding law of manslaughter to the case before you, you are instructed:

"(1) If you find that the killing of deceased, if he was killed, would otherwise be murder, then, in order to reduce the killing to the grade of manslaughter on the ground of insulting words or conduct towards a female relation of defendant, the following facts must all concur and have existed:

"(2) That deceased was guilty of insulting words or conduct towards defendant's daughter, Lula Brunsterman (now deceased), or that defendant had been informed of such conduct, and in good faith believed, deceased was guilty.

"(3) If you believe the witness Alvin Vinson on the day and before the homicide the killing told defendant that deceased said of and concerning defendant's daughter, Lula, in effect and substance, that she was in a state of pregnancy when deceased married her, the same would be insulting words towards a female relation of defendant, and would constitute 'adequate cause' such as is meant by that term in the definition of manslaughter, if in connection with what else, if anything, defendant was informed deceased had done and the other circumstances of the case, the relations of the parties, the same such provocation as would commonly produce in a person of ordinary temper, agitated as defendant was, a degree of anger, or resentment sufficient to render the mind incapable of cool reflection, and in this connection you are instructed that the evidence of the general character of said deceased for chastity and virtue, if you believe defendant had knowledge of such character of his daughter, may be considered by you in order to ascertain the extent of the provocation.

"(4) That he killed deceased the first time he met with him after he, defendant, had been informed by Vinson of such insulting words of deceased towards or concerning said daughter, Lula, and in this connection you are instructed that the time intervening between the time defendant was informed of the insulting words and the time of the killing is immaterial, as to the matter of it is only required that the killing must have been upon the first meeting after information of the insult was communicated to defendant by the witness Vinson, hereinbefore referred to, if you believe the matter so communicated by Vinson was under the circumstances

sulting, and in this connection you are instructed that, in judging and deciding whether the matter so communicated to defendant by Vinson was insulting and calculated to provoke the passion of defendant, you may look to and consider previous insulting words or conduct, (if any there was), of deceased towards said Lula, notwithstanding the defendant may be shown to have met with deceased after he had been informed of such previous insults and before the occasion upon which the shooting occurred, and you will also bear in mind that it is immaterial for the purpose of this case as to whether deceased, Fred Brunsterman, was in fact guilty of such insulting words or conduct, if any, imputed to him and upon information of which defendant claims to have acted. If defendant was informed that he, deceased, was so guilty, and in good faith believed and acted upon such information, it would avail him the same whether deceased had or had not in fact been guilty of such insults.

"(5) That such insulting words or conduct by deceased was the real provocation which induced the killing. * * *

"(6) That when defendant killed deceased, if he did kill him, he was affected by such a degree of anger, rage, resentment, or terror as would commonly, in a person of ordinary temper, render the mind incapable of cool reflection.

"Now, if you find from the evidence beyond a reasonable doubt that defendant did voluntarily shoot with a pistol and thereby kill Fred Brunsterman at the place and about the time charged in the indictment, but you further believe that at the time of the killing the defendant was under the immediate influence of sudden passion rendering his mind incapable of cool reflection and aroused by insulting words of or imputed to deceased towards or concerning defendant's daughter, Lula Johnson (then Lula Brunsterman), communicated to defendant by the witness Andrew Vinson, to the effect that said Lula was in a state of pregnancy when deceased married her, and that same amounted to 'adequated cause,' and that the killing took place upon the first meeting of defendant with deceased after Vinson had informed defendant of such insult, you will not find defendant guilty of murder, but will find him guilty of manslaughter, and assess his punishment at confinement in the penitentiary not less than two nor more than five years."

The correctness of this charge is vigorously assailed by appellant, and on many grounds. Among other things, it is asserted that it is error for the court to fail to charge the jury, in connection with his charge upon manslaughter predicated upon such facts, that the facts and circumstances must be viewed from the standpoint of the defendant, and that in view of all the testimony showing that deceased had only a short while prior to the homicide stated of and concerning appellant's daughter that he could prove that

she was in a state of pregnancy for a period of two months prior to her marriage to deceased, which statement had been communicated to the appellant, that it was error for the court to submit to the jury in its charge upon manslaughter as a question of fact to be found by them as to whether or not such language constituted adequate cause. Further, it is complained that this charge is erroneous, in that the doctrine of reasonable doubt is not applied to the evidence raising the issue of manslaughter. It is also complained that the court erred in this charge, in that it is a charge upon an issue not raised by the evidence and included an instruction on "a provocation given by some other person than the party killed." Again, complaint is made that the charge of the court on the subject of manslaughter is argumentative, upon the weight of the testimony, and holds out too prominently before the jury the opposite view upon the issue of manslaughter, in that in the fourth, fifth, and thirteenth paragraphs of the charge quoted the court instructs and repeats to the jury that that cause must have created in the mind of the defendant sudden passion, such as anger, rage, sudden resentment, or terror in order to reduce the offense to manslaughter, and by such repetition was calculated to induce the jury to believe that the court was of the opinion that no such passion existed. We think that many of these criticisms are correct. There was, as we conceive, no justification for the inclusion in the charge of the clause "on a provocation given by some other person than the party killed," and, while this of itself, in view of the evidence, may possibly not have been hurtful, on another trial it should be omitted for the reason that there was no claim by appellant or pretense in the evidence that the provocation for the killing was given by any other person than the party killed.

Among other things, the court instructs the jury as follows: "Now, if you find from the evidence beyond a reasonable doubt that defendant did voluntarily shoot with a pistol and thereby kill Fred Brunsterman at the place and about the time charged in the indictment, but you further believe that at the time of the killing the defendant was under the immediate influence of sudden passion rendering his mind incapable of cool reflection, and aroused by insulting words of or imputed to deceased towards or concerning defendant's daughter, Lula Johnson (then Lula Brunsterman), communicated to defendant by the witness Andrew Vinson, to the effect that said Lula was in a state of pregnancy when deceased married her, and that same amounted to 'adequated cause,' and that the killing took place upon the first meeting of defendant with deceased after Vinson had informed defendant of such insult, you will not find defendant guilty of murder, but will find him guilty of manslaughter, and assess his punishment at confinement in the peni-

tentary not less than two nor more than five years." It is to be assumed, of course, that the word "adequated" is either a typographical error or a mere lapse of the pen, but we believe that the insertion of this clause, "and that the same amounted to adequate cause," was both erroneous and hurtful. It is expressly provided that among others the following is deemed in law adequate cause: "Insulting words or conduct of the person killed toward a female relation of the party guilty of the homicide." And it is error in such case to leave the jury to determine whether such insulting words or conduct are adequate cause. *Fuller v. State*, 50 Tex. Cr. R. 14, 95 S. W. 541; *Stewart v. State* (Tex. Cr. App.) 106 S. W. 685. In the case of *Stewart v. State* it is said: "In regard to insulting conduct toward a female relative, the statute provides that it is adequate cause if the passion be engendered thereby, if the killing occurs on the happening of the insulting conduct, or as soon as the parties may meet after the slayer has been informed of such insulting language or conduct." It will be noted that in a former paragraph of the charge the court had instructed the jury as follows: "Insulting words or conduct of the person killed towards a female relation of the defendant would be adequate cause, such as above spoken of, provided the killing took place immediately upon the happening of the insulting words or conduct, or so soon thereafter as the party killing may meet with the party killed after having been informed of such insulting words or conduct." However, as will be noted in the last clause of the charge quoted, where he comes to apply the law to the facts of the case and state the penalty for the offense, it is in terms left to the jury as to whether same is adequate cause. Again, we think the charge of the court subject to criticism and just complaint, in that it does not apply the doctrine of reasonable doubt to the issue of manslaughter. The court does charge the jury that if they believe from the evidence beyond a reasonable doubt that the defendant is guilty of an unlawful killing, but have a reasonable doubt as to whether the offense is murder or manslaughter, that they will give defendant the benefit of such doubt and find him guilty of no higher grade of offense than manslaughter; but the jury are not in terms instructed that, if they have a reasonable doubt as to the existence of the facts essential to constitute the offense of manslaughter, they would acquit him of such grade of homicide. As stated in the opinion on the first appeal, under the facts of this case, it was all important to the appellant that a clear and correct submission of the issue of manslaughter should have been given by the court in his charge. We do not think this has been done, and we think that the charge is justly

subject to the objections above noted and probably others.

For the errors noted, the judgment of the court below is reversed, and the cause remanded.

BROOKS, J., dissents.

HARROLSON v. STATE.

(Court of Criminal Appeals of Texas. Oct. 1908. Rehearing Denied Nov. 25, 1908.)

1. CRIMINAL LAW (§ 822*)—INSTRUCTION ON REASONABLE DOUBT—APPLICATION TO CASE.

In a prosecution for theft of a hog, an instruction that, "if the defendant took the hog in question, but at the time he took it the hog belonged to him, or if he believed that the hog belonged to him, then he is not guilty of the crime, and you will acquit him, or if you have a reasonable doubt of his guilt, you will acquit him," sufficiently applied the law of reasonable doubt to the particular issue in connection with which it was given; a general instruction on reasonable doubt having been given in another portion of the charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1990; Dec. Dig. § 822.*]

2. CRIMINAL LAW (§ 942*)—NEW TRIAL GRANTED—NEWLY DISCOVERED TESTIMONY—IMPEACHING EVIDENCE.

A motion for a new trial will not be granted for newly discovered testimony which is not impeaching in its nature, and directed mainly to one witness in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2331, 2332; Dec. Dig. § 942.*]

3. CRIMINAL LAW (§ 941*)—NEW TRIAL GRANTED—CUMULATIVE EVIDENCE.

A new trial will not be granted for testimony which only multiplies witnesses as facts already investigated, or adds other circumstances of the same general character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2328-2330; Dec. Dig. § 941.*]

4. CRIMINAL LAW (§ 957*)—NEW TRIAL—CONDUCT OF JURY.

On an application for a new trial, the court properly refused to permit accused to prove a juror that, while in their retirement, some of the jurors remarked that they would not convict, unless they understood the testimony of certain witness as to the incriminating facts about which he testified; the jury having been brought into court and the testimony of such witness in its entirety read to them, after which they brought in a verdict of guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2394; Dec. Dig. § 957.*]

Appeal from District Court, Shelby County; James I. Perkins, Judge.

Silas Harrolson was convicted of theft, and he appeals. Affirmed.

Stephenson & Stephenson and Bryarley Carter & Walker, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a hog theft conviction. In a general way, and substantially, the evidence discloses that Daw, the alleged owner, lost some hogs, one of which was sub-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

sequently discovered in the possession of appellant with marks changed. Appellant claimed the hog as one that he had raised. Daw and another witness testified that appellant subsequently, in substance, admitted that he believed it was Daw's hog. This may be a sufficient statement of the case for the state, though the facts are rather voluminous. Appellant claimed the hog as his own property, and further that when he found the hog and put it in his pen, somebody had changed it from his mark into Daw's mark, and that he (appellant) changed the mark back to his own. His statement is corroborated by the testimony of other witnesses. The theory of the state was that appellant had stolen the hog and changed the mark, and placed the hog in his horse lot. Appellant's theory was that Daw had changed the mark, and he (appellant) had discovered that fact, and Daw instituted the prosecution to protect himself. This is about the substance of appellant's theory of the case. The court charged the jury, after giving the general definition of theft, as follows: "If he defendant took the hog in question, but at the time he took it the hog belonged to him, or if he believed that the hog belonged to him, then he is not guilty of theft, and you will acquit him, or if you have a reasonable doubt of his guilt, you will acquit him." Exception was reserved to this charge because the reasonable doubt, it is contended, referred to the whole case, and not specifically to the particular question of appellant's account of possession of the hog. Usually a charge on reasonable doubt applying to the whole case is sufficient, where this does not interfere with the exception to the rule which calls for the application of reasonable doubt to specific matters, such as the degrees in homicide. We believe this charge does sufficiently apply the law of reasonable doubt to the identical issue in the connection in which it is given. A general instruction on reasonable doubt was given in another portion of the charge. We are of opinion there is no error at this point.

Appellant filed a motion for new trial, among other things setting up newly discovered testimony, much of which is only impeaching in its nature and directed mainly to one witness in the case, to wit, Frazier. By these witnesses it was proposed to prove that Frazier's reputation for truth and veracity was bad. A motion for new trial will not be granted for this character of testimony, under the authorities in this state. By the witness Smith it was proposed to show, as newly discovered evidence, that he (Smith) knew the hog in question, and knew it to belong to appellant. The affidavit of Smith states the fact why he knew it, etc. He further swears he did not communicate the knowledge of these facts to appellant or his attorneys until after the conviction. This may be disposed

of by the statement that it is only cumulative, and is strikingly similar to the testimony introduced by the appellant on the trial. Upon this ground, under the authorities, the motion will not be granted. A new trial will not be granted for testimony which is merely cumulative. Evidence is cumulative which only multiplies witnesses as to one or more facts already investigated, or only adds other circumstances of the same general character. For citation of authorities see White's Annotated Code of Criminal Procedure, art. 817, § 1149, subd. 6.

Appellant reserved a bill of exceptions to the refusal of the court to permit him to prove by the juror Crawford that, while in their retirement, the jury had not agreed; some of them remarking they would not convict unless they understood the testimony of the witness Frazier as to the incriminating facts about which he testified. The jury was brought into court, and Frazier's testimony in its entirety, as taken down by the stenographer, was read to the jury. That they retired, and shortly afterwards brought in a verdict of guilty. The court refused to hear the testimony of Crawford, and a bill of exceptions was reserved. We are unable to see what effect this would have had on motion for new trial. It is provided by law that where the jury disagrees as to facts, they may be brought into court upon their request, and have the testimony about which they disagree reproduced or again detailed. The bill raises no objection to the fact the jury was brought in and Frazier's testimony read to them. The objection seems to go to a rejection of the facts offered to show that the disagreement grew out of Frazier's testimony, which tended to incriminate appellant. This, perhaps, may have been intended to have a bearing upon the alleged newly-discovered impeaching testimony. If this is not the reason for it, we do not understand why the testimony of the juror was offered. The bill does not state the reason for it, or the objection or purpose to be attained. If the newly discovered impeaching evidence is not cause for a new trial, then the rejection of the testimony of Crawford would not be error.

As the case is presented, we find no reversible error. Therefore the judgment ought to be affirmed, and it is accordingly so ordered.

RAMSEY, J., absent.

Ex parte WEBB.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

HABEAS CORPUS (§ 30*)—GROUNDS—TESTING INDICTMENT.

A writ of habeas corpus is not available to test the validity of an indictment.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

Original application for writ of habeas corpus by John Webb for his discharge from imprisonment under a criminal charge. Relator remanded.

Bisland & Bruce, for relator. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Relator was arrested, after an information being filed against him, charged with keeping a disorderly house by reason of selling spirituous, vinous, and malt liquors therein without license. Upon his arrest relator sued out a writ of habeas corpus before the county judge of said county, who remanded relator, whereupon relator applied to a member of this court for a writ of habeas corpus, which was granted and made returnable before the whole court, and now comes before us for decision.

The decisions of this court preclude the use of a writ of habeas corpus to test the validity of an indictment. This is the only question involved in this appeal. See *Ex parte Beverly*, 34 Tex. Cr. R. 644, 31 S. W. 645, and *Ex parte Cox* (Tex. Cr. App.) 109 S. W. 369.

Accordingly relator is remanded.

RUSH v. J. E. THOMPSON & CO.

(Court of Civil Appeals of Texas. Nov. 5, 1908.)

APPEAL AND ERROR (§ 1156*)—MOTION TO REVERSE—CONSIDERING AFFIDAVITS NOT IN RECORD.

In support of a motion to reverse and remand, because of the failure of the trial judge to make up and file a statement of facts, the affidavits accompanying the motion, and showing the reason for such failure, cannot be considered; the appellate court having power on appeal to consider only matters appearing of record, and Rev. St. 1895, art. 998, providing that such court shall have power on affidavit to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction, having no application.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1156.*]

Appeal from Lamar County Court; Leslie Hardison, Judge.

Action by J. E. Thompson & Co. against W. H. Rush. Defendant appealed, and moved to reverse. Motion denied, and judgment affirmed.

Allen & Dohoney, for appellant. G. W. Wells, for appellee.

LEVY, J. This suit was instituted by appellees against appellant, to recover certain commissions, claimed to be owing them for effecting a sale of land. In accordance with the verdict of a jury judgment was rendered in favor of appellees.

There is no statement of facts in the transcript. Appellant has filed a motion in this court, asking that the case be reversed and

remanded because of the failure and inability of the trial judge to make up and file a statement of the facts in the case. The motion is accompanied by affidavits, setting out facts which go to show that the failure to procure and have filed such statement of facts was not due to any fault of the appellant or his attorneys, but it was because of the serious and dangerous sickness of the trial judge, occurring immediately after the final orders in the case were made, and continuing for a long time, and his inability to make a statement of facts, even during convalescence, from want of recollection of the facts, due to severe sickness. We are of the opinion that the case of *Ennis Mercantile Co. v. Wath*, 93 Tex. 622, 57 S. W. 947, rules this motion. In that case no statement of the facts was made out and filed by the trial judge; a motion was made in the Court of Civil Appeals asking to reverse and remand the case because of the failure, on the part of the trial judge, to make up and file a statement of the facts, which motion was supported by affidavits. In answering the certified questions in the case the Supreme Court, speaking through Justice Brown, ruled that the statute confines the action of the Court of Civil Appeals, on appeal or writ of error, to such matters as are made to appear of record by one of the methods stated in article 1014, Rev. St. 1895, and which are presented to the court by an assignment of error pointing out the matter complained of as it appears in the record of the case, and the fundamental errors apparent of record. It further ruled that article 998, Rev. St., could not be made applicable to the motion and affidavits accompanying it. This court having no power to consider the motion predicated on the facts set up in the affidavits, it is overruled. To the end that the ruling in this instant case be not understood as conveyed, the idea that, if the transcript had contained the affidavits herein, and an assignment of error had been filed thereon in the court below, a contrary ruling would have been made, we feel justified in intimating that as the law now stands, prescribing the basis for the exercise of appellate jurisdiction and confining the power, on appeal or writ of error, to the Courts of Civil Appeals, we doubt the power of this court to consider an assignment predicated on such facts. While the facts set out in the affidavits in the two cases are not alike, and mandamus perhaps would not have been awarded in the instant case, yet the ruling as to the power of this court on appeals on assignments made and predicated on failure to obtain a statement of facts is stated by us, as we construe the law, in the case of *Applebaum v. Bass*, 101 S. W. 173, recently decided by us, and here referred to in connection with the above intimation.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

The assignments of error in this record are of such a nature that this court cannot pass thereon without a statement of the facts. Because thereof, the case was ordered affirmed.

TEXAS CENT. R. CO. v. ESTES.†

(Court of Civil Appeals of Texas. Nov. 14, 1908. Rehearing Denied Nov. 7, 1908.)

1. APPEAL AND ERROR (§ 1002*)—FINDINGS OF FACT—CONFLICTING EVIDENCE.

The judgment for mules killed by defendant's train will not be disturbed, though there was evidence that they entered on the track through a gate left open by some one; there being other evidence to support the finding that defendant's right of way fence was out of repair, and that the mules escaped from plaintiff's pasture through the fence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. RAILROADS (§ 415*)—KILLING STOCK—NEGLECT.

A finding of negligence is warranted by evidence that mules were running in front of a locomotive, and that by a proper lookout being kept they could have been seen in time to prevent killing them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1477; Dec. Dig. § 415.*]

Appeal from Hill County Court; N. J. Smith, Judge.

Action by J. H. Estes against the Texas Central Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

A. P. McKinnon and J. A. Kibler, for appellant. L. C. Hill and C. F. Greenwood, for appellee.

RAINEY, C. J. This is an appeal from a judgment rendered in the county court against the railroad company in favor of appellee for the killing of two mules by appellant's locomotive engine.

The appellant's railroad track runs through appellee's farm. Its right of way is fenced, and gates are placed on either side, and a crossing over the track for a passageway to and from the different pastures of the farm. On the morning after the mules were killed, the gate was found open. By whom left open the evidence does not disclose. The fence was not in good repair, and the evidence is sufficient to sustain the appellee's contention and to warrant the jury's finding that the mules entered upon the right of way over the fence where out of repair. Whether or not the mules went through the gate or through the fence seems to have been a sharply contested issue on the trial below. There being evidence to support the finding that the fence was out of repair, and that the mules escaped from appellee's pasture through the fence, the judgment will not be disturbed. *Railway Co. v. Pruitt*, 109 S. W. 925, 21 Tex. Ct. Rep. 72.

There is testimony tending to show that the mules were running in front of the engine, and that by a proper lookout being kept by the operatives they could have seen them in time to have prevented killing them. This was sufficient to warrant a finding of negligence on the part of the operatives in not stopping the train before killing the mules.

The judgment is affirmed.

WM. D. CLEVELAND & SONS v. SMITH et al.

(Court of Civil Appeals of Texas. Oct. 19, 1908. On Rehearing, Nov. 19, 1908.)

1. JURY (§ 25*)—RIGHT TO JURY TRIAL—DEMAND.

Const. art. 5, § 10, provides that either party, on application in open court, may have a jury by depositing a specified jury fee. *Sayles' Ann. Civ. St.* 1897, art. 3189, requires the application to be made on the first day of the term at which the case is to be tried unless it be an appearance case. *Held* that, where plaintiff in an action of trespass to try title applied for a jury on the first day of the term at which the case was tried and tendered the fee, it was error to refuse the application because the case had been on the nonjury docket for several terms, and to grant a jury over defendants' objection would necessitate a continuance.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 161; Dec. Dig. § 25.*]

2. APPEAL AND ERROR (§ 1062*)—REVIEW—HARMLESS ERROR.

Error in refusing plaintiff a jury trial was harmless where the undisputed evidence would have required an instruction for defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4213; Dec. Dig. § 1062.*]

3. ADVERSE POSSESSION (§ 43*)—POSSESSION UNDER COLOR OF TITLE—PAYMENT OF TAXES.

Where defendant and his tenant occupied the land in controversy under color of title from April 29, 1897, to November, 1901, when part of the land was conveyed by defendant to S., after which the occupancy of the remainder continued in defendant through his tenants to the commencement of the action in October, 1903, defendant and S. having paid the taxes, defendant acquired title under the five-year statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 219; Dec. Dig. § 43.*]

4. ESTOPPEL (§ 26*)—DEED OF TRUST—ACQUISITION OF TITLE BY TRUSTEE.

The trustee in a deed of trust is under no legal or moral obligation to defend the title of the grantor; and, not having sold the land under the trust deed, he is not estopped to acquire title adverse to that acquired by the purchaser on foreclosure of the trust deed by action.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 61; Dec. Dig. § 26.*]

5. ESTOPPEL (§ 28*)—WARRANTY DEEDS—HEIRS.

A warranty in a deed only binds the grantor's heirs to the extent of the property received by them from the grantor's estate, which being insolvent, the heirs were not estopped to acquire a title adverse to that conveyed by the ancestor.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 68; Dec. Dig. § 28.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Application for writ of error dismissed by Supreme Court for want of jurisdiction.

6. **ESTOPPEL (§ 44*)—AFTER-ACQUIRED TITLE.**
The doctrine of estoppel on which that of after-acquired title rests does not depend on a covenant of warranty, nor does it apply to one who is not a grantor in the deed on which the estoppel is sought to be predicated, and is not bound by the warranty contained therein.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 111; Dec. Dig. § 44.*]

7. **MORTGAGES (§ 151*)—VENDOR'S LIEN—PRIORITY.**

Where notes for the purchase price of land contained an express vendor's lien, the superior title remained in the vendors, so that a subsequent grantee of their heirs in consideration of a payment of the notes acquired a superior title to that of a purchaser under a deed of trust by the vendee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 318; Dec. Dig. § 151;* Vendor and Purchaser, Cent. Dig. § 670.]

On Rehearing.

8. **JURY (§ 28*)—TRIAL BY JURY—WAIVER.**

Where plaintiff, after the court had erroneously denied its application for a jury trial, voluntarily submitted its entire case to the court, it could not insist on a reversal of an adverse judgment in case the undisputed evidence required a verdict for defendants as a matter of law.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 181; Dec. Dig. § 28.*]

Appeal from District Court, Jasper County; W. B. Powell, Judge.

Trespass to try title by William D. Cleveland & Sons against George W. Smith and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. C. Howell, for appellant. W. W. Blake, for appellees.

PLEASANTS, C. J. This is an action of trespass to try title brought by the appellant against Geo. W. Smith, Sampson Smyth, Isaac Riley, and Isabella Riley to recover the title and possession of a tract of 335 acres of land on the Geo. W. Smith head-right survey in Jasper county. The trial in the court below was without a jury, and resulted in a judgment in favor of defendants for all of the land in controversy. At the request of appellant, the trial court filed the following conclusions of fact, which we find to be supported by the record and adopt as our fact conclusions:

"It was agreed, and I so find, that J. T. Armstrong and wife were common source of title, and that the title was in them from the sovereignty of the soil. It was agreed that the grantors of Geo. W. Smith were the legal and sole heirs of J. T. and S. A. Armstrong, and that they were dead, and Geo. W. Smith was the son of W. H. Smith, and that he was dead. I find that on the 23d day of October, 1875, J. T. Armstrong and his wife, S. A. Armstrong, conveyed the land in controversy to W. H. Smith for a consideration of \$1,100, evidenced by two promissory notes, one for \$600 and one for \$500, which fact was recited in the deed.

The notes reserved a lien on the land to secure their payment but the lien was not expressed in the deed. On the 15th day of April, 1891, W. H. Smith, acting with a as a member of the firm of Smith Bros., a firm of merchants in Colmesneil, Tyler county, Tex., executed a deed of trust to Geo. W. Smith in trust for W. D. Cleveland & Co. of Houston, Tex., which among other lands and property included the land in controversy. During the negotiations leading up to the execution of this deed of trust and at the time of the execution of said deed W. H. Smith notified the firm of Cleveland & Co. that the vendor's lien notes were outstanding against the land, and at first objected to including in the deed of trust a tract of land in controversy, but upon being pressed by Cleveland & Co., included the land in the deed of trust. On the 1st day of July, 1894, Cleveland & Co. closed the deed of trust in the district court of Tyler county, Tex., and had order of sale to issue to Jasper county, Tex., under which the land was sold on the 4th day of April, 1895, to Cleveland & Co., and the bid created on the judgment. On the 16th day of April, 1897, the heirs of J. T. Armstrong sold the land to Geo. W. Smith, the defendant, for the face value of the notes (interest having been kept paid up by W. Smith), and that said deed was duly recorded on the 29th day of April, 1897, in the deed records of Jasper county, Tex.; this occurring before the death of W. Smith.

"I find that the firm of Smith Bros., Colmesneil, was composed of W. H. Smith, J. J. Smith, and R. R. Smith, and were indebted to W. D. Cleveland & Co. in a large sum of money and executed the deed of trust to G. W. Smith as trustee for Wm. D. Cleveland & Co. to secure the same, and that said Cleveland & Co. knew at the time of the deed of trust was executed that the vendor's lien notes were out against the land in controversy, and accepted the same with full knowledge of that fact. On the 1st day of November, 1901, Geo. W. Smith conveyed to Sampson Smyth, his codefendant, 92 acres of the land in controversy, which deed was duly placed on record in Jasper county on the 25th day of November, 1901.

"I find that W. H. Smith never delivered up possession of the land after the foreclosure sale by Cleveland & Co. until its purchase by Geo. W. Smith, when he immediately took possession by his tenant and has continuously held possession since said purchase. Geo. W. Smith testified that his father and himself had always kept taxes paid up on the land, except the past two years or three years. A statement from the tax rolls made by the collector from 1897 showed that Geo. W. Smith had paid for the years 1898, 1899, 1900, 1901.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

1902, 1903, and 1904. The statement showed that Sampson Smyth had paid the taxes on the land purchased by him from his co-defendant every year from the date of his purchase. Sampson Smyth was in possession at the date of his purchase as tenant of Geo. W. Smith, and has continued to occupy the same since his purchase, and is now living on it."

The appellant, Wm. D. Cleveland & Sons, a private corporation organized under the laws of this state, is the holder of whatever title was acquired by the firm of W. D. Cleveland & Co. under the foreclosure proceedings above mentioned.

The first assignment of error complains of the refusal of the trial court to comply with appellant's demand to have the case placed upon the jury docket and tried by a jury. The bill of exceptions to this action of the court is as follows: "Be it remembered that on the 10th day of June, A. D. 1907, being the morning of the first day of this term of the court, and during the call of the nonjury docket for the first time during this term, and this cause being called regularly on the docket, the plaintiff, Wm. D. Cleveland & Sons, Inc., then and there, in open court, demanded a jury in said cause, and then and there tendered to the clerk of said court the sum of five (\$5.00) dollars cash, lawful money of the United States, as a jury fee in said cause, but that the court then and there denied and overruled plaintiff's said application for a jury, and refused to allow plaintiff to have a jury for the trial of said cause, to which action of the court plaintiff then and there in open court excepted, and now here tenders this its bill of exception, and prays that the same be approved and signed and made a part of the record in this cause, which is accordingly done." In approving this bill the trial judge makes the following statement: "The above case was filed in this court on the 30th day of October, 1905, and no jury was ever demanded until the first day of this term. At the May term of this court, 1905, the first week of this court was set apart for the trial of nonjury cases, and the attorney and parties to this suit knew of this order, and said cause had stood on the nonjury docket ever since it had been filed, with full knowledge that it would be called for trial on the first day of the term along with all other nonjury cases. There was no jury for the first week of the court, nor has there been one for the first week of the court since May, 1905. The defendants were ready, and so announced and objected to the jury, on the ground that it was nonjury week, and the case having been permitted to remain on the nonjury docket since it was filed in October, 1905, and to permit it to go to the jury docket, then was equivalent to continuing the case, owing to the condition of the docket. The defendant and plaintiff both being nonresi-

dents, and for such (nonresidents') litigants' convenience, the court set the first week of the term for the trial of nonjury cases, and jury was refused for the above reasons."

We think the court erred in refusing the demand for a jury. The Constitution of this state provides that in the trial of all cases in the district courts the plaintiff or defendant shall upon application made in open court, have the right of trial by jury, the only further requisite to make such right available, in addition to the demand in open court, being the deposit of a jury fee "for such sum and with such exceptions as may be prescribed by the Legislature." Const. art. 5, § 10. In compliance with this provision of the Constitution, the Legislature has fixed the jury fee which the party applying for a jury is required to deposit, and had excepted from such requirement any applicant who makes oath of inability to make such deposit. The statute further provides that an application for a jury in such cases shall be made "on the first day of the term of the court at which it (the case) is to be tried, unless the same be an appearance case, in which event the application shall be made on default day." Sayles' Ann. Civ. St. 1897, art. 3189. The appellant having fully complied with all of these requirements was entitled to a trial by jury, notwithstanding the fact that to grant it such right may have caused a continuance of the cause when appellees were ready and anxious for a trial. This condition, if it existed, was not due to any dereliction on the part of appellant, and therefore could not defeat or impair its constitutional right to have its case tried by a jury. It has been uniformly held that, even where a party has been dilatory in making his application, his right to a jury will not be denied, unless the granting of such right will prejudice the rights of the opposite party, and we have been cited to no case in which the right to a jury has been denied when the demand therefor was made in the manner and at the time prescribed by the statute. In the case of *Cole v. Terrell*, 71 Tex. 553, 9 S. W. 668, cited by appellees, the demand for the jury was not made until the 5th day of the term, the court could only sit for two weeks, and the parties had agreed that the case should not be tried before the second week of the term with actual or constructive notice that by a standing order of the court no jury had been drawn for that week. Under these facts, it was held that the appellant by his failure to demand a jury on the first day of the term and by agreeing to have the case tried at a time when he knew, or was charged with knowledge, of the fact that no jury would be in attendance upon the court had forfeited his right to a jury trial. The decision in the case of *Petri v. National Bank*, 84 Tex. 155, 19 S. W. 379, also cited by appellee, is based upon the failure of the appellant to demand a jury on the first day of the term. In the case

of *Allen v. Plummer*, 71 Tex. 546, 9 S. W. 672, it is held that, the demand having been made on the first day of the term, the applicant was entitled to the jury, notwithstanding the fact that the jury fee was not deposited until the next day, and the granting of the application would have the effect of continuing the case. This decision is conclusive of the question presented on this appeal, and, while in the subsequent case of *Petri v. Bank*, supra, Judge Gaines, who wrote the opinion in both cases, observes that the rule announced in the *Plummer* case "goes to the extreme verge of propriety," it has not been modified so far as we are aware.

We are of the opinion, however, that this error of the trial court does not require nor authorize a reversal of the judgment because the undisputed evidence adduced upon the trial would have required a verdict in favor of the appellees, and, if a jury had been impaneled to try the case, it should have been instructed to find for the defendants. Such being the state of the evidence, no injury resulted to appellant from the refusal of the court to comply with its demand for a jury, and the error in refusing such demand was harmless. We predicate this holding upon the following statement of the pleadings and the evidence disclosed by the record. In addition to their pleas of not guilty, the defendants pleaded the statutes of limitation of three, five, and ten years. All of the testimony shows that the defendant Geo. W. Smith, by his tenants, Isaac and Isabella Riley and Sampson Smyth, had occupied the land in controversy from the 29th day of April, 1897, to the 25th day of November, 1901, and that after said date and up to the filing of this suit on October 30, 1905, 92 acres of said land was occupied by the defendant Sampson Smyth under a deed therefor from Geo. W. Smith, which was duly recorded on November 25, 1901, and the possession and occupancy of the remainder was continued in the said Geo. W. Smith through his said tenants. The possession of Geo. W. Smith was under a deed from the heirs of J. T. and S. A. Armstrong which was recorded on April 29, 1897, and the possession and occupancy of the defendants during all the time before stated has been of the adverse character required to sustain their pleas of limitation. The undisputed evidence further shows that Geo. W. Smith paid the taxes on all of the land held by him for the years from 1898 to 1904, inclusive, and that Sampson Smyth has paid the taxes on that part of the land purchased by him since the date of his purchase. The records of the collector's office of Jasper county show that the land assessed, and upon which the taxes were paid by the defendants as above stated, was assessed as a part of Geo. W. Smith survey "Abstract No. 36" up to the year 1904, since which time the rolls show that the land assessed by the defendants was on

the Geo. W. Smith survey "Abstract No. 968." This apparent confusion as to the abstract number of the survey on which the land rendered for taxes by the defendant was situate arose out of the fact that the Geo. W. Smith headright survey was located upon two separate tracts of land, and that both surveys appeared upon the state abstract No. 36 up to the year 1904, when the Land Office discovered the confusion thereby caused, and corrected the abstract by giving the smaller of the two surveys abstract No. 968. All of the evidence shows that the land assessed in the name of the defendant and upon which the taxes were paid by them as aforesaid was the land in controversy in this suit and is situate upon the smaller of said Smith surveys now having abstract No. 968. Under this state of the evidence had the trial been by a jury, it would have been the duty of the court to instruct the jury to find for the defendants on their plea of limitation for five years.

There is no merit in appellant's contention that Geo. W. Smith having been made trustee in the trust deed executed by his father, W. H. Smith, for the benefit of Cleveland & Co., was estopped from subsequently acquiring a title to the land against Cleveland & Co., who purchased at the foreclosure sale under said trust deed, and that any title thus acquired by said Geo. W. Smith would inure to the benefit of Cleveland & Co. As before shown, the land was not sold by the trustee under the deed of trust, and we agree with the trial court in the conclusion that the issue of after-acquired title does not arise upon the facts of this case. Geo. W. Smith as trustee in the deed of trust was under no legal or moral obligation to defend the title of his grantor, and, while his conveyance under the terms of the trust deed would have bound his grantor to warrant and forever defend the title to the land, and any title thereafter acquired by said grantor would pass by estoppel to the purchaser, the trustee would not be estopped from acquiring a title adverse to that conveyed by him under the trust deed.

The contention that, because Geo. W. Smith is a legal heir of W. H. Smith, he is estopped from acquiring a title adverse to that conveyed by his father, is also without merit. The warranty of W. H. Smith would only bind his heirs to the extent of the property received by them from his estate, and the evidence shows that the estate was insolvent and Geo. W. Smith therefore could have received no property therefrom.

The doctrine of estoppel upon which that of after-acquired title rests does not depend upon the covenant of warranty, but it certainly cannot be held that such doctrine should apply to one who is not a grantor in the deed upon which the estoppel is sought to be predicated, and is not bound by the covenant of warranty contained in such deed. The deed from the Armstrong

heirs conveys the interest inherited from their father and mother in the land in controversy, and we think the evidence is sufficient to sustain the finding of the trial court that the notes given by W. H. Smith to the Armstrongs in payment of the purchase money for the land in controversy contained an express vendor's lien, and therefore the superior title remained in the Armstrongs, and, when Geo. W. Smith paid said notes and received the deed from the Armstrong heirs, he acquired the superior title to the land, and defendants were entitled to recover upon such title.

This disposes of all of the material points presented in appellant's brief. None of the assignments of error, except the first, is presented in a manner requiring our consideration, but we have considered the questions sought to be presented and are of the opinion that none of the assignments should be sustained, and that the judgment of the court below should be affirmed.

Affirmed.

On Rehearing.

In holding in the main opinion in this case that the error of the trial court in refusing appellant's request for a jury does not require a reversal of the judgment because had there been a trial by jury no other verdict than one in favor of the appellees could have been properly rendered under the undisputed evidence adduced on the trial, we do not intend to announce the rule that a party who has been wrongfully deprived of his right to a jury trial is required to submit his cause to the court. It may be that the party thus denied a trial by jury can stand upon his rights, and decline to offer any evidence or to recognize the right of the court to proceed with the trial, and in such case would be entitled to have any judgment which might be rendered against him reversed because of the refusal of the court to grant his request for a jury, but this record does not present a case of this kind. The judgment recited that, after the refusal of the court to grant appellant's request for a jury, the parties by their attorneys submitted "the matters in controversy as well of fact as of law to the court, and, the evidence and argument of counsel having been heard and fully understood, it is considered by the court," etc. There is nothing in the record to negative the presumption that the facts of the case were fully developed. The appellant, having submitted its entire case to the court, and taken its chances on a favorable judgment, is not in the position to claim a reversal of the judgment because of the error of the court in refusing its request for a jury when the case made by the undisputed evidence is one in which no other verdict than one in favor of appellees could have been rendered.

In that portion of the main opinion in which we find the facts on the issue of limitation we state that both of the tracts of land located under the Geo. W. Smith headright certificate appeared upon the state abstract as No. 36. This statement is not accurate. Abstract No. 36 was applied to the Geo. W. Smith headright survey. This headright certificate, as stated in the main opinion, was located upon two separate tracts of land, so the abstract No. 36 might have applied as well to one of the surveys as to the other, but there was not, in fact, two abstracts No. 36 designating the two surveys.

We have, after full consideration of the motion for rehearing, concluded that it should be overruled, and it has been so ordered.

Overruled.

TRIMBLE v. BURROUGHS.†

(Court of Civil Appeals of Texas. June 10, 1908. On Rehearing, Nov. 11, 1908.)

1. TRIAL (§ 139*)—SUBMISSION OF ISSUES—COURT'S DUTY.

Where the evidence presents any issue under the pleadings, the court must submit it to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

2. PUBLIC LANDS (§ 173*)—SCHOOL LAND LEASES—CANCELLATION—JURY QUESTION.

Whether there had been an informal cancellation of a school land lease to defendant, when plaintiff applied to purchase the land, held a jury question under the evidence in trespass to try title.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

3. APPEAL AND ERROR (§ 999*)—REVIEW—FINDINGS—CONCLUSIVENESS.

The Court of Civil Appeals will not disturb a finding on an issue properly submitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.*]

4. TRESPASS TO TRY TITLE (§ 18*)—SCHOOL LAND—DEFENSES—EQUITABLE TITLE.

In trespass to try title to school land, wherein plaintiff claimed by purchase and defendant under a prior lease to another, defendant could not show an application by and an award to the lessee, since that would only show an outstanding equitable title in the lessee, which until connected with defendant would constitute no defense.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 21; Dec. Dig. § 18.*]

5. TRESPASS TO TRY TITLE (§ 18*)—DEFENSES—OUTSTANDING TITLE.

An outstanding valid legal title, but not an equitable title, in a third person with which defendant is not connected, may be pleaded in bar of trespass to try title.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 21; Dec. Dig. § 18.*]

6. PUBLIC LANDS (§ 173*)—SCHOOL LANDS—AWARD—CANCELLATION—POWER OF COMMISSIONER.

The commissioner of the land office cannot cancel an award to a purchaser of school land;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

that being a judicial act, authority for which is vested in the courts and not in him.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 173.*]

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Trespass to try title by J. B. Burroughs against M. E. Trimble. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 41 Tex. Civ. App. 554, 95 S. W. 614.

Wright & Wynn, Brightman & Upton, and E. Cartledge, for appellant. W. C. Merchant and Hill & Lee, for appellee.

RICE, J. This was a suit in trespass to try title, originally brought in the district court of Coke county, Tex., against appellant for title and possession of fractional section No. 4, certificate No. 5/121, H. T. & B. Ry. Co., containing 460.1 acres of land, situated in said county, and for \$500 as damages for removing certain fence posts and wire therefrom, as well as to recover the rental value thereof, alleged to be reasonably worth 10 cents per acre per month. The venue of the suit, on appellant's application therefor, was changed to Tom Green county, wherein the same was tried. On a former appeal of this case the same was reversed and remanded, principally on account of the error of the trial court in sustaining exceptions to defendant's application for change of venue. See 95 S. W. 614, 14 Tex. Ct. Rep. 753. Defendant answered by general demurrer, general denial, and plea of not guilty. A jury trial resulted in a verdict in favor of appellee for the land sued for and for rents thereon, in the sum of \$391, and judgment was rendered in accordance therewith, from which this appeal is prosecuted.

The land involved in this suit is what is known as "public school land," situated in the absolute lease district. The controlling question in this appeal, in our judgment, raised by appellant's first and thirteenth assignments of error, is whether or not the court erred in refusing to give appellant's peremptory instruction directing a verdict in his behalf, but, instead thereof, submitting to the jury the question whether or not lease No. 11,252, to F. L. and R. H. Harris, of said land for a term of 10 years from October 1, 1895, had been canceled at the time the plaintiff made his first file on said land on the 29th of September, 1899, or at the time he made his second file thereon on the 18th of September, 1901. The facts, briefly stated, are that appellee, being an actual settler on and owner of the west half of survey 314 in block 2, H. & T. C. Ry. Co., which being within the proper radius, on September 26, 1899, in due form of law, applied to purchase the survey in question as an additional section to his home tract, which application was filed

in the land office September 29, 1899. Thereafter, on September 18, 1901, appellee made another application in due form to purchase the same land, which on the same day was filed in the clerk's office and duly recorded, and thereafter, on the 24th day of September, 1901, was filed in the land office. It was shown that he had made his first payment of 1/40 of the purchase price and executed his obligations in due form under each of said applications. This land was awarded to appellee September 24, 1901, on his first application, his second having been rejected. He paid all of the interest that accrued on said obligations to November 1, 1902, testifying that since 1902 he sent each year the necessary amount of money to the State Treasurer to pay the annual interest thereon and that the money had never been returned to him.

It was shown on the part of appellant that the Commissioner of the Land Office, on October 24, 1895, by lease No. 11,252, of that date had duly leased said land for a term of 10 years therefrom to F. L. and R. H. Harris, but it appeared from a certificate of the Commissioner of the Land Office that the last rental payment was made thereon September 3, 1898, and it was likewise shown that said lease was duly canceled by the Commissioner of the Land Office September 22, 1902. Appellant's application to purchase said land, duly filed in the land office, on date September 23, 1902, accompanied with proof of payment of 1/40 of the purchase money, the execution of his obligation therefor, and interest payments thereon, and the award of same to him October 10, 1902, were all fully shown, and he testified that at the date of his application he was an actual settler upon said land. The following evidence was introduced by appellee in rebuttal: (1) A relinquishment of said lease executed in July, 1899, and filed in the land office, by R. H. Harris to F. L. Harris, of his leasehold interest in said land. (2) A letter from the Commissioner of the Land Office to the county clerk of Coke county under date of July 10, 1900, informing said clerk that lease No. 11,252 had been canceled, instructing him to enter a cancellation thereof upon his records. (3) A notice from the Commissioner of the Land Office of date September 16, 1901, addressed to the county clerk of Coke county, stating that the land in suit was again placed on the market, classifying the same as grazing land, valued at \$1 per acre, but at this time the rents on said lease were about two years in arrears, and soon after said last letter from the commissioner to said clerk, to wit, September 24, 1901, an award was made of said land to appellee. It appears from the testimony of one of the attorneys for the appellant that, soon after the decision in the case of Schwarz v. McCall was rendered, which was on the 24th of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

March, 1900, that he told the State Treasurer that he wanted to pay the rentals on said lease, but the treasurer informed him that he could not accept it, "as his books showed that the lease was at an end," and that he was informed by Mr. Rogan, Commissioner of the Land Office, that a sale of land out of the lease, though illegal, had the effect to cancel the lease. There was no evidence on the part of appellant to show any rights under said lease, nor was it shown that the same had ever been recorded in Coke county.

The court, among other instructions, charged the jury as follows: "You are instructed that in this case you will return a verdict for the plaintiff (who is the appellee herein) for the land sued for, unless you find for defendant under instructions hereinafter given you. You are further instructed that, if you do not find from the evidence that the lease introduced in evidence to F. L. and R. H. Harris had been canceled at the time plaintiff made his first file, to wit, on the 29th September, 1899, or at the time he made his second file, to wit, on the 18th of September, 1901, then you will return a verdict for the defendant, M. E. Trimble. There are two ways to cancel a lease: One is statutory, as where the land commissioner, under his hand and seal, cancels a lease and files said cancellation with the papers pertaining to said lease. The other is what our Supreme Court has denominated an 'informal cancellation.' On the question of an informal cancellation of a lease you are charged that, if the land commissioner and the lessees (that is, the parties owning the lease) agree together that said lease shall be canceled generally and as to all persons, then said lease would be canceled; or if the fact exists that authorizes a cancellation, which fact is the nonpayment of the lease money for 60 days after the same is due, and the land commissioner treats said lease as canceled, and the lessees acquiesce in said commissioner's action in said matter, then said lease would be canceled. If you do not find that said lease had been canceled as the same is hereinabove explained to you at the time the plaintiff made his first file, on the 29th day of September, 1899, or at the time he made his second file on the 18th day of September, 1901, then you will return a verdict for defendant, M. E. Trimble."

Relative to the refusal of the court to give in charge to the jury appellant's peremptory instruction, we understand the law to be well settled that, where the evidence presents any issue under the pleadings, it is always the duty of the court to submit the same to the jury. The facts in this case raise the issue as to whether or not there had been an informal cancellation of the Harris lease at the time of the filing of appellee's applications therefor and the award thereon, and it was the duty of the court to present this issue as raised by the evidence by appropriate instructions for the

determination of the jury. *Wallace v. Southern Oil Co.*, 91 Tex. 21, 40 S. W. 399. Therefore, if the court gave a proper instruction on the law of informal cancellation, as raised by the evidence, and the evidence is sufficient to warrant the verdict thereunder, then it would seem to us that appellant has no just grounds of complaint as raised by his said assignments of error. The law provides (article 4218v, Rev. St. 1895) as follows: "If any lessee shall fail to pay the annual rental due in advance for any year within sixty days after such rents shall become due, the Commissioner of the Land Office may declare such lease canceled by a writing under his hand and seal of office, which writing shall be filed with the other papers relating to such lease, and thereupon such lease shall immediately terminate, and the land so leased shall become subject to purchase or lease under the provisions of this chapter." It is not contended by appellee in this case that there was any formal cancellation of the Harris lease at the time of the filing of his several applications and the award thereon; but it is insisted in his behalf that the evidence shows an informal cancellation thereof, and sustains the action of the commissioner in making said award to him, because at said time the annual rental thereon was past due over 60 days; the rent being in arrears for about two years. And it is further contended by appellee that the failure to pay the annual rental on said lease for 60 days after it accrued, the relinquishment of his interest in the lease to F. L. Harris by R. H. Harris, above alluded to, together with the silence and apparent acquiescence of the said lessees and the letters referred to by the commissioner to the county clerk of Coke county authorizing its cancellation upon the records and again placing same on the market, and his action thereon in making the award to appellee, constituted a sufficient basis for a valid cancellation of said lease, and justified the action of the Commissioner of the Land Office in making said award.

In discussing the law with reference to an informal cancellation of a lease by the Commissioner of the Land Office, Mr. Justice Williams, speaking for the court in *West v. Terrell*, 96 Tex. 548, 74 S. W. 905, after discussing the facts that the record disclosed no formal cancellation of the lease in that case on the part of the commissioner, said: "But, aside from this view, we are of the opinion that even if it be conceded that, in order to put an end to the rights of a lessee under his lease by the mere action of the commissioner, this formal declaration of cancellation is essential. It is also true that such rights may be terminated by an informal cancellation, when the power to cancel exists and all parties concerned agree to or acquiesce in it. It is certainly not the law that a lease must continue in existence notwithstanding facts have

arisen authorizing its cancellation, and all parties consent to and submit to an informal cancellation and a letting or sale of the property as subject to sale or lease. The facts show that such was the character of this transaction, if the formal cancellation was not made, and it is not permissible for a third party, if it would be for the lessee after this lapse of time, to reopen the subject." In the present case it appears that, while there was no formal cancellation of the lease at the time appellant's applications were made, nor at the time of his award, still it clearly appears that at said time the rents upon said lease were in arrears for about two years, and one of the lessees had relinquished his rights thereunder. They knew that the rents were unpaid, and they likewise knew, or could have known, that the commissioner had taken such action as to again place the land upon the market, and he did make an award thereof to appellee. It seems to us that these facts were sufficient to authorize the court in giving the charge upon the subject of an informal cancellation, and, the jury having found in favor of appellee thereon, we are not disposed to disturb their verdict.

We do not believe that the court erred in refusing to permit appellant to introduce in evidence the application for and the award of the land to F. L. Harris by the commissioner, for the reason that, if the same had been shown, it would constitute only an outstanding equitable title in said Harris, which, in the absence of evidence showing any connection therewith on the part of appellant, would constitute no defense to this action. Where an outstanding valid legal title is shown, a party not connected therewith can plead and offer the same in bar of an action of trespass to try title, but this is not true of only an equitable title. *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467. This case is easily distinguishable from that of *Patterson v. Knapp* (Tex. Civ. App.) 99 S. W. 125, and other cases cited in support of the doctrine therein announced, in this that in the present case the lessees are not complaining of the action of the commissioner in making an award adverse to their lease; but in *Patterson v. Knapp*, supra, and other cases cited by appellant, the lessees or the parties at interest thereunder were asserting rights under the lease. Here appellant is shown to have no connection with nor claim to the lease of the Harrises, but is interposing it as an obstacle to the right of the state to make an award of the land to appellee, after the existence of facts is shown authorizing its cancellation, which cannot, as we believe, be legally done.

We overrule appellant's contention complaining of the action of the court in refusing to allow him to introduce evidence showing the cancellation of the award to

appellee by the commissioner, because we believe under the law there was no power or authority in the commissioner, after making the award to appellee, to cancel the same. This would be the doing of a judicial act on the part of the commissioner, authority for which is not vested in him under the law, but in the courts.

Believing there is no merit in the questions presented by the remaining assignments, the same are overruled, and, finding no error in the record, the judgment of the trial court is in all things affirmed.

Affirmed.

On Rehearing.

Appellant requests, in the event his motion for rehearing herein should be overruled, then the following additional facts be found by this court to have been proven on the trial below, which we have consented to do, the same being as follows, to wit:

1. We find that the evidence shows that appellant made his application and obligation to purchase the land in controversy on September 23, 1902, and that the same was awarded to him by the Commissioner of the Land Office October 10, 1902.

2. That the payment of the first $\frac{1}{40}$ of the purchase price on said application was duly made, together with interest thereon as it accrued regularly each year thereafter until 1905.

3. That the appellant was living upon the land in controversy prior to the date of his application, and continued to occupy the same with his family for three years thereafter, and was living on the land in September, 1901; but we also find, in this connection, that at the time of the filing of said application and obligation by appellant, as well as at the time of the award thereon to him, the land had been previously awarded to the appellee upon his applications and obligations theretofore made, as stated in the original opinion.

With these additional findings, appellant's motion for rehearing is overruled.

TAYLOR v. WHITE.

(Court of Civil Appeals of Texas. Oct. 23, 1908. Rehearing Denied Nov. 19, 1908.)

1. MASTER AND SERVANT (§ 278*)—RAILROADS—BOILER EXPLOSION—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence held to show negligence of a railway company respecting a defective boiler, an explosion of which injured a fireman.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 962; Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 281*)—RAILROADS—BOILER EXPLOSION—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence held to show that a railway fireman was not guilty of contributory negligence

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

respecting injury received through explosion of a locomotive boiler.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987, 990; Dec. Dig. § 281.*]

3. DAMAGES (§ 206) — PERSONAL INJURIES — PHYSICAL EXAMINATION.

It was not error to refuse to require one suing for personal injury to undergo examination by defendant's physicians.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 531; Dec. Dig. § 206;* Discovery, Cent. Dig. §§ 92-98.]

4. MASTER AND SERVANT (§ 293*) — INSTRUMENTALITIES — MASTER'S DUTY — INSTRUCTIONS.

An instruction that defendant railway receiver was "bound" to furnish a fireman a reasonably safe engine, and that, if he failed to exercise such care as an ordinarily prudent person would have exercised to see that the engine was reasonably safe, defendant was negligent, but otherwise if he did exercise such care, was not erroneous as making it defendant's absolute duty to furnish a reasonably safe engine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1150; Dec. Dig. § 293.*]

5. WORDS AND PHRASES—"DUTY."

A "duty" is an obligation to perform some act.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2283-2284; vol. 8, p. 7646.]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Personal injury action by E. R. White against C. L. Taylor, receiver of the Texas Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. P. Jones, for appellant. T. W. Davidson, for appellee.

LEVY, J. Appellee sued for personal injuries received by him while in the discharge of his duties as a fireman on the locomotive of the appellant receiver, resulting from the alleged explosion in the boiler of the locomotive, which explosion was due to defective stay bolts, severely scalding him with hot water. The appellant answered by general denial and plea of contributory negligence and assumed risk. The case was tried to a jury, and, in accordance with the verdict, a judgment was entered for the appellee.

The evidence shows that E. R. White, the appellee, was a locomotive fireman in the employ of the receiver, and was called to go out on engine No. 57 on the night of June 26, 1907. Appellee had never seen or handled this engine before this particular time. While on the trip, and at the station of Rhonesboro, and while the train and engine at the time were on a side track, a portion of the engine boiler gave way, caused by a sudden explosion in the fire box, throwing the fire door open, and severely scalding the appellee with hot water. Appellee at the time was in the performance of his duties as a fireman on the engine. It was proven that

the explosion was not caused from any improper management or operation of the engine at the time on the part of the fireman or engineer. It was proven that the engine boiler at the time it was furnished the appellee to perform his work had five defective stay bolts, and the giving way of these stay bolts caused the explosion, and which condition of the engine had previous to this time been reported to the master mechanic of the appellant, but had not been fixed or renewed by him. Appellee did not know of the condition of the engine at the time, nor did he know that its bad order condition had been reported to the master mechanic. Our conclusion of facts are that there was negligence on the part of the appellant, as alleged in the petition, and no contributory negligence on the part of the appellee, and that the amount of damages awarded in the case is sustained by the evidence.

It does not appear from the record that the court took any action upon the motion referred to in the first assignment. If we assume that the court denied the motion to require the appellee to undergo examination before the physician summoned by the appellant, it would not constitute error. *Railway v. Brown* (Tex. Civ. App.) 75 S. W. 807.

The second assignment is in complaint of the charge to the effect that the court erred in describing the duty that the master owed to the servant in respect to the instrumentality with which the servant is to perform his work. The particular error urged is that a more onerous burden than authorized by law is required of appellant when the instruction to the jury prescribed the duty of "furnishing a reasonably safe engine with which to perform the duties of his employment." That portion of the instruction complained of is contained in the first sentence of the paragraph, and the whole paragraph reads: "It is the duty of the defendant to furnish the plaintiff with a reasonably safe engine with which to perform the duties of his employment. And, if in the performance of this duty defendant failed to exercise such care as an ordinarily prudent person would have exercised under the same circumstances to see that the said engine was reasonably safe, then the defendant would be guilty of negligence. But, on the other hand, if in the performance of said duty the defendant did exercise such care as an ordinary prudent person would have exercised under such circumstances to see that said engine was reasonably safe, then defendant would not be guilty of negligence and the plaintiff could not recover, although you may believe he suffered injury." We do not think that the instruction, taken and read in its entirety, could be properly construed and understood as making it the absolute duty of the appellant to furnish appellee with a reasonably safe engine with

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which to perform his duties. The effect of the instruction was to subject and confine the appellant to liability for failure to exercise ordinary care to provide a reasonably safe engine, and to liability for no other cause or condition in respect thereto. Although it be conceded that the words used in the first sentence of the instruction to denote the legal standard of safety which the engine furnished by the appellant must satisfy did describe a different and higher duty than authorized by law, yet nevertheless, when that duty is illustrated by the following portion of the instruction contained in the next sentence applying the law, there is indicated and fixed the proper legal standard of ordinary care which appellant is to exercise in order to provide appellee the reasonably safe engine. The instruction as a whole imports that, even though the engine was not reasonably safe, yet the unsafe condition would not be negligence unless appellant failed to use ordinary care in respect thereto. A duty is but an obligation to perform some act, and the court expressly stated to the jury that, "if in the performance of this duty" appellant failed to exercise ordinary care, he would be guilty of negligence, and not guilty of negligence if he did exercise ordinary care, in respect to the matter referred to. In so charging both the performance and the nonperformance of the duty of the master is confined to the exercise of ordinary care with respect to the instrumentality which causes the injury. By the instruction considered as a whole we think the jury were informed, and could not reasonably have been misled, that they could not find for the appellee, if they found that that the appellant's duty to the appellee was performed by the exercise of ordinary care to provide a reasonably safe engine with which to perform his duties. We do not think that our construction of the charge in this case is opposed to the case cited us, as the charges in these cases are not the same as this one nor are they constructed as a whole like the one before us. The assignment of error is overruled.

The third assignment of error in complaint of the charge of the court involves in effect practically the same contention as is raised in the second assignment of error. The ruling upon the second assignment of error determines the contention on this assignment. We are of the opinion that the charge is not susceptible of the construction that it misdirected the jury as to the proper legal duty of the appellant to the appellee. The assignment is therefore overruled.

The appellant claims that the verdict in this case is excessive. While it might reasonably be contended under the evidence in this case that the verdict was large for the injuries proven, yet we are not prepared to say that it is so excessive as to justify us to cause a

remititur of any part of the same. It is difficult to measure the compensation that should be allowed for anguish and pain occurring from being scalded by hot water, as shown by this evidence. The assignment is therefore overruled.

The case was ordered affirmed.

DAVIS v. SHERRILL.

(Court of Civil Appeals of Texas. Nov. 7, 1908.)

1. ATTACHMENT (§ 91*)—AFFIDAVIT—SIGNATURE OF AFFIANT—NECESSITY.

Rev. St. 1895, art. 186, authorizes the issuance of a writ of attachment on affidavit in writing by plaintiff or his attorney, setting up some statutory ground therefor. Article 6 provides that "all affidavits provided for in this title shall be in writing and signed by the party making the same." *Held*, that the requirement as to signing is mandatory, and applies to affidavits for attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 233; Dec. Dig. § 91.*]

2. ATTACHMENT (§ 122*)—AFFIDAVIT—SIGNATURE OF AFFIANT—AMENDMENT.

Where a purported affidavit for attachment is not signed by the affiant, it is not an affidavit, and cannot be amended.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 328; Dec. Dig. § 122.*]

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Action by Mrs. Myra B. Sherrill against John Davis. From a judgment for plaintiff, defendant appeals. Reformed and affirmed.

The following statement of the case is taken from the brief of appellant, and, the same appearing to be correct, it is adopted: "Appellee, plaintiff below, filed her suit against John Davis on a note for \$500, dated September 15, 1903, due two years after date, with 8 per cent. interest, and the usual provisions for attorney's fees, and at the same time filed an instrument, which she styled an affidavit and bond in attachment, and proceeded to have issued a writ of attachment. In her prayer she asks judgment for her debt, with the foreclosure of the attachment upon the property seized. There was not in the trial court nor is there any controversy here as to the money judgment proper to be rendered in favor of the plaintiff below, Mrs. Myra B. Sherrill, and against the defendant, John Davis. The only question is as to the writ of attachment. The purported affidavit is in words as follows: 'State of Texas County of Dallas. Mrs. Myra B. Sherrill, Plaintiff, v. John Davis, Defendant. Before me, the undersigned authority, on this day personally appeared R. E. L. Sauer, who, being by me duly sworn, says that he is the attorney for Mrs. Myra B. Sherrill, plaintiff in the above-entitled cause; that the defendant, John Davis, is justly indebted to the plaintiff in the sum of four hundred and ninety (\$490.00) dollars, with interest thereon at the rate of eight

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

per cent. per annum, from the 15th day of September, A. D. 1903, together with an additional amount of ten per cent. as attorney's fees, which amount at this date is seven hundred and four and $\frac{17}{100}$ dollars, and that the said John Davis is about to convert this property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors; that the attachment is not sued out for the purpose of injuring or harassing the defendant; that the plaintiff will probably lose her debt unless this attachment is issued. Sworn to and subscribed before me, this the 22d day of March, A. D. 1907. Geo. W. Mitchell, Notary Public in and for Dallas County, Texas. [Seal]—same being regular, except that it was neither signed by plaintiff below nor any one else. The defendant below called the attention of the court to the defect by a motion to quash the writ. Plaintiff below replied by a motion to be allowed to amend her affidavit by having Saner, her attorney, attach his signature to the instrument. The motion to quash was overruled. The motion to amend was granted, and the court rendered judgment for the debt, and ordered the land seized in attachment to be sold in satisfaction of the debt. Thereafter defendant's motion for a new trial was overruled, to all of which said John Davis excepted and gave notice of appeal, which was duly perfected."

Albert W. Webb, for appellant. Saner & Saner and Don Robinson, for appellee.

BOOKHOUT, J. (after stating the facts as above). The only question presented by this appeal is, Was the purported affidavit for attachment sufficient, and if not, could it be amended? Article 186 of the Revised Statutes of 1895 authorizes the issuance of a writ of attachment upon the plaintiff, his agent, or attorney making an affidavit in writing, setting up the existence of some one of the statutory grounds therein set out for the issuance of the writ. The making of the affidavit is the basis for the issuance of the writ, and without the affidavit the writ is unauthorized. Article 6 of the Revised Statutes of 1895 provides that: "All affidavits provided for in this title shall be in writing and signed by the party making the same." It is held that the words "all affidavits provided for in this title" mean all those concerning or relating to which the provisions of the title are made. It is further held that the language is mandatory, and necessarily has the effect to make the signature of the affiant a necessary part of all affidavits embraced within its provisions. *Anderson v. Cochran*, 93 Tex. 583, 57 S. W. 29. In the case cited it was held that an affidavit required to establish a claim against an estate must comply with said article 6, and must be in writing and signed by the

party making the same. It is also clear, from the opinion in that case, that article 6 of the Revised Statutes of 1895 applies to affidavits for attachment, and that a writ of attachment, issued upon an affidavit not signed by the party making the same, is unauthorized and void. Article 6 of the Revised Statutes of 1895 was not adopted until 1879, and the decisions prior to its adoption held that the signature of the affiant was not an essential part of an affidavit. *Shelton v. Berry*, 19 Tex. 154, 70 Am. Dec. 326; *Crist v. Parks*, 19 Tex. 234. The purported affidavit in this case not being signed by the affiant, it was not an affidavit within the meaning of the statute. Not being an affidavit, it could not be amended, and the trial court erred in permitting the amendment, allowing the affiant to attach his signature thereto. It follows that the trial court erred in overruling the motion to quash the writ of attachment.

The judgment is reformed and the writ of attachment is quashed, and that part of the judgment foreclosing the attachment lien is held error, and is set aside. The money judgment on the note in favor of appellee is affirmed.

Reformed and affirmed.

BERGER v. DE LOACH et al.†

(Court of Civil Appeals of Texas. Nov. 5, 1908. Rehearing Denied Nov. 19, 1908.)

APPEAL AND ERROR (§ 71*)—DECISIONS REVIEWABLE—ORDER GRANTING OR DISSOLVING TEMPORARY INJUNCTION.

Acts 1907, p. 208, c. 107, authorizing appeals from interlocutory judgments granting or dissolving injunctions, provides only for an appeal from the final order granting or dissolving a temporary injunction, and no appeal lies from an order refusing to grant an injunction on return of an order to show cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 394; Dec. Dig. § 71.*]

Appeal from District Court, Bowie County; R. W. Simpson, Judge.

Action by Samuel Berger against A. B. De Loach and others. From a judgment refusing an injunction, plaintiff appeals. Dismissed.

Appellant brought this suit by petition or bill for injunction to restrain the members of the city council of the city of Texarkana, Tex., from "closing or in any manner interfering with the operation of plaintiff's business," in pursuit of his occupation as a retail liquor dealer at No. 210 Broad street in the said city; also for mandamus to compel said city council to grant him a license to pursue said occupation at said place. Upon the presentation of the petition, on August 19, 1908, to the district judge at chambers, he made the order fixing August 22 at 9 o'clock at chambers as the time and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

place for hearing and determining whether the relief prayed for should be granted, and requiring the clerk to forthwith serve the defendants in the suit with notice. At the time and place named all the parties appeared, the defendant filed answer, and the judge heard the evidence, and thereafter rendered his judgment refusing the relief prayed for, and such judgment was entered upon the record. Appeal was taken by the plaintiff in the suit from the action of the judge.

Todd & Hurley, for appellant. Thos. N. Graham and F. M. Ball, for appellees.

LEVY, J. (after stating the facts as above). This appeal is taken under Acts 1907, p. 206, c. 107, authorizing appeals from interlocutory judgments granting or dissolving injunctions. The appellees moved to dismiss the appeal. In reply to appellees' motion to dismiss, the appellant says that the action of the judge in assuming jurisdiction, fixing a time and place for hearing, and notifying defendants to appear and show cause, constituted, in legal effect, the granting of a temporary restraining order, or limited injunction restraining defendants, until such hearing, from taking any action interfering with plaintiff's business, and the order of the judge, August 22d, refusing the relief prayed for was, in legal effect, the "dissolution" of such preliminary injunction. It might be a proper legal contention in a given proceeding that the recited action and order of the judge had the legal effect of preserving the status quo and protecting the plaintiff's rights, if any he had, pending the interim of hearing on August 22d; but we are of the opinion that the statute provides only for an appeal from the final order of the judge wherein a temporary injunction may be granted or dissolved in the suit. *Baumberger v. Allen* (Tex.) 107 S. W. 526; *Walstein v. Nicholson* (Tex. Civ. App.) 105 S. W. 207.

The appeal is ordered dismissed.

ROSS-ARMSTRONG CO. v. SHAW.

(Court of Civil Appeals of Texas. June 3, 1905.
On Rehearing, July 1, 1905.)

1. SALES (§ 38*) — FALSE REPRESENTATIONS — MATERIALITY.

Where the seller of a piano represented to the purchaser that the piano had a mandolin attachment, and the purchaser was thereby induced to make the purchase believing that he was purchasing a better piano than he did purchase, the representation was material.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 38.*]

2. SALES (§ 38*) — FALSE REPRESENTATIONS — KNOWLEDGE OF FALSITY.

Where the seller by making false representations as to a material matter effects a sale, it

is immaterial that he may have been ignorant of the fact that it was false.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 66; Dec. Dig. § 38.*]

On Rehearing.

3. SALES (§ 38*) — FALSE REPRESENTATIONS — PRUDENCE OF PURCHASER.

A false representation by the seller to the purchaser of a piano that it had a mandolin attachment was of such a nature as would likely have deceived a person of ordinary prudence and business sense.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 74, 75; Dec. Dig. § 38.*]

Appeal from Tarrant County Court.

Action by the Ross-Armstrong Company against J. A. Shaw. From a judgment for defendant, plaintiff appeals. **Affirmed.**

Baskin, Dodge & Baskin and W. Stover, for appellant. Martin & Smith, for appellee.

STEPHENS, J. The evidence tended to prove, and warranted a finding, that appellant represented to the appellee and his wife that the piano sold appellee had a mandolin attachment, and that appellee relied on this representation, and was thereby induced to make the purchase, and that he was thereby induced to believe that he was purchasing a better piano than he did purchase, which representation was therefore material. The evidence also warranted a finding that the representation was false, and it matters not that appellant may have been ignorant of the fact that it was false. He who affirms that to be true which he does not know to be true is responsible for the consequences in law, if not in morals. Judgment affirmed.

On Rehearing.

The Michigan cases cited in motion do hold that it is not sufficient that the person defrauded deemed the false representation material, and was in fact induced to act on them, but it is held also, in *Hall v. Johnson*, 41 Mich. 286, 2 N. W. 55, that they would be material if, in addition to deceiving, they be such as a person of ordinary prudence would likely be deceived by. In this instance we hold, not only that appellee and his wife were deceived, but also that a person of ordinary prudence and business sense situated as he and his wife were would probably have been influenced as they were. The other cases cited are not applicable, the representations being promissory, and not as to existing facts.

TEXAS LAND & IRRIGATION CO. v. SANDERS et al.

(Court of Civil Appeals of Texas. Oct. 13, 1908.)

1. COURTS (§ 169*) — JURISDICTION — AMOUNT IN CONTROVERSY.

In an action in the county court to recover one-fifth of a certain crop alleged by plaintiff to be worth \$960, a mandatory injunction was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

granted requiring defendants to deliver to plaintiff the property claimed. After delivery to plaintiff defendants filed a plea in abatement, alleging that the amount in controversy was more than \$1,000 and beyond the jurisdiction of the court, and on trial the court sustained the plea and rendered judgment for \$1,218.75, the value of the property. *Held*, that the judgment was authorized, though the amount exceeded the court's jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 109.*]

2. APPEAL AND ERROR (§ 733*)—ASSIGNMENT OF ERROR—SUFFICIENCY.

An assignment that the court erred in overruling plaintiff's motion to set aside the judgment, for the reason that the judgment was against the law and the evidence, and the motion referred to was made on the grounds that "the judgment of the court is against the law and the evidence," is too general to require consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3025; Dec. Dig. § 733.*]

Appeal from Austin County Court; C. G. Krueger, Judge.

Action by the Texas Land & Irrigation Company against H. M. Sanders and others. From a judgment for defendants, plaintiff appeals. Affirmed.

A. Chesley, C. R. Johnson, and W. A. Matthaël, for appellant. Brown, Carothers & Brown, for appellees.

McMEANS, J. The Texas Land & Irrigation Company, appellant, brought this suit against H. M. Sanders, L. M. Sanders, and J. W. Sanders, appellees, to recover one-fifth of the rice raised by appellees during the year 1905, under a contract wherein appellant contracted to furnish water to irrigate the crop, and appellees jointly agreed to pay to it therefor one-fifth of all the rice raised by them. Appellant alleged the value of the one-fifth to be \$960. Upon an allegation that appellees had repudiated the contract and its right to one-fifth of the crop and were preparing and threatening to sell the entire crop, which appellant alleged they would do unless restrained, appellant sought and obtained from the county judge of Austin county what is termed in its brief "a mandatory injunction," which required appellees to deliver to appellant one-fifth of the rice raised by each of them during said year. Appellees filed and presented their motion to dissolve the injunction, which, on hearing, was refused. In compliance with the order of the judge each delivered to appellant one-fifth of his rice crop, amounting to 325 sacks, of which 184 sacks were delivered by H. M. Sanders, 106 by L. M. Sanders, and 85 sacks by J. W. Sanders. The value of the rice so delivered was fixed by appellant's own witnesses at \$3.25 per sack, and this valuation was accepted by the court as correct. The value of the rice thus delivered was in excess of \$1,000. Thereafter appellees filed a plea in abatement, alleging that the amount in controversy was beyond the jurisdiction of the county court, and that the value of the

rice stated in the petition to be \$960 was fraudulently alleged in order to confer jurisdiction on that court. When the case was called for trial, all the parties appeared, and the court having heard evidence upon the plea in abatement, sustained the plea and dismissed the suit of appellant, and in the same order, and evidently for the purpose of placing the parties in statu quo (the rice having been sold by appellant in the meantime), rendered judgment against appellant and in favor of each of the appellees for the value of the rice each had delivered to appellant under the order of the court; the aggregate of the amounts being \$1,218.75. By an appropriate assignment of error appellant questions the right of the county court to render judgment against it, because the evidence offered in support of the plea in abatement showed that the value of the rice it had received and sold was in the aggregate in an amount beyond the jurisdiction of the county court, and the judgment against appellant in favor of appellees, being in the aggregate for more than \$1,000, was beyond the jurisdiction of said court to render. On the other hand, the appellees contend that, while the county court correctly refused to entertain appellant's suit, and there was no error in dismissing it, having unlawfully taken the rice from appellees, the court had power to order restitution and thereby place the parties in statu quo, notwithstanding the value of the rice was of such an amount as to deprive the court of jurisdiction to hear and determine the controversy, and that inasmuch as appellant had sold, and could not therefore return the specific rice received by it, the court correctly rendered judgment against appellant for its value. On this state of facts we certified to our Supreme Court the following questions: "(1) Did the court have jurisdiction to render the judgment against appellant? (2) Was the judgment properly rendered against appellant under the facts stated?"

Our Supreme Court has answered both questions in the affirmative, and, in accordance with the opinion of that court, we hold that the judgment was correctly rendered against appellant and in favor of each of the appellees for the value of the rice delivered by him in obedience to the order of the county court. Appellant has presented several other assignments of error seeking a reversal of the judgment, none of which is presented according to the rules or in a way to require our consideration. For instance, the first assignment is that the court erred in overruling plaintiff's motion to set aside the judgment rendered, for the reason that the judgment was against the law and the evidence as set out in section 1 of said motion. Section 1 of the motion is that "the judgment of the court is against the law and the evidence." Under repeated decisions of our

appellate courts the assignment is too general to require consideration. Some of the assignments, not propositions in themselves, are submitted as propositions, while others are not followed by statements as required by the rules, and still others, relating to entirely different subjects, are grouped, and propositions subjoined which are not germane to the group.

There being no reversible error pointed out, and none apparent on the record, the judgment of the court below is affirmed.

Affirmed.

SANDERS et al. v. CAULEY et al.

(Court of Civil Appeals of Texas. Nov. 7, 1908.)

1. EQUITY (§ 65*)—PRINCIPLES OF EQUITY—AID TO WRONGDOING—CLEAN HANDS OF COMPLAINANT.

A court of equity never aids in the commission of a wrong, nor in protecting or preserving an unjust advantage wrongfully obtained.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.*]

2. EQUITY (§ 65*)—EQUITABLE PRINCIPLES—CLEAN HANDS.

Under the principle that he who seeks equity must come with clean hands, equity will not aid a complainant, if his claim grows out of or depends on, or is inseparably connected with, his own prior fraud or misconduct, but will leave him to his remedies and defenses at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.*]

3. DEDICATION (§ 48*)—LANDS DEDICATED TO PUBLIC USE—EFFECT.

Where a landowner for more than 25 years before his death knew and acquiesced in the use of a tract of land and a house thereon for public school purposes, and repeatedly offered to convey the title to the school trustees, complainants, with knowledge of and acquiescence in such use, had no right, though with the consent of the trustees of the school district, or the original owner's heirs, to remove the house from such tract and place it on land held by them, though in trust for school purposes, notwithstanding the property had also been used for religious and cemetery purposes.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 114; Dec. Dig. § 48.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 69*)—SCHOOL PROPERTY—APPROPRIATION.

Where property on which a school building was located had been dedicated to school purposes for the benefit of all the patrons of the school district, the participation by two of the trustees of the district in the removal of the building to another tract constituted a legal fraud, a perversion of their trust, and a practical confiscation of the schoolhouse.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 174; Dec. Dig. § 69.*]

5. EQUITY (§ 65*)—EQUITABLE PRINCIPLES—CLEAN HANDS.

Where complainants had illegally removed a school building from a tract dedicated to the public for school purposes, they could not maintain a suit for injunction to restrain defendants from removing the schoolhouse from the place complainants had located it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Suit by Dud Sanders and others against Jim Cauley and others. Judgment for defendants, and complainants appeal. Affirmed.

Davis & Davis, for appellants. Poindexter & Padelford and J. M. Moore, for appellees.

TALBOT, J. This suit was instituted by appellants to enjoin appellees from removing a house from land alleged to be owned by appellants. A temporary writ of injunction was granted, and upon motion of appellees was, on the 12th day of September, 1908, dissolved. From this judgment appellants have appealed.

The grounds of the motion are: (1) That "the bill or petition is void of equity, and shows no ground for the relief sought, for the reasons appearing in defendants' answer, herewith filed and here referred to and made a part hereof"; (2) that "all the material allegations contained in plaintiffs' petition are denied and traversed by defendants in their sworn answer, herewith filed and made a part hereof." In support of and against the motion to dissolve, in addition to the sworn pleadings, numerous affidavits were filed by the respective parties, and from these affidavits and pleadings the following facts may be adduced: About 30 years prior to the institution of this suit O. P. Arnold gave and dedicated five acres of land, situated in the Hopewell public school community or district in Johnson county, Tex., to be used for school, religious, and cemetery purposes. No deed was ever made conveying said land, but shortly after Arnold donated the land for said purposes the resident citizens of said community, by voluntary contributions and subscription, erected thereon a house 24x18 feet, which was thereafter used for school purposes, and sometimes church purposes, until some time during the year 1907. For 25 years or more before the institution of this suit the said house was used for school purposes, and controlled by the trustees of the said Hopewell public school district, and was known and recognized during that time as public school property of said district. For said number of years the said O. P. Arnold, who died before this suit was brought, set up no claim to said property, but acquiesced in the use being made of it, and recognized it at all times as public school property, and repeatedly offered to convey it to the school trustees, as such property, if they would prepare and present to him a deed to that effect. During the year 1907 the boundaries of the said public school district were extended, and the school patrons of said district thereafter met in a mass meeting, and by a majority vote agreed to

move said schoolhouse off the said school and cemetery lot donated by O. P. Arnold to a more desirable point to them in said school district, the plaintiffs voting with the minority to keep said house on said school and cemetery lot. It is alleged by appellees, and proof in support thereof by affidavits was introduced by them, to the effect that, by the action thus taken at the mass meeting of the patrons a controversy arose about the moving of said schoolhouse, and that by common consent it was agreed that said house should remain where it was during the year 1907, and until new school trustees were elected; that thereafter the plaintiffs, appellants in this court, or a portion of them, of their own motion, and in violation of the agreement that said schoolhouse should remain on the school and cemetery tract of land, moved said house across the line of said five acres and onto the small piece of land described in plaintiffs' petition, containing only about one-fourth of an acre.

It is alleged by plaintiffs, in a supplemental petition, and evidence, by affidavits in support thereof, was offered, that the house in question and the five acres of land upon which it was originally built was not built for and dedicated to public school purposes, and was not turned over to the trustees of said public school district to be controlled by them; but that said land was dedicated to cemetery purposes, and that the house in question was built, by public donations and subscriptions, to be used for holding religious services in, and burial services, and to teach public or private school in, as the community might desire. It is conceded by plaintiffs in their said pleading, and in argument, however, that said house had been used for school purposes by the school district, as well as for the other purposes mentioned, since it was built, about 25 years, and that, notwithstanding the trustees of said district did not have the exclusive control of said house, yet they did have the right to have the public school of said district taught therein. Plaintiffs do not deny, but admit, as we understand, that they removed said house from the five-acre tract of land, and placed it on the land now claimed by them; but they alleged, and offered evidence in support of such allegations, that they had not agreed that the house should remain on said five-acre tract; that they obtained the consent of two of the trustees of said school district, and the consent of three of the six surviving children of the said O. P. Arnold, to move said house. The instrument by which the plaintiffs acquired the one-fourth acre of land upon which they placed the schoolhouse was attached to and made a part of their petition. This instrument conveyed said tract of land to plaintiffs Sanders and Teeters in trust for their use and the use of the trustees of the Copewell school district and a minority of

the patrons of the school, and provided that "said property, land and all improvements placed thereon shall be used, maintained and perpetuated as a schoolhouse and for such public gatherings of the community and others, as said beneficiaries shall provide for, and for public worship of God and for conducting of funeral services, all these to be conducted at said place only, it being hereby expressly agreed by and between the grantor herein, said trustees and their successors, and the above-named beneficiaries of this trust, that any house or improvements placed by said beneficiaries on said land is their own property and upon the unanimous vote of all of said beneficiaries for such removal, may be removed therefrom at any time upon and to said five-acre cemetery lot, but to no other place, and by authority of no other persons."

Appellants contend that, by their act in moving the house onto the land deeded to them by Shellhorse and wife, the same became a fixture, a part of their land, and that they may justly invoke the aid of a court of equity to restrain appellees from invading their premises and retaking said house. It is well said in argument by counsel for appellees that a court of equity never aids in the commission of a wrong, nor will it lend its aid in the protection or preservation of an unjust advantage wrongfully obtained. It is a fundamental principle of equity jurisprudence that "he who comes into a court of equity must come with clean hands." Mr. Pomeroy says: "Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days that, while the Court of Chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction to those rules, while it could act upon the conscience of a defendant, and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct, in connection with the same matter or transaction, had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain." Pomeroy, Eq. Jur. (3d Ed.) § 398. The principle does not, of course, apply to every unconscientious, inequitable, or wrongful act on the part of the plaintiff. It will be confined in its operation to misconduct connected with the matter in litigation, "so that it has in some measure affected the equitable relations subsisting between the parties and arising out of the transaction." Pom. Eq. Jur. (3d Ed.) § 399. Many illustrations of the principle are given in the books, one of the most familiar being cases where the plaintiff's

claim is affected by his own fraud. So that it is said that, whatever be the nature of the plaintiff's claim and of the relief which he seeks, if his claim grows out of, or depends upon, or is inseparably connected with, his own prior fraud, a court of equity will in general deny him any relief, and will leave him to whatever remedies and defenses at law he may have. Pom. Eq. Jur. (3d Ed.) § 401, and cases cited in note. In such cases a court of equity will refuse all affirmative relief.

But it is not alone fraud which will prevent a litigant from obtaining relief in a court of equity. "Any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience." Pom. Eq. Jur. (3d Ed.) § 404. We think the conduct of appellees in removing the house onto their land, in the manner and under the circumstances shown by the undisputed evidence, brings them within the operation of the equitable principles announced, and that the writ of injunction was properly dissolved. The house and the five-acre tract of land upon which it originally stood had become dedicated to the uses to which it was being put before its removal. The uncontradicted facts show that O. P. Arnold, for about 25 years or more before his death, not only knew and acquiesced in the use of said land and house for public school purposes, but proffered more than once, to make title thereto to the school trustees for such purposes. Such knowledge and acquiescence is also shown by appellants' pleadings, and the fact that said property may have been used also for religious and cemetery purposes does not, in our opinion, materially affect the question of its dedication to school purposes, and neither the consent of the trustees of the school district, nor of O. P. Arnold's children justified the removal of the house and the placing of it upon land held by appellants (even though it be in trust for school purposes), under a conveyance or instrument which, by its express terms, provides that it may be used for purposes other than those to which it was dedicated by O. P. Arnold, and that any house or improvements placed on said land by the beneficiaries named therein is their own property, and should only be removed from said land by the authority of said beneficiaries. As has been seen, the instrument by which the one-fourth acre of land upon which the schoolhouse was placed by plaintiffs, and from which they seek to restrain its removal, provides that said land is conveyed to the beneficiaries named, among whom are the two trustees of the Hopewell public school district who consented to the removal of the schoolhouse off the five-acre tract, "and in trust that said property land and all improvements placed thereon shall be used * * * as a schoolhouse and for such public gatherings of the community and oth-

ers, as said beneficiaries shall provide for, and for public worship, etc., all these to be conducted at said place only, it being further expressly stipulated that any house or improvements placed by said beneficiaries on said land is their own property and shall be removed therefrom only by the unanimous vote of all of said beneficiaries, and then only to and upon said five-acre cemetery lot adjoining, and by authority of no other persons."

The sanction of the two school trustees of the Hopewell public school district of this unwarranted appropriation of property which had been dedicated to school purposes for the benefit of all the patrons of the school of said district could give no validity to the unlawful and wrongful act; and the participation in such act, on the part of said trustees, was a violation of duty, and in legal effect a perversion of the trust which had been committed to them as school trustees, and constituted such a legal fraud, in relation to the subject-matter of this litigation, as will prevent them from entering a court of equity for the relief sought. By their wrongful conduct they have practically confiscated the house, which they now call on a court of equity to assist them in holding. They have sought to wrest the control of said house from the trustees of the school district, and confer it upon the beneficiaries named in their deed, who are a part, if not all, of the minority patrons of the Hopewell school, and who opposed a majority of such patrons in their desire to locate said house at a point in the school district which, at least, appeared to them to be more convenient and accessible for all. They have, by placing said house upon the one-fourth acre tract of land, attempted to make it a part of said land, and thereby, and by the written agreement contained in the deed from Shellhorse, converted said house and endeavored to make it their own. The trustees who became parties to this transaction and unlawful removal of said house from the five-acre tract have thereby abandoned said last-named tract for school purposes, and assisted in placing it probably within the power of Arnold's heirs, two of whom, it seems, are beneficiaries in said deed, to not only secure the land by reversion, but also, if it should please the other beneficiaries in said deed to act with them, by moving said house back on the abandoned five-acre tract, to acquire the title to and possession of said house. Clearly it cannot be said that under these circumstances the plaintiffs came into court in the prosecution of this suit "with clean hands," and hence we think they are in no position to invoke in a court of equity the relief asked.

This effectually disposes of the appeal, and other questions, discussed in the briefs and arguments of counsel need not be noticed.

The judgment of the court below is affirmed.

ORANGE LUMBER CO. v. THOMPSON.

(Court of Civil Appeals of Texas. Oct. 15, 1908.
On Rehearing, Nov. 23, 1908.)

1. NAVIGABLE WATERS (§ 26*)—OBSTRUCTIONS—INJURIES—ACTION—INSTRUCTIONS.

In an action for damages from obstructions placed in waters alleged to be navigable, an instruction that "such waters as are navigable in fact are navigable waters" is not misleading, although so indefinite as to be of little service to the jury in determining whether waters are navigable.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 163; Dec. Dig. § 26.*]

2. NAVIGABLE WATERS (§ 26*)—REMEDIES FOR OBSTRUCTION—"NAVIGABLE STREAM."

In an action for damages for placing obstructions in a bayou and river alleged by plaintiff to be navigable, thus preventing him from floating logs placed therein to market, an instruction to find for plaintiff, if the jury believed from the evidence that he had placed logs in the bayou and river, and further believed that said bayou and river "were navigable for the purpose of floating said logs to market," is inaccurate, as such waters might have been navigable at the time that plaintiff wished to market his logs and not navigable at other times, and the stream to be navigable must be capable of use by the public, either at all times during the year, or for times long enough to make them useful to the public as a means of transportation.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 163; Dec. Dig. § 26.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4675-4684; vol. 8, p. 7728.]

3. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction, in an action to recover damages for the obstruction of navigable waters, thereby preventing plaintiff from floating his logs to market, directing the jury to find for plaintiff, if they believed from the preponderance of the evidence that defendant unreasonably detained plaintiff's logs by reason of wrongfully obstructing their passage "along said navigable waters," is incorrect as being on the weight of the evidence; the question of the navigability of those waters being controverted.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 439-466; Dec. Dig. § 194.*]

4. TRIAL (§ 191*)—INSTRUCTIONS TO JURY—STATUTORY PROVISIONS.

Sayles' Ann. Civ. St. 1897, art. 1317, prohibiting a trial judge from commenting on the weight of the evidence in his charge to the jury, is mandatory, and an assumption in the charge that a controverted fact has been established one way or another is a violation of the statute.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 420; Dec. Dig. § 191.*]

5. NAVIGABLE WATERS (§ 26*)—REMEDIES FOR OBSTRUCTIONS.

In an action for obstructing navigable waters, thereby preventing plaintiff from floating his logs to market, plaintiff alleged in his complaint that, because of defendant's wrongful obstruction, it was necessary for him, in order to save his logs and get them to market, to camp near the same and spend his entire time between two specified dates, and he testified that, because of the obstruction complained of, it became necessary for him to stay near and watch his logs, and that the customary wages for such services was \$3 per day, and that his time, while engaged in caring for his logs while they were detained, was reasonably worth \$3 per day. *Held*, that

an instruction that plaintiff's damage might be measured by the reasonable value of his time while he was necessarily engaged in caring for the logs was correct.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 162, 163; Dec. Dig. § 26.*]

6. NAVIGABLE WATERS (§ 19*)—REMEDIES FOR OBSTRUCTIONS.

One who is rightfully using navigable waters is not liable for damages resulting from their necessary obstruction by such use.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 66; Dec. Dig. § 19.*]

7. APPEAL AND ERROR (§ 216*)—OBJECTIONS IN LOWER COURT—INSTRUCTIONS.

An instruction which is defective because omitting an important modification will not be considered on appeal, where no instructions supplying the omission were requested.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 629; Dec. Dig. § 216.*]

On Rehearing.

8. NAVIGABLE WATERS (§ 26*)—REMEDIES FOR OBSTRUCTION.

In an action for obstructing navigable waters, thereby preventing plaintiff from floating his logs to market, the petition alleged that defendant constructed and maintained a boom in such a manner that its logs completely blocked Tiger bayou and Old river for a distance from their mouths, and at the trial plaintiff testified that he was prevented from floating his logs out of the Tiger bayou and into the Sabine river by an obstruction across the mouth of said bayou, and that defendant put in timber in Old river, and kept plaintiff from reaching Sabine river. The court, in submitting the case to the jury, instructed them to find for plaintiff on certain conditions, if they believed that plaintiff placed logs in Tiger bayou, or Old river, and that defendant, by placing obstructions in said waters, or across the same, prevented plaintiff from transporting his logs to market. *Held* that the question whether Tiger bayou and Old river were navigable was a material issue.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 163; Dec. Dig. § 26.*]

9. NAVIGABLE WATERS (§ 21*)—OBSTRUCTIONS.

A lumber company has no right, by constructing booms across the mouth of a navigable stream, or at other places in navigable waters, for any length of time to prevent their free use by others for the purpose of floating logs.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 123; Dec. Dig. § 21.*]

10. NAVIGABLE WATERS (§ 26*)—REMEDIES FOR OBSTRUCTION.

If a lumber company used navigable waters to store logs instead of to transport them, it would be liable, to one who desires to use the waters to transport logs, for such damages as reasonably should have been contemplated by the lumber company as likely to result, from so storing its logs, to the person who desires to use the waters to transport his logs.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 162; Dec. Dig. § 26.*]

Appeal from Orange County Court; W. J. Wingate, Judge.

Action by John Thompson against the Orange Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Adams & Huggins, for appellant. Holland & Holland, for appellee.

WILLSON, C. J. Alleging that Sabine river and its tributaries Tiger bayou and Old river were navigable, and that, because of obstructions wrongfully placed and maintained therein by appellant, he had been unable, from April 29th to October 1, 1905, to float to market certain cypress logs he had prior to said April 29th placed in said bayou and Old river for that purpose, whereby he had lost certain of the logs, and time in caring for same, and incurred extra expense in marketing those of the logs not lost, appellee sought by his suit to recover of appellant as damages \$430 as the value of the logs lost, \$450 as the value of his time lost, and \$20 as the aggregate of expenses incurred by him over and above those he otherwise would have incurred in marketing the logs saved. From a judgment in his favor for the sum of \$788, rendered in accordance with the verdict of a jury, this appeal is prosecuted.

The evidence established without controversy that appellant had constructed, and during the time alleged had maintained, in the Sabine river a boom extending across the mouth of Tiger bayou and Old river, and had so caught and stored logs therein, and in the mouths of said bayou and Old river, as to prevent appellee from floating his logs, from points where he had placed same in said bayou and Old river above their mouths. Into the Sabine river and on to the market at Orange. Whether the bayou and Old river were navigable or not within the meaning of the law, so as to entitle appellee to use same for the purpose of transporting his logs to market, was a controverted issue in the case. In his general charge the court advised the jury that "such waters as are navigable in fact are navigable waters," and instructed them, on other conditions specified in the charge, to find for appellee if they believed from the evidence that he had placed logs in the bayou and Old river, and further believed that said bayou and Old river "were navigable for the purpose of floating said logs to market." "The term 'navigable body of water,'" says Mr. Farnham, "includes all waters which, for a period long enough to be of commercial value, are of sufficient capacity to float water craft for the purpose of commerce, or to float to market the products of the country through which the water extends, so as to be useful to the population along its banks." 1 Water and Water Rights, § 23. "The capability of use by the public for the purpose of transportation and commerce," says another writer, "rather than the extent and manner of that used, affords the true criterion of the navigability of waters. If they are capable in their natural state of being used for the purpose of commerce, no matter in what mode of commerce they may be conducted, they are navigable in fact and become in law public highways." 21 A. & E. Ency. Law (2d Ed.) 428. Measured by these definitions, we do not think it

properly can be said that the one given by the court was misleading; though, as a guide to the jury in determining whether the bayou and Old river were navigable or not, it perhaps was useless, because a "definition which did not define anything." When it is said that "such waters as are navigable in fact are navigable waters," the question remains: What waters does the law recognize as navigable in fact? We are not so sure that appellant's contention as to the other language quoted from the court's charge is not meritorious. The bayou and Old river at the time in question may have been capable of floating appellee's logs to market, and yet not have been navigable water within the meaning of the law. The jury should have been required to find, not that at that particular time alone the streams were capable of floating appellee's particular logs, but that at that and other times they were capable of floating any person's logs. In their natural state the streams must, to have been navigable, have been capable of use by the public, either at all times, or periodically during the year for times long enough to make them susceptible of beneficial use to the public as a means of transportation. Whether the vice pointed out in the charge was removed by the further instruction, given the jury at the request of the appellant, that to be navigable the bayou and Old river must have been "so far floatable in their natural capacity as to be of public use in the transportation of property" need not be determined, as the judgment will be reversed on other grounds hereafter to be stated, and as on another trial the jury doubtless will be more carefully instructed as to what in law constitutes a "navigable stream."

After instructing the jury on conditions specified to find for appellee as damages a sum equal to the market value of the logs lost, the court further instructed them as follows: "If you believe from a preponderance of the evidence that the defendant unreasonably detained the logs of plaintiff, by reason of wrongfully obstructing their passage along said navigable waters, and that it was necessary for plaintiff to care for and watch said logs, and he did so care for and watch same, then you will find for plaintiff such additional sum as his time was reasonably worth during all of the time he was compelled to and did care for said property." The contention made that the portion of the charge quoted, in the use of the language "along said navigable waters," was on the weight of the evidence must be sustained. Whether Tiger bayou and Old river were navigable or not were sharply controverted facts on the trial of the case. The charge assumed that they were navigable. The statute prohibiting a trial judge from commenting on the weight of the evidence in his charge to the jury (Sayles' Ann. Civ. St. 1897, art. 1317) is mandatory. An assumption in the charge that a controverted fact

has been established to be one way or another is a violation of the statute, as is any intimation from the judge as to the weight which should be given by the jury to the evidence on any controverted issue material to a determination of the case. Overall v. Armstrong (Tex. Civ. App.), 25 S. W. 440; Ry. Co. v. Williams, 17 Tex. Civ. App. 675, 40 S. W. 161; Ry. Co. v. Smith (Tex. Civ. App.) 63 S. W. 1066. In the third and fourth paragraphs of the court's instructions to the jury like language was used, rendering those portions of the charge subject to the criticism made of the portion quoted above.

The paragraph quoted above from the court's charge is further objected to on the ground (1) that it states an incorrect measure to determine appellee's damages, appellant contending the reasonable and actual expense incurred in caring for the logs while they were wrongfully detained, and not the reasonable value of appellee's time lost in caring for them, was the correct measure; and (2) that a recovery should have been limited to the expense incurred, not for the entire time that the logs were detained, but only for the time they were detained with reference to appellant's equal right to make use of the streams. In his petition appellee alleged that, because of appellant's wrongful obstruction of the stream, it was necessary for him, in an effort to save his logs and get them to market, to camp near same and spend his entire time from April 29th to October 1, 1905. Appellee testified that, because of the obstructions complained of, it became necessary for him to stay near and watch his logs, that the customary wages for such service was \$3 per day, and that his time, while engaged in caring for his logs while they were detained, was reasonably worth \$3 per day. In this attitude of the pleading and evidence, we are not prepared to say that the court erred in authorizing the jury to measure appellee's damage, in the particular in question, by the reasonable value of his time while he was necessarily engaged in caring for the logs. If it was necessary for appellee to remain near and devote his time to caring for the logs, then it seems to us that the value of his time should be held to be a part of the "reasonable and actual expenses incurred in caring for the logs," which appellant contends should be the measure of his damages. If it should be so included, it was not error for the court in effect, to so instruct the jury. As to the other objection specified, we think it is not without merit. If the streams were navigable, appellant had the right, equal to appellee's, to reasonably and for a reasonable time use them; and, while it so used them, it would not be liable to appellee because he thereby was prevented from using them. On another trial the court should properly instruct the jury as to the relative rights of the parties to the use of the water, if navigable, and should not authorize the

jury to recover for any expense incurred by appellee in caring for his logs while appellant was rightfully using the streams. 1 Farnham on Water and Water Rights, §§ 27, 84c; A. & E. Ency. Law (2d Ed.) 441.

Appellant complains of the portion of the court's charge instructing the jury, on conditions specified, to "find for the plaintiff the market value" of the logs lost. The contention is that the instruction should have been to find the market value of the logs lost, "at the time and place they were lost." An instruction supplying the omission from the court's charge was not requested, and for this reason appellant should not be heard to complain thereof. For a like reason there is no merit in appellant's complaint that the court failed to instruct the jury as to appellee's duty, if he could have done so at a moderate expense, to protect himself from injurious consequences of appellant's wrongful acts.

We have considered the assignments of error complaining of other matters shown by the record, and, being of the opinion that they are without merit, overrule them.

The judgment of the trial court will be reversed and the cause will be remanded for a new trial.

On Rehearing.

Appellee insists it was wholly immaterial whether Tiger bayou and Old river were navigable or not—that his suit, as made by his pleadings, the evidence, and the charge of the court, was for damages for obstructing Sabine river, and not for obstructing said bayou and Old river. The allegations of his petition, so far as pertinent to his contention, were as follows: "That therefore, to wit, on or about the 29th day of April, 1905, plaintiff owned and had in his possession 65 sticks of cypress timber, which he had theretofore cut down and topped and placed in Tiger bayou and Old river, both of which are navigable streams, in Orange county, Tex., for the purpose of floating the same down and upon the waters of Sabine river, a navigable stream, to Orange, his only market. That on or about said date, and for a long time thereafter, defendant constructed and maintained a boom, and kept the same constantly filled with floating timber and logs in and across the mouths of said Old river and Tiger bayou and extending a distance of some three miles up and down the Sabine river above and below the mouths of said Tiger bayou and Old river in such a manner that said Orange Lumber Company's logs completely blocked Tiger bayou and Old river for a distance up from their mouths, and kept the Sabine river blocked and filled with logs for the distance between the west bank of said Sabine river and said boom, and although often requested by plaintiff to open same, or to allow said plaintiff to open same, refused to do so, or to allow plaintiff to do so, and prevented plaintiff from reaching,

and shut plaintiff off from his only market for, his said cypress timber." Appellee testified: "I placed 36 sticks in Old river and 28 sticks in Tiger bayou. There was no obstructions in either Tiger bayou or Old river when I placed my timber in there. * * * The timber I placed in Tiger bayou I floated down to its mouth where it empties into the Sabine river, and found a 'sheer' or 'skin' across its mouth, which prevented me from getting my logs into the Sabine river. Defendant had their logs in the Sabine river in a boom which took up about one-half of the width of the Sabine river. It was some 300 or 400 feet to the outside of the boom, and all the intervening space was filled with defendant's logs. In order to market, I would have been obliged to open the sheer or skin, pass through all those logs, and then through the boom in the middle of the Sabine river. * * * I often told Mr. Hunt, who had charge of the boom for the Orange Lumber Company, that if he didn't let me out with my timber that I would cut the sheer, but he would not let me out. * * * Defendant maintained a boom across the mouth of Old river. I could not pass the boom with my timber. They also began putting in timber in Old river, and it kept me from reaching the Sabine river." The court instructed the jury: "If you find from the evidence in this case that the plaintiff, John Thompson, placed any cypress logs or timber in Tiger bayou or Old river, tributaries of the Sabine river, and that such waters were navigable for the purpose of floating said logs to market, and defendant, by placing booms or other obstructions in said waters or across the same, or in the Sabine river or across the same, prevented the said plaintiff from bringing his said logs to market for an unreasonable length of time, under all the circumstances introduced in evidence before you, and you further find that, because of such obstructions and delay, the plaintiff lost any of the logs, then you will find for the plaintiff the reasonable market value of all the logs so lost, if any." It will be observed that in his petition appellee alleged that appellant constructed and maintained a boom "in such a manner that said Orange Lumber Company's logs completely blocked Tiger bayou and Old river for a distance up from their mouths." It will also be observed that appellee testified that he was prevented from floating his logs out of Tiger bayou and into the Sabine river by a "sheer" or "skin" across the mouth of said bayou, and that appellant "began putting in timber in Old river and it kept me from reaching the Sabine river." And when it is further observed that the court in submitting the case to the jury, instructed them to find for appellee on certain other conditions named, if they believed from the evidence that the plaintiff placed cypress logs in Tiger bayou or Old river, and that defendant, "by placing booms or other obstruc-

tions in said waters or across the same," prevented appellee from transporting his said logs to market, we think it will be apparent that we did not misconceive appellee's case, and on an immaterial issue reverse the judgment of the lower court.

In support of his contention appellee argues that his cause of action would have appeared to be as perfect, if, instead of alleging that he had placed his logs in the bayou and Old river, navigable streams, he had alleged that he had placed them on a chute extending from the land into the Sabine, or had alleged them to be in a swamp. In fact he argues it was "wholly immaterial where his timber was." But we think it was material. Before he would be entitled to recover damages on the ground that appellant had so obstructed the Sabine as to prevent him from using its waters to transport his logs to market, it would have to appear that but for such obstruction his logs could have been so transported to market. If other obstacles were in the way, which would have to be removed before the logs could be got to and floated in the Sabine, until those obstacles had been removed he would have no ground on which to complain of an obstruction in the Sabine. If his logs were in a position where they could not be floated in the Sabine, even if it were free of obstructions, certainly he would have no right to complain of obstructions in it. If, in the case suggested by him as illustrating his argument, his logs had been on the hillside near the Sabine, it would be no concern of his that its waters were so obstructed as to prevent the floating of logs therein, if on account of a wall or other obstruction on the hillside between his logs and the Sabine, they could not have been gotten to and into its waters. So, if his logs were in Tiger bayou or Old river, and, on account of obstructions existing in those streams, could not be got to the Sabine, he would have no right to complain because of obstructions in the Sabine, which, had he been able to get his logs into its waters, would have prevented him from floating them to market.

In the opinion disposing of the appeal we made this statement: "If the streams were navigable, appellant had a right equal to appellee's to reasonably and for a reasonable time use them; and, while it so used them. It would not be liable to appellee because he thereby was prevented from using them. On another trial the court should properly instruct the jury as to the relative rights of the parties to the use of the waters, if navigable, and should not authorize the plaintiff to recover for any expense incurred by him in caring for his logs while appellant was rightfully using the streams." That there may be no misapprehension as to what was meant by the language quoted, we state that we are of the opinion that, if the bayou and Old river were navigable, appellant would not have a right, by constructing

"sheers" or "skins" or booms across them at their mouths, or at other places, for any length of time, to prevent their free use by appellee for the purpose of floating his logs. And we also are of the opinion that, if appellant, without constructing such obstructions, instead of using the waters of the bayou and Old river for the purpose and the incidents thereto of transporting its logs, used them for the purpose of storing them, it would be liable to appellee for such damages as reasonably should have been contemplated by appellant as likely to result to appellee while he was prevented by such storing of its logs from floating his own to the Sabine.

The motion for a rehearing is overruled.

THOMASON et al. v. BERWICK.

(Court of Civil Appeals of Texas. Oct. 30, 1908.)

1. TRESPASS TO TRY TITLE (§ 38*)—EQUITABLE INTEREST—BONA FIDE PURCHASER—BURDEN OF PROOF.

That one asserting a prior equitable interest against a purchaser of the legal title may prevail, he must show that the holder of the legal title is not a purchaser for value, or that he purchased with notice of the prior equity.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 38.*]

2. VENDOR AND PURCHASER (§ 238*)—BONA FIDE PURCHASER—PRIOR EQUITIES—TERMINATION.

If a subsequent purchaser with notice acquires title from a former purchaser, who bought for value and without notice, the subsequent purchaser succeeds to all the rights of his grantor.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 580, 581; Dec. Dig. § 238.*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Trespass to try title by Tom Berwick against Mrs. J. A. Thomason, Jr., and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Stephens & Pickett and G. H. Pendarvis, for appellants. C. N. Smith and H. E. Marshall, for appellee.

PLEASANTS, C. J. This is an action of trespass to try title, brought by appellee against appellants, the widow and heirs at law of J. A. Thomason, Jr., deceased, to recover land situated in Liberty county. Mrs. Julia A. Thomason answered for herself and is guardian of the minor defendants J. A. Thomason and James H. Thomason, by plea of not guilty and pleas of limitation. The minors Laura and Cordella Thomason answered by their respective guardians, the Houston Land & Trust Company and R. M. Kilgore. Each of these defendants pleaded not guilty, and the Houston Land & Trust Company also pleaded limitation. The trial

in the court below without a jury resulted in a judgment in favor of the plaintiff for the land in controversy.

The record shows that the land was conveyed to H. Berwick by J. S. Blasdel on August 27, 1885. On June 8, 1887, H. Berwick and wife, Ida Berwick, conveyed it to W. E. Stetson, and thereafter it was conveyed by said Stetson to George F. Allen, by Allen to W. B. Brittain, by Brittain to C. H. Simmons, and on May 8, 1893, Simmons and wife conveyed it to appellant, Mrs. Julia A. Thomason, who was then the wife of J. A. Thomason, Jr., now deceased, under whom the other appellants claim. The appellee, Tom Berwick, is the son of Mary Berwick, deceased, who was the wife of H. Berwick at the time the land was conveyed to him by J. S. Blasdel, as before stated, on the 27th day of August, 1885. Mary Berwick died in January, 1886, and H. Berwick thereafter married Ida McShane, who joined him in the execution of the deed conveying the land to W. E. Stetson on June 8, 1887. The evidence sustains the finding of the trial court that the land was paid for with the separate funds of Mary Berwick. The appellee, Tom Berwick, is the sole heir of said Mary. The evidence also sustains the finding that, while the land was conveyed by Simmons and wife to Mrs. Julia A. Thomason, it was in fact purchased and paid for by her husband, J. A. Thomason, Jr., and that at the time he purchased he knew that it was the separate property of appellee's mother, Mary Berwick, and that the plaintiff, as the heir of said Mary Berwick, was claiming the land. There is no evidence that any one of the purchasers under H. Berwick and wife, prior to the said J. A. Thomason, Jr., had any knowledge of the fact that H. Berwick had a former wife, or knew any facts which would put them upon notice of appellee's claim to the land. Upon this state of the evidence the trial court erred in rendering judgment for the plaintiff. It is a well-settled rule of decision in this state that, in order for one asserting a prior equitable title against the purchaser of the legal title to prevail, it devolves upon him to show that the holder of the legal title is not a purchaser for value, or that he purchased with notice of the prior equitable claim. *Johnson v. Newman*, 43 Tex. 642; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; *French v. Strumberg*, 52 Tex. 92; *Baldwin v. Root*, 90 Tex. 552, 40 S. W. 3; *Fordtran v. Perry* (Tex. Civ. App.) 60 S. W. 1000.

It is equally well settled that, if a subsequent purchaser with notice acquires title from a former purchaser, who bought for value and without notice, such subsequent purchaser succeeds to all the rights of his grantor. When land once becomes freed from equities by a bona fide purchase by one

having no notice of the equities, such purchaser obtains a complete *jus disponendi*, and any one who takes title from him takes it free from said prior equities, notwithstanding he may have notice thereof at the time he buys. *Grace v. Wade*, 45 Tex. 522; *Lewis v. Johnson*, 68 Tex. 450, 4 S. W. 644. We think it logically follows from these decisions that the burden upon one asserting an equitable claim against the purchaser of a legal title, who has not purchased directly from the holder of the legal title against whom the equity arose, is not discharged by merely showing that the last purchaser had notice of the equity, but the proof must go further and show that the land was not free from such equity in the hands of any of the intermediate vendors of said purchaser. This is the holding in the following cases: *Peterson v. McCauley* (Tex. Civ. App.) 25 S. W. 826; *Burleson v. Alvis*, 28 Tex. Civ. App. 51, 68 S. W. 235.

The record presents no other error that is likely to occur upon another trial, and it is unnecessary to discuss any of the other questions presented.

For the error indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

SMITH v. SIMPSON BANK et al.

(Court of Civil Appeals of Texas. Oct. 28, 1908. Rehearing Denied Nov. 25, 1908.)

1. ADVERSE POSSESSION (§ 13*)—TITLE ACQUIRED.

Defendant is entitled to 160 acres of land, embracing the improvements by adverse possession, on showing that his grantor's predecessor having a tax title to a survey gave grantor 160 acres, including a house, etc., and 35 or 40 acres of inclosed and cultivated land, and that grantor went into possession occupying the improvements with his family and cultivating the land continuously for 13 years, at the end of which he sold and delivered possession to defendant, who occupied the land until this suit therefor.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 65; Dec. Dig. § 13.*]

2. ADVERSE POSSESSION (§ 100*)—EXTENT.

Though one is entitled to a particular tract of land by adverse possession, where his actual occupancy for the statutory period has been by inclosure or other actual uses or by a public claim to the particular boundaries, defendant in trespass to try title, who claims 160 acres through actual occupancy of a part thereof, cannot claim 160 acres to particular boundaries shown by the cutting of timber by his predecessor less than 10 years before the suit was brought, though he is entitled to have 160 acres set aside to him, including the improvements.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 547; Dec. Dig. § 100.*]

Appeal from District Court, Sabine County; W. B. Powell, Judge.

Trespass to try title by the Simpson Bank and others against T. R. Smith and another.

From the judgment, defendant T. R. Smith appeals. Reversed and remanded.

John Hamman, John B. Warren, Tom C. Davis, and Hamilton & Minton, for appellant. Goodrich & Synnot, for appellees.

JAMES, C. J. This action of trespass to try title was by the Simpson Bank and others against Henry Smith and T. R. Smith; the judgment being in favor of Henry Smith for a tract claimed by him, but against T. R. Smith for the tract claimed by him. The appeal is by T. R. Smith; he having set up title by limitations to 160 acres of the land sued for, describing a certain tract of that size by metes and bounds.

The court instructed the jury to return a verdict against him, and he claims here that the evidence at least entitled him to a submission of his plea to the jury, and in fact is such as to entitle him to a judgment in this court for the 160 acres as described in his plea. The evidence is to this effect: That about 1886 W. T. Pulliam, who had a tax title to the Henry Canfield survey, gave his son-in-law, Love, 160 acres of the tract, including his dwelling house, etc., and 35 or 40 acres of fenced and cultivated land. Love went into possession, occupying the improvements with his family, and cultivated the land from 1887 continuously until he sold and turned over the place to defendant T. R. Smith early in 1900. Then Smith moved there and occupied it until this suit was brought in August, 1903. Both Love and Smith at all times claimed 160 acres, and this claim was open and understood in the neighborhood. There can be no question from the evidence that there had been such character of occupation by Love and Smith consecutively, and for such length of time, as, under the 10-year statute, entitled this defendant to 160 acres of land embracing the improvements. The only question which arises is whether or not the evidence is such as to authorize the adjudication to Smith of the 160 acres of the survey as he described it in his answer.

It is contended that the limits of the 160-acre parcel were indicated on the ground by the timber which Love had cut and sold from the land for staves; this being claimed to be an act which visibly defined the extent and shape of his claim. But we find that the testimony shows that Love had not been cutting this timber until from about three years before he sold to Love. Consequently this means of proclaiming the lines to which Love was claiming had not subsisted for 10 years. This cutting of timber in this manner, and a survey of the land by Love when he sold to Smith in 1900, which survey was as the 160 acres are described in the answer, the pointing out by Love at that time of the same as the bound-

aries of his claim, are substantially all there is to establish those lines as the boundary of the 160 acres.

The law, as we understand it, entitled the defendant to the ground actually occupied, by improvements, etc., and enough more to make 160 acres. If his actual occupancy is of 160 acres by inclosure or other actual uses, or if merely by a public and notorious assertion of claim to certain boundaries constituting 160 acres, the decisions entitle him to claim the particular 160 acres. *Giddings v. Fischer*, 97 Tex. 188, 77 S. W. 209; *Davis v. Receivers of Houston Oil Co.* (Tex. Civ. App.) 111 S. W. 219, and cases cited. But here there was nothing indicating an assertion of claim to the 160 acres set up, except what is above stated, which, while they might have been sufficient, had not subsisted for the length of time necessary. Defendant certainly has not the right, when his claim as to boundaries has thus been indefinite, to select the land at the trial. We think that, while appellant has not shown himself entitled as of right to claim the boundaries of the 160 acres to be as he described them, his right, nevertheless, exists to have 160 acres of land set apart to him to include the improvements, as was held in *Bering v. Ashley* (Tex. Civ. App.) 30 S. W. 838, and it was error to direct a verdict against him.

Reversed and remanded.

SAN ANTONIO TRACTION CO. v. LEVYSON et al.†

Court of Civil Appeals of Texas. Oct. 28, 1908.
Rehearing Denied Nov. 25, 1908.)

1. NEGLIGENCE (§ 136*)—QUESTIONS OF LAW OR FACT.

The question of negligence vel non is primarily for the jury, and only becomes one of law for the court when the facts are undisputed and only one conclusion can be drawn therefrom.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 279-300; Dec. Dig. § 136.*]

TRIAL (§ 139*)—QUESTION FOR COURT OR JURY—PEREMPTORY INSTRUCTION.

It is only where it is so clearly established from the undisputed testimony as to admit no other reasonable hypothesis or conclusion that a fact essential to plaintiff's cause of action is not proven, or one which is a complete defense has been shown, that it becomes the court's duty to direct a verdict for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

STREET RAILROADS (§ 114*)—INJURIES TO PEDESTRIAN—NEGLIGENCE.

In an action for death of a pedestrian in collision with a street car, evidence held to warrant a finding that the motorman failed to exercise ordinary care in keeping a lookout for persons on and at the intersection of the streets where the accident occurred.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 243-245; Dec. Dig. § 114.*]

4. STREET RAILROADS (§ 114*)—INJURIES TO PEDESTRIANS—PROXIMATE CAUSE.

In an action for death of a pedestrian in a collision with a street car at a street intersection, evidence held to warrant a finding that the motorman's negligence in failing to keep a proper lookout was the proximate cause of decedent's death.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 114.*]

5. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

The burden of proof of proving contributory negligence is on the defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 229; Dec. Dig. § 122.*]

6. STREET RAILROADS (§ 117*)—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

That deceased stepped immediately in front of a moving street car, by which he was struck and killed, did not necessarily convict him of negligence as a matter of law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 235; Dec. Dig. § 117.*]

7. STREET RAILROADS (§ 81*)—RIGHTS IN STREET—OPERATION OF CARS.

Use of streets by the public is not subordinate to their use by a street car company; the company being required to operate its cars with due regard to the rights of individuals who are ordinarily not negligent in making a proper use of the street, though it be the part on which the railway is constructed.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-176; Dec. Dig. § 81.*]

8. STREET RAILROADS (§ 93*)—CARE REQUIRED—PERSONS ON OR NEAR TRACK.

It is the duty of a street railway company to exercise special care to prevent injuring those who are on the street or crossing its tracks to take passage.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-197; Dec. Dig. § 93.*]

9. STREET RAILROADS (§ 93*)—PERSONS CROSSING TRACK—INJURIES—INVITATION.

Where a street railway company provided a bench for waiting passengers, it thereby invited passengers to cross the street diagonally to take a car stopping on the opposite corner, and its servants were therefore required to keep a lookout for persons who accepted such invitation, and to regard the act of crossing as a signal to stop the car in order that they might take passage thereon.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-197; Dec. Dig. § 93.*]

10. STREET RAILROADS (§ 117*)—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

Decedent occupied a seat provided by defendant street railway company at a street corner for prospective passengers, and, on seeing the car approaching, started diagonally across the street intersection and crossed the track in front of the car to the point where it usually stopped to take on passengers. Decedent was unaware of the proximity of the car when he stepped in front of it and was struck and killed by the motorman's negligence in failing to keep a proper lookout. Held, that decedent was not negligent as a matter of law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 248-250, 255-257; Dec. Dig. § 117.*]

11. STREET RAILROADS (§ 118*)—DEATH OF PEDESTRIAN—INSTRUCTIONS.

The court charged that if decedent was killed by one of defendant's street cars at or near a street intersection, and the motorman failed to keep a lookout for deceased on or along de-

fendant's track at the time and place, etc., and such failure was negligence and was the direct cause of decedent's death, etc., plaintiffs could recover. *Held*, not erroneous as requiring the motorman to keep a lookout for a particular person, nor as assuming that there was evidence that deceased was walking along the track.

[Ed. Note.—For other cases, see *Street Railroads*, Dec. Dig. § 118.*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Fannie Levyson and others against the San Antonio Traction Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Ogden, Brooks & Napier, for appellant. Terrell, Hopkins & Terrell, H. C. Carter, and Perry J. Lewis, for appellees.

NEILL, J. The appellees, who are the widow and children of Paul Levyson, deceased, sued the appellant for causing his death by negligently running one of its street cars over him. The negligence charged was: (1) In failing to sound the gong; (2) in failing to have the car equipped with a fender; (3) in failing to have the car under complete control, as required by city ordinances; (4) in failing to keep a lookout; and (5) in running the car at a greater rate of speed than allowed by city ordinances. The defendant, after interposing general and special exceptions to plaintiffs' petition, answered by a general denial, specially denied that it was guilty of any of the several acts of negligence alleged, and pleaded contributory negligence of the deceased in stepping immediately in front of the moving car, alleging that he, while waiting for and intending to board defendant's north-bound car, when he knew that it was coming, stepped immediately in front of the same, and that in so doing he was guilty of contributory negligence, which caused his death. The trial of the case resulted in a judgment for the appellees in the sum of \$7,000.

As the first assignment complains of the court's refusing defendant's motion, upon the close of plaintiffs' testimony, to instruct a verdict in its favor; the second, of the refusal of a requested special instruction to the jury to return a verdict for defendant; the third, of the failure of the court to grant a new trial upon the ground that the undisputed evidence showed the deceased was guilty of contributory negligence in going upon defendant's track immediately in front of a moving car; and the fifth, of its failure to grant a new trial upon the ground that the great preponderance of the evidence showed deceased was guilty of contributory negligence in going upon the track immediately in front of a moving car—the findings of fact will determine the merit of each of the four assignments mentioned, and they will all be disposed of in connection with our—

Conclusions of Fact.

About 2 o'clock in the afternoon of July 10, 1905, Paul Levyson, the husband of appellee, Fannie Levyson, and the father of the other appellees, was struck, knocked down, run over, and killed by one of appellant's electric street cars at the intersection of Guenther and South Alamo streets. At that time appellant maintained and operated an electric street car line which ran along South Alamo street, which is intersected and crossed by Guenther street. It then maintained two car tracks along said street extending south across Guenther street to a point near a bridge across San Antonio river, at which point one of the tracks is terminated by a switch which connects it with the other. The distance between the inner rails of these tracks where Guenther street is crossed is 4.9 feet, which continues south nearly to the point of their convergence. The cars going north ran on the track on the east side of the street, and those running south on the west side. The distance from the south side of Guenther street to the end of the switch which connects the two tracks is 114 feet. The length of the switch is 34.3 feet. The distance from the switch to the bridge is 64.7 feet, the entire distance from the south line of Guenther street to the bridge being 213 feet, and the bridge is nearly 100 feet long. The sidewalk on the east side of Guenther street is 6 feet wide, and the distance from its inner curb to the railway track is 28 feet; on its east side, the sidewalk is 7½ feet wide, and the distance from the curb is 35 feet. There was, and had been a long time prior to Levyson's death, a bench under a shade tree on the southwest corner of the intersection of the streets, used by persons waiting to take passage on defendant's cars, and a telephone pole just north of the bench. The custom of the defendant company was to stop its cars to let off and take on passengers after its car crosses a street. In accordance with this custom, its cars running north into the business part of the city would stop after crossing Guenther street at its northeast corner, and passengers waiting at the bench under the shade to take a north-bound car would have to cross over the street diagonally to that corner in order to get aboard. There was a clear view from the southwest corner of Guenther street of the street car track south to and across the bridge, and further, until it turns a corner; but such view does not extend from the bench, because obstructed by a fence, nor from the telephone pole, and the motorman on the north-bound car would have had a clear view of any one crossing the street diagonally, unless obstructed by a car on the other track.

The deceased, who resided not far from

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the point of intersection of the streets, when going to his place of business on defendant's cars, usually took passage at this place. On the day of his death, after eating his dinner, he started from his home to his place of business, intending to take one of defendant's cars running north at the intersection of Guenther and South Alamo streets. A few minutes afterwards he was seen by Mr. Guenther in a sitting posture, leaning against the telephone pole, talking to some one on the adjacent bench. A car going south had evidently just passed, though not observed by the witness, or, if it was, it had escaped his recollection when he testified upon the trial. The witness then saw him arise from where he was sitting and start diagonally across the street towards its northeast corner, where defendant's cars going north usually stopped to let off and take on passengers. The witness did not notice whether he walked or ran, but supposed he moved pretty fast, though he did not notice deceased all the time from when he saw him get up. His attention was called next to him by hearing a shriek, and then he saw the accident. He observed no change in the speed of the car before it struck Levyson, and he said that it must have been south of the spur when deceased started across. He had no recollection whether he heard the gong sounded or not. This witness saw the north-bound car stop after it struck Levyson.

Another witness, who visited the scene of the accident a few moments after it occurred, testified: "When I got down there, the body was under the car * * * kinder doubled up, with the wheels touching against a portion of the neck and head. The body was all doubled up like it had been rolled and mashed. * * * A man named Turner lives there on the corner, and the car was just a little south of his front gate, very near the corner. I noticed three blood marks on the ground, one distinctly visible about the middle of the street. The blood spot I observed particularly was right about the middle of Guenther street and in the middle of the east rail. And in the middle of the track near where this blood spot was, about two feet from it, it started. It was just like you had rolled something. The body lay somewhere north of the crossing, under the first or second truck of the car. I remember when the body was taken out. Yesterday morning * * * I stepped it off to see. I had been told I would be called as a witness in the case, and I stepped it off, and it was 17 full steps from the place in the middle of the street to the place where the body was. I remember pretty definitely where the body was."

Mr. Hildebrand, who was on the car when the collision occurred, testified: "As we approached the intersection of Guenther street on South Alamo street, and as the car came to where there was a switch, it kind of slowed up, and we passed the other car, and,

after we passed the other car, why, the car made a jolt and stopped. The motorman stopped and got down and looked under the car. The jolt was like you would strike some rocks, or something like that. * * * At the time, the conductor was taking my fare from me. * * * Just before I felt the jolt the motorman looked back at the car that had just passed by. I felt the jolt just about the time I felt for the fare to pay the conductor. The motorman jumped down off the car and looked underneath, and I saw from his expression there was something wrong. * * * He had an expression that something had happened—turned pale, * * * so I could see from his countenance there was something wrong. The conductor was standing by me, and he and I jumped off about right together, and we saw the man under the car. * * * I don't believe I noticed any slackening in the movement of the car after it passed the other car. It was not going at a very fast speed after it passed the other car. It was a little slower than the usual speed because we had just passed the other car, and it hadn't got under good headway. We passed the south-bound car this side of where the switch is, * * * and I suppose it was on the main line at the time we hit the man. * * * I am sure we had passed the south-bound car entirely, that is, the two cars were clear of each other. At the time I felt the jolt I don't know in which direction the motorman was looking. It was before the jolt came that I saw him looking to the rear, towards the car that had passed. It was just an instant before the jolt came. I didn't feel the application of the brakes, or sudden stopping of the car, just before feeling the jolt; but after the jolt I did. I think he put on the brakes right then. I think he must have put on the brakes just after the jolt. I felt the application of the brake after the jolt. The man was under the right-hand side of the car going north, * * * under the first wheels. It would be a hard matter for me to tell whereabouts on Guenther street I got off the car with relation to the south or north boundary line of the street. * * * I didn't notice the bench at that time, but saw it there afterwards. The bench is on the corner right across, at the southwest corner of Guenther and South Alamo streets. * * * The car that we passed would be between the car I was on and that bench. The car passed on the west track, and we were on the east track, the bench being on the west side of the street, so the south-bound car that we passed would be between me and the bench."

Mrs. Hildebrand, who was also a passenger on the car, testified: "I was a passenger on a car on South Alamo street, coming from the Aransas Pass depot on July 10, 1905, at the time Mr. Paul Levyson was run over by a car on Guenther and South Alamo streets. The first thing that attracted my attention to

the happening of an accident was the sudden jolt of the car. I knew something had happened, and watched the motorman's countenance to see if it was serious, and I heard him say, 'There must be clods of dirt under the track.' This was almost instantly after I felt the jolting, because he stopped the car. Just an instant, or a very short time prior to feeling that jolt, I noticed that the motorman was looking back, but not at that time. It was not long before I felt the jolting that I saw him look back, just a few seconds before. * * * He was making no effort to stop the car at the time he was looking back. The motorman commenced stopping the car as soon as he felt that he was running over somebody or something. I never observed any effort to stop the car before the jolting."

Neither conductor nor motorman in charge of and operating the car was called as a witness by either party, nor testified in the case, and, as the testimony recited is practically all the evidence introduced, the issues of fact, which must control the disposition of the four assignments of error, must largely be determined from deductions drawn from the testimony introduced and the failure of the defendant to introduce witnesses at its command who were evidently familiar with the facts and circumstances which elucidate and make clear such issues of fact. In determining these issues, we shall view the evidence in the light most favorable to the findings of the jury manifested by their verdict.

The two first assignments of error involve one or both of these propositions: (1) That it appears from the undisputed evidence, as a matter of law, that defendant was free from any of the acts of negligence alleged by plaintiffs as their cause of action. (2) That it appears as a matter of law from the evidence that deceased was guilty of negligence which proximately contributed to his death. The third and the last assignment referred to also involve, with a slight modification of it as to the latter, the second proposition.

The question of negligence *vel non* is primarily a question of fact to be determined by the jury, and only becomes one of law to be decided by the court when the facts are undisputed and only one conclusion can be drawn from them. "It is only where it is so clearly established from the undisputed testimony as to admit of no other reasonable hypothesis or conclusion, that either a fact essential to plaintiff's cause of action is not proven, or one which is a complete defense has been shown, that it becomes the duty of the court to instruct a verdict for the defendant." *Southern Pac. Co. v. Winton*, 27 Tex. Civ. App. 503, 86 S. W. 477; *Lee v. I. & G. N. Ry.*, 89 Tex. 583, 36 S. W. 63; *Choate v. S. A. & A. P. Ry.*, 90 Tex. 83, 36 S. W. 247, 37 S. W. 819; *Bonn v. G., H. & S. A. Ry.* (Tex. Civ. App.) 82 S. W. 808; *Johnson v.*

Tex. Cent. Ry. (Tex. Civ. App.) 93 S. W. 433; *Anson v. Gulf, C. & S. F. Ry.* (Tex. Civ. App.) 94 S. W. 94; *Reynolds v. G., H. & S. A. Ry.* (Tex. Civ. App.) 99 S. W. 596; *G., H. & S. A. Ry. v. Patillo* (Tex. Civ. App.) 101 S. W. 498; *Herring v. G., H. & S. A. Ry.* (Tex. Civ. App.) 108 S. W. 977; *St. L. & S. F. Ry. v. Summers* (Tex. Civ. App.) 111 S. W. 213. In view of this well-settled principle of law, we will examine the testimony recited in order to determine whether either of the propositions involved can be established.

1. Is the evidence such that the only conclusion that can be drawn from it by reasonable minds is that none of the acts of negligence charged by plaintiffs as the cause of Levyson's death was proved?

As is seen from our statement of the pleadings, among the acts of negligence averred by plaintiff is that the motorman operating the car failed to exercise ordinary care in keeping a lookout for people upon and at the intersection of the streets where the accident occurred. As to this averment, we think the conclusions can reasonably be deduced from the testimony of the witnesses Hildebrand that the motorman failed to exercise such ordinary care, and, from the facts and circumstances in evidence, that such failure on the part of the motorman was negligence, and that such negligence was the proximate cause of deceased's death, and we so conclude as matters of fact. As this was the only one of the grounds of negligence alleged by plaintiffs submitted by the court to the jury, we need not pursue the question further; but, were we required to go beyond the conclusion announced, we would be strongly inclined to hold that the evidence of other acts of negligence charged is not such as precludes reasonable minds from the conclusion that some of them, at least, were shown.

2. Was the deceased guilty of contributory negligence as a matter of law?

The burden of proving the defense of contributory negligence is upon the defendant, and upon such an issue, if there is from the evidence room for a reasonable difference of opinion, as upon other issues, the judgment of the jury must be taken. *Drake v. S. A. & A. P. Ry.*, 90 Tex. 240, 89 S. W. 407. If it be conceded, as appellant contends, that deceased stepped immediately in front of a moving car, it does not necessarily follow that he was guilty of negligence *per se*. This depends upon the attending facts and circumstances. It has been held even in a case where one stepped on a railway track immediately in front of a string of moving railway cars and was killed by being run over, that the jury were warranted in finding he was not guilty of contributory negligence in view of the facts and circumstances. *G., H. & S. A. Ry. v. Conuteson* (Tex. Civ. App.) 111 S. W. 188. The cases of *Texarkana & Ft. S. Ry. v.*

Frugia (Tex. Civ. App.) 95 S. W. 565, and St. L. & S. F. Ry. v. Summers (Tex. Civ. App.) 111 S. W. 211, are of like import. The law upon a question of this character is much more favorable to one who goes upon a street railway track in front of a moving car than it is to one who steps in front of a steam engine. In the former case the rights and duties of the parties are reciprocal. In the latter the right of the railroad to the use of its track is ex necessitate superior to the individual, and, if he interferes with this right by going on a railway track in front of a moving train, he ordinarily becomes a trespasser and guilty of negligence as a matter of law. A street railway, as its very name imports, is ordinarily constructed and maintained in streets of cities which are intended for and used by the general public, and this use by the public of the streets is not subordinate to the use of a street car company to run its cars along it. In the exercise of the right to run its cars along a public street, the company must regard the rights of the public in its use and operate them with due regard to the right of individuals. Ordinarily, a member of the public will not be guilty of negligence when he is in the legitimate exercise of the use of a public street, even though it be that part upon which a street railway is constructed over which the company propels its cars. As it necessarily takes on and discharges its passengers in the streets over which it runs its cars, it is its duty to especially exercise ordinary care to prevent injuring those who are on the street and crossing its track for the purpose of taking passage.

As is seen from the evidence recited, Levyson left his home after dinner for the purpose of taking passage upon defendant's north-bound car in order to return to his place of business. The car not having reached the junction of South Alamo and Guenther streets, where it generally stopped for the purpose of taking on and discharging passengers, when deceased arrived there, he seated himself by the telephone pole, near the bench where passengers intending to take the car usually awaited its arrival. When he arose from his seat, it may be fairly presumed, from the evidence and circumstances, that he knew, or had reason to believe, from having seen the south-bound car pass that point, that it would be but a short time before the car he desired to take would reach the northeast corner of the street, where it would be expected to stop for the purpose of taking him on as a passenger, and, as he went diagonally across the street towards such corner, that it was for the purpose of boarding the car when it arrived there, and that he reasonably thought he had time to reach that point before the arrival of the north-bound car. He also had the right to presume, and act upon the presumption, that

the car would slow down at the street crossing, and that its operators would see him in the street and give him timely notice of its approach, and that they would not so run the car as to injure him while in the exercise of his right in crossing the street, from the place the company had provided for waiting passengers to the point where it usually stopped the cars to take on those who intended to take passage north. Indeed, in view of the facts that the company had prepared a place at the southwest corner of the street for passengers to wait for its cars, and that it stopped its north-bound cars at the northeast corner, may be taken as an invitation to those waiting at the bench for the cars to go across from the southwest to the northeast corner, and as an obligation on the part of its servants operating the car to keep a lookout for persons who had accepted such invitation, and to regard the act of the crossing from one corner to the other as a signal to stop the car in order that they might take passage thereon. Evidently, the deceased was acting on these assumptions, and thrown off his guard, when he stepped upon the railway track and was knocked down and run over by the car; and for this reason, as well as the car's coming up from behind him, he was unaware of its proximity when he stepped in front of it, for, in the absence of evidence to the contrary, it must be presumed that the deceased, when he started across the street, had reason to believe that he could reach its northeast corner before the arrival of the car, and, when he stepped upon the track, that he had time to cross it in safety. It must be presumed that he did not knowingly place himself in the position where death was inevitable, and that he exercised ordinary care and prudence to insure his safety. As is said by the Supreme Court of the United States in *Railway v. Landrigan*, 191 U. S. 462, 24 Sup. Ct. 140, 48 L. Ed. 262: "We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death." See, also, *Railway v. Frugia* (Tex. Civ. App.) 95 S. W. 566; *San Antonio Traction Co. v. Upson*, 31 Tex. Civ. App. 50, 71 S. W. 565; *San Antonio Traction Co. v. Kumpf* (Tex. Civ. App.) 99 S. W. 863; *San Antonio St. Ry. v. Renken* (Tex. Civ. App.) 38 S. W. 829; *Dallas St. Ry. Co. v. Illo*, 32 Tex. Civ. App. 290, 73 S. W. 1076; *San Antonio Traction Co. v. Haines* (Tex. Civ. App.) 100 S. W. 788; *Copeland v. Met. St. Ry.* (Sup.) 73 N. Y. Supp. 856; *Id.*, 79 N. Y. Supp. 1054.

We therefore conclude that deceased was not guilty of contributory negligence as a matter of law; but that the question was one for the jury to determine, and the evidence warranted their conclusion that he was not guilty of such negligence. From

this it follows that the verdict upon this issue is not manifestly against the preponderance of the evidence.

Conclusions of Law.

1. Our conclusions of fact, as is seen from them, dispose of appellant's first, second, third, and fifth assignments of error.

2. The fourth assignment of error complains of the second paragraph of the court's charge, which is as follows: "If you find from the evidence that on the 10th day of July, 1905, the deceased, Paul Levyson, was run over and killed by one of defendant's cars at or near the intersection of Guenther and South Alamo streets, and you further find that the motorman operating said car failed to keep a lookout for said deceased on or along said defendant's track at said time and place, and that such failure, if any, was negligence, and that such negligence, if any, was the direct cause of deceased's death, and you further find that said Paul Levyson was not guilty of any negligence that either caused or contributed to his death, and you further find that said plaintiffs have sustained pecuniary damage in the death of the deceased, Paul Levyson, then you will find your verdict for said plaintiffs." To this part of the charge it is objected: (1) That the law does not impose upon the operators of a street car the duty of keeping a lookout for any particular person, but merely imposes the duty to exercise ordinary care to keep a lookout for persons that may come or be upon its track; (2) That there was no evidence that the deceased was walking along the track, and the charge was misleading in submitting that issue. If, as is conceded by appellant in its first proposition under this assignment, the law imposes upon the operator of a street car the duty to exercise ordinary care to keep a lookout for persons on the track, it follows that it was the motorman's duty, upon the occasion under consideration to exercise such care to keep a lookout for any person on the track which would include the deceased. The charge does not bear the construction contended for by the second objection.

3. Our conclusions of fact dispose of the sixth assignment of error adversely to appellant.

There is no error in the judgment, and it is affirmed.

SAN ANTONIO LIGHT PUB. CO. v. LEWY.†
(Court of Civil Appeals of Texas. Oct. 20, 1908.
Rehearing Denied Nov. 18, 1908.)

1. PLEADING (§ 67*)—PETITION—ANTICIPATING DEFENSES.

It is not necessary for plaintiff to anticipate and avoid in his petition defenses to his action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 139; Dec. Dig. § 67.*]

2. LIBEL AND SLANDER (§ 83*)—PLEADING—PETITION—MALICE—NECESSITY OF ALLEGATION.

Though malice may be inferred from other matters pleaded, the rules of pleading require a special allegation of malice in actions of libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 198; Dec. Dig. § 83.*]

3. LIBEL AND SLANDER (§ 89*)—PLEADING—PETITION—SPECIAL DAMAGE—NECESSITY OF ALLEGING.

Damages which are necessarily pecuniary follow a libelous publication as a matter of law, and, if a publication in a newspaper tends to injure plaintiff's reputation and expose her to public hatred, contempt, or ridicule or impeach her honesty, it is unnecessary to allege in the petition financial injury therefrom.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 213; Dec. Dig. § 89.*]

4. LIBEL AND SLANDER (§ 89*)—PLEADING—PETITION—DAMAGE—INJURY TO REPUTATION.

In libel for publishing a newspaper article charging that plaintiff imported goods without paying custom duties thereon, it was unnecessary to allege that the publication tended to expose plaintiff to public hatred, etc., and to cause her to be suspected of smuggling, etc.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 213; Dec. Dig. § 89.*]

5. LIBEL AND SLANDER (§ 86*)—PLEADING—INNUENDOES—PROPRIETY.

A defendant in libel is not prejudiced by innuendoes contained in the petition, since he can either deny using the words or using them with the meaning alleged, or he may admit the one and deny the other, or may admit and prove the truth of either, and plaintiff may prove his innuendo, or, on failure to do so, may seek to establish liability from the words themselves, when the innuendo may be rejected as surplusage.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 208; Dec. Dig. § 86.*]

6. LIBEL AND SLANDER (§ 89*)—PLEADING—PETITION—ALLEGATIONS OF SUFFERING—NECESSITY.

In libel for charging plaintiff with smuggling, it was unnecessary to aver the nature, character, or extent of the mental suffering caused by the publication, or even the suffering therefrom, it being sufficient to aver the damages sustained thereby.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 213; Dec. Dig. § 89.*]

7. PLEADING (§ 8*)—PETITION—INTENT—CONCLUSIONS.

In libel, allegations that defendant published the libelous article recklessly and willfully, without proper investigation of its truth, were not objectionable as stating a conclusion of the pleader, since to have stated the facts showing the intent in making the publication would have been to plead the evidence of such willfulness.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 8.*]

8. PLEADING (§ 11*)—ALLEGATIONS—EVIDENCE—PROPRIETY.

The evidence upon which a party relies to prove his allegations should not be pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.*]

9. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO CASE.

In defining libel, the definition should be limited to the character of the libel shown by the evidence, and, in libel for injury to the reputation, it was error to include financial in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

jury as one of the results of the publication; such injury not being alleged or proved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 610; Dec. Dig. § 252.*]

10. TRIAL (§ 296*)—INSTRUCTIONS—CURE.

The error of including financial injury as one of the results of the publication, in an instruction defining libel in an action for injury to the reputation alone, was harmless, where the court only submitted such matters contained in its definition of libel as were pleaded and proved, and instructed that in estimating plaintiff's damages they should not consider any financial injury suffered by her.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 706, 715; Dec. Dig. § 296.*]

11. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMPTION OF FACT.

Where the undisputed evidence showed that the alleged libelous article was published by defendant as alleged, and its publication was not denied, the court could assume in its charge that defendant published the article.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 432; Dec. Dig. § 192.*]

12. LIBEL AND SLANDER (§ 100*)—ACTIONS—ANSWER—TRUTH—NECESSITY OF ALLEGATION.

The truth of the publication in libel must be pleaded by defendant to be available; Act 1901, p. 30, c. 26, making the truth of the statement a defense to libel, not having affected the rule requiring such defense to be specially pleaded.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 249½; Dec. Dig. § 100.*]

13. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Defendant, not having put in issue the truth of the alleged libelous matter, cannot complain that the court did not instruct upon the truth of the publication as a defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 587; Dec. Dig. § 251.*]

14. LIBEL AND SLANDER (§ 54*)—ACTIONS—DEFENSES—TRUTH.

The truth of the defamatory matter is a complete defense in libel.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 152; Dec. Dig. § 54.*]

15. LIBEL AND SLANDER (§ 124*)—ACTIONS—INSTRUCTIONS—INJURY FROM DEFAMATION—"GOOD NAME."

A charge in libel that if the article published was calculated to impeach plaintiff's good name, etc., used the word "good name" as equivalent to reputation, in which sense the words have always been used.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

16. LIBEL AND SLANDER (§ 124*)—ACTIONS—INSTRUCTIONS—DAMAGES—RECOVERY FOR FINANCIAL LOSS.

In libel an instruction to award plaintiff, upon finding for her, such compensatory damages as would ordinarily and probably result from the publication, and in estimating her damages to consider her mental suffering, if any, caused by the publication, did not authorize a recovery for financial loss.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

17. LIBEL AND SLANDER (§ 119*)—ACTIONS—DAMAGES—MENTAL SUFFERING.

In libel for charging plaintiff with smuggling, upon a finding for plaintiff, she should be awarded such compensatory damages as would ordinarily and probably result from the publication, and, in estimating the damages, the jury

might consider any mental suffering caused by the publication.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 119.*]

18. LIBEL AND SLANDER (§ 120*)—ACTIONS—DAMAGES—EXEMPLARY DAMAGES.

In such case exemplary damages are not recoverable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 350, 351; Dec. Dig. § 120.*]

19. LIBEL AND SLANDER (§ 48*)—PRIVILEGED COMMUNICATION—MATTERS OF PUBLIC INTEREST.

Acts 1901, p. 30, c. 26, § 3, subd. 4, making privileged a reasonable and fair criticism of official acts of public officials and all other matters of public concern, relates solely to criticism of official acts and matters of public concern, and the existence of probable cause for making the comment is immaterial, as the criticism is not privileged if libelous, unless it is shown to be fair and reasonable.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 144, 145; Dec. Dig. § 48.*]

20. LIBEL AND SLANDER (§ 124*)—ACTIONS—INSTRUCTION—PROBABLE CAUSE.

In libel for charging plaintiff with smuggling, the publication commenting upon the acts of the officers in discovering the goods as well as upon plaintiff's conduct, an instruction that if any of the statements were libelous, but were made by defendant upon probable cause and for general information, the finding should be for defendant, was properly refused, since it would permit a finding for defendant even though there was probable cause for the comments upon the officers.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

21. EVIDENCE (§ 34*)—JUDICIAL NOTICE—LAWS OF THE UNITED STATES.

The state courts take judicial notice of the laws of the United States.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 49, 50; Dec. Dig. § 34.*]

22. TRIAL (§ 33*)—RECEPTION OF EVIDENCE—SCOPE OF PROOF.

Since state courts take judicial notice of the laws of the United States, the testimony of federal officers, such as revenue agents, is not admissible to prove such laws.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 33.*]

23. LIBEL AND SLANDER (§ 103*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In libel for charging plaintiff with smuggling, testimony by a revenue officer as to the authority of custom agents to enter one's house and seize property without warrant, upon probable cause for suspecting that the goods were smuggled, was irrelevant even if such officer had the authority stated.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 103.*]

24. LIBEL AND SLANDER (§ 48*)—PRIVILEGED COMMUNICATIONS—COMMENT ON PUBLIC OFFICERS.

Where an alleged libelous article did not comment on the acts of custom officers in seizing smuggled property, but charged that plaintiff was guilty of smuggling, and possibly of bribing the custom officers, the publication was not privileged as to plaintiff on the ground that it was a fair comment on official acts.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 144, 145; Dec. Dig. § 48.*]

25. LIBEL AND SLANDER (§ 51*)—PRIVILEGED COMMUNICATIONS—EXISTENCE OF MALICE.

Actual malice on the part of a publisher of a libelous article prevents it from being privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 51.*]

26. LIBEL AND SLANDER (§ 48*)—PRIVILEGED COMMUNICATIONS—MATTERS OF PUBLIC CONCERN—COMMENT.

Though official proceedings are matters of public concern, unless newspaper comments thereon are fair and impartial they are not privileged, and, if such comments are untrue, the fact that such proceedings were matters of public concern would not render the comments privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 144, 145; Dec. Dig. § 48.*]

27. LIBEL AND SLANDER (§ 56*)—JUSTIFICATION AND MITIGATION—PROBABLE CAUSE.

Though the existence of probable cause for believing matters contained in a libelous article to be true may mitigate the damage, it will not justify the publication.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 153; Dec. Dig. § 56.*]

28. TRIAL (§ 251*)—ACTIONS—INSTRUCTIONS—APPLICABILITY TO ISSUES.

In libel for charging plaintiff with smuggling, the truth of the alleged libelous charge not having been pleaded, a charge submitting whether plaintiff was guilty of the offense of smuggling was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 587; Dec. Dig. § 251.*]

29. TRIAL (§ 261*)—INSTRUCTIONS—REQUESTS.

In libel for charging plaintiff with smuggling, an instruction submitting the question whether plaintiff was guilty of smuggling was properly refused where it omitted an essential element of the offense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 660, 671, 675; Dec. Dig. § 261.*]

30. CUSTOMS DUTIES (§ 125*)—VIOLATION OF CUSTOM LAWS—"SMUGGLING"—ELEMENTS OF OFFENSE.

To constitute the offense of smuggling, there must be a secret introduction of dutiable goods with intent to defraud the government.

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 125.*]

For other definitions, see Words and Phrases, vol. 7, p. 6535.]

31. LIBEL AND SLANDER (§ 124*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In libel, where the trial court did not submit an instruction as to the effect of the existence of probable cause for the publication of the libelous article, an instruction that, in determining the existence of probable cause as to any issue in which the existence of probable cause was submitted, the jury could inquire whether plaintiff was guilty of the offense charged in the article, was properly refused, there being nothing to which it could apply.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 124.*]

32. APPEAL AND ERROR (§ 882*)—RIGHT TO REVIEW—ESTOPPEL TO ALLEGE ERROR—INVITED ERROR.

A party may not commit error prejudicial to himself and obtain a reversal because the trial court refused a charge to correct such error; and hence in libel, for charging the offense of smuggling, where defendant introduced in evidence the judgment of the federal court in proceedings to forfeit the goods, he cannot

complain of a refusal to instruct that such judgment should have no influence on the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8602; Dec. Dig. § 882.*]

33. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

In libel, where trial court charged the issue of privilege in the language of the statute, which clearly defines and enumerates the matter made privileged thereby, a charge that defendant was not required to prove its defense of privilege literally, but only substantially, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

34. LIBEL AND SLANDER (§ 7*)—WORDS ACTIONABLE—WORDS IMPUTING CRIME—SMUGGLING.

An article which in effect charged plaintiff with smuggling goods into the country without paying the custom duties thereon was libelous, there being nothing in the article limiting or qualifying its meaning.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 67; Dec. Dig. § 7.*]

35. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

A requested charge, given in substance in the main charge, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

36. LIBEL AND SLANDER (§ 106*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

In libel, where the undisputed evidence showed that defendant published the article in its paper, a copy of the paper containing the alleged libelous article was properly admitted.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 298; Dec. Dig. § 106.*]

37. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS—CONVERSATIONS WITH OTHERS.

A question which sought to elicit the witness' conclusion from a conversation had with plaintiff was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2153; Dec. Dig. § 471.*]

38. LIBEL AND SLANDER (§ 103*)—EVIDENCE—ADMISSIBILITY—RELEVANCY.

In libel for charging that plaintiff imported goods without paying the custom duties thereon, even if the report of the government officers who investigated the case was an official proceeding so as to justify comment thereon, the report not being commented on in the alleged libelous article, it was irrelevant and inadmissible.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 103.*]

39. EVIDENCE (§ 318*)—HEARSAY—ADMISSIBILITY.

In libel for charging plaintiff with smuggling, the report of the government officer who investigated the case was inadmissible as evidence of the facts stated therein, being hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1196; Dec. Dig. § 318.*]

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

Action by Dora C. Lewy against the San Antonio Light Publishing Company. From a judgment for plaintiff, defendant appealed. Affirmed.

Nat B. Jones and Marcus W. Davis, for appellant. John Sehorn and R. U. Culberson, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

NEILL, J. This suit was brought by the appellee against appellant to recover damages alleged to have accrued to her from the publication in a newspaper of the libelous article concerning plaintiff, hereinafter copied in our conclusions of fact. Plaintiff's petition copies the alleged libelous publication, and avers in the usual form all the essential facts necessary to constitute a cause of action for the publication in a newspaper of a libel against the defendant. The appellant answered by general and special exceptions to plaintiff's petition, a general denial, and specially pleaded that the alleged libelous article, if published, was in good faith and in the honest belief that it was a true, fair, and impartial account of the official proceedings of the United States, through its officers of law, in an attempt to collect lawful duty and revenue upon the goods imported and brought into this country by the appellee, which proceedings were authorized by law and had under color and by virtue of their official position; that there were just and reasonable grounds and probable cause for believing that the alleged article was a fair, true, and impartial account of said official proceedings, and that the publication was made only after due and sufficient inquiry as to the matters mentioned in the article and of the acts of the officers engaged in an investigation and prosecution concerning the importation of the goods therein mentioned; and that the article and matters complained of were reasonable and fair comments upon a matter of public concern, and were published by it for general information. The trial of the case resulted in a verdict and judgment in favor of plaintiff for \$2,500.

Conclusions of Fact.

The undisputed evidence shows that the defendant, on the 11th day of February, 1906, was engaged in the publication of a newspaper in the city of San Antonio, Tex., called the San Antonio Sunday Light, and that on said day the defendant maliciously published and distributed in the city of San Antonio, Tex., an issue of said newspaper containing the following libelous article of and concerning the plaintiff:

"Smuggled Goods are Seized by the Customs Officers.

Nearly Two Thousand Dollars Worth of Bric-a-brac Confiscated.

"Goods Came from Europe.

"Seized Merchandise Said to have been Smuggled Through Port of Galveston and an Investigation will be Made.

"Several Official Heads may Fall.

"What has proved the largest seizure of smuggled goods that has occurred in San Antonio in fifteen years, involving the identity of one of the best known ladies of this

city, came to light yesterday when Customs Inspector C. M. Ferguson disclosed \$1,870 worth of miscellaneous bric-a-brac, in his office, confiscated from Mrs. Dora C. Lewy, widow of the late Augustus Lewy. It is claimed that the seized merchandise was smuggled through the port of Galveston, either with or without the knowledge of the Galveston authorities. As a result of the disclosure the Galveston customs service is greatly agitated, and several official heads will probably fall.

"Hand painted china and glassware, \$1,392; oriental and Turkish rugs, \$342; hand-made laces, \$200; making a grand total of \$1,870 worth of European and Eastern bric-a-brac, comprise the list of goods now in the possession of the United States custom house authorities at this port. These articles were seized by the officers nearly seven days ago, since which time they have been traced from practically their purchasing point to the places where they were at last discovered.

"This seizure is the largest haul of smuggled goods that has been made in San Antonio in fifteen years. The last great haul was that of smuggled opals that were seized here, after they had passed the customs inspectors at the port of Brownsville on the Rio Grande. It was cleverly worked up by the officers, and its history involves quite a bit of detail.

"Several years ago Customs Inspector C. M. Ferguson suspected that smuggled goods of the nature just seized were brought into this city and sold to local merchants and private purchasers. While he had his suspicions, no tangible evidence was discovered and nothing definite was done. He determined to keep a watch, however, believing that if his suspicions were well founded his watchfulness would bear fruit in due season.

"Advertisement Read.

"Early in January of the current year Mr. Ferguson read an advertisement in a local paper saying that fine hand-painted China was for sale by a certain party in the city, who also had established a studio where reproductions of the work would be taught. Believing he knew who the lady was who had thus inserted the advertisement, and not wishing to excite undue suspicion, Mr. Ferguson called in the assistance of Special Treasury Agent H. C. Smith, to help in the work of finding out whether the advertised goods were smuggled or not.

"In a Commerce Street jewelry store window the officers observed some of the china-ware displayed for sale, to which was attached a card that more of the same character of goods might be seen in a certain studio in the Riverside Building. To the Riverside Building the officers wended their way, and into the studio Mr. Smith ushered himself.

"Did he wish to see the goods?" inquired the lady in charge, very politely.

"To be sure, madam, my wife is quite an artist herself, and this afternoon I shall bring her here to see if she would not like to make a few purchases."

"It happened that Special Agent Smith had his wife with him while in the city, and, by pre-arrangement, she accompanied her husband to the studio the following day to make a thorough examination of the imported merchandise. Representing themselves as tourists from the north, the pair presented themselves at the studio.

"This display is perfectly exquisite," exclaimed Mrs. Smith to the owner of the property. "You have these plates marked at from \$25 to \$35 apiece. They are well worth that amount. If I had them back home I could easily get from \$75 to \$100 apiece for them. Those rugs which you price to me at \$150 I could sell for \$300 in my native city."

"Suppose we buy the entire lot, take them back home and sell them again," interposed Mr. Smith to his wife.

"How perfectly lovely!" cried Mrs. Smith enraptured.

"Investigation Commenced.

"A price for the entire lot was accordingly fixed, and arrangements were perfected whereby the husband was to return on the morrow to make a payment and take his purchase. This delay was merely a play for time, in order that every step about to be taken might be certain, sure and legal. Mr. Smith was in daily consultation with Mr. Ferguson during the procedure, in addition to which other government authorities were at work along other lines. Telephonic communication was had with Galveston, Baltimore, Washington City, Chicago, and several European points. It was discovered, in the course of the investigation, that Mrs. Dora C. Lewy, widow of Augustus Lewy, prominently known in San Antonio, left the port of Galveston on the steamer Frankfort on the afternoon of June 8, 1905. When she left Galveston, it was ascertained, she had three pieces of baggage; when she returned she carried eight pieces.

"It was further learned that Mrs. Lewy had three daughters who had either finished, or were completing, their art education in Germany, and that it had been her custom for several years to make trips to that country. Mr. Ferguson further learned that Mrs. Lewy had been accustomed to bringing back with her from these European journeys much valuable bric-a-brac of the European and oriental type.

"Two and two were put together, and, apparently, the result was four.

"Astonishing Revelation.

"Well, I am here to get the goods," announced Mr. Smith on the appointed day, to the lady owner of the bric-a-brac; "but before I hand you the money I would like to

have the customs house receipts for them. A mere matter of business, you know."

"Why, the receipts are unnecessary," replied the lady. "Just take the goods along with you, and the receipts will be all right."

"But the receipts; I must have the receipts. I could never think of taking this stuff back north unless I had the proper customs house papers," declared the prospective purchaser.

"Well, to tell you the truth, I have no receipts. The customs inspectors passed the articles through the port of Galveston free of duty."

"Then, madam, I must seize these goods and convey them to the office of the local customs officer, Mr. C. M. Ferguson. I am a special agent of the government, and there are men below with a dray ready to come after them."

"Oh, my goodness!" exclaimed the lady. "What have I done?"

"Nothing, madam, except these goods must be confiscated by the government, and an explanation made how they were brought through the Galveston customs house without any tribute being levied against them," replied Mr. Smith very deliberately.

"Goods Seized.

"Forthwith the outfit was carted to the Federal Building where an appraisement was made as to their value. There the goods will stay until further disposition of them is made by the Federal authorities. By her own confession, Mrs. Lewy, for it was not other than she who brought them with her across the water, has surrendered her ownership of the rugs, laces and china to the United States government.

"Our duty as customs officers cease when we have seized goods and made out our case," said Customs Inspector Ferguson last night. "Mrs. Lewy has acted perfectly fair about this matter through the entire investigation has helped us recover the goods she had already sold, and I have no mind to make further prosecution. If criminal action is taken against the lady it will have to be taken by the United States District Attorney, and the Treasurer at Washington City. I have performed my duty in apprehending smuggled merchandise, have seized the goods, and proved that the goods thus seized were smuggled. That completes my action in the premises."

"Responsibility Fixed.

"An investigation is now being made concerning the identity of the particular inspector who made the final examination of the merchandise at the time Mrs. Lewy entered Texas through the port of Galveston. The idea of bribery is indignantly spurned by the principals involved, and it is presumed that the investigation will result in the discharge of the inspector who 'grossly neglected' his duty in not making a closer and more

thorough examination of the imported bric-a-brac.

"The Galveston customs service is greatly agitated over the disclosure and it is not unlikely that several heads will fall by reason of the vigilance and merciless activity manifested by the San Antonio customs inspector."

Copies of said paper, containing said libelous publication, were sold, distributed, and put in the hands of a number of citizens of the city of San Antonio, and the libelous article therein published was read by them.

The evidence is reasonably sufficient to show that the article so published by the defendant, taken as a whole, tended to impeach the honesty, integrity, and good name of the plaintiff, and that the same, or at least part thereof, constituted a libel as against the plaintiff, it not being a fair, true, and impartial account of any official proceedings authorized by law in the administration of the law, nor a reasonable and fair comment or criticism of the official acts of public officials, or of other matters of public concern published for general information. That by reason of defendant's publishing and distributing said libelous article the plaintiff was damaged in the amount found by the jury.

Conclusions of Law.

1. The plaintiff's petition was not obnoxious to the general demurrer. It alleges the essential ingredients of a libel as defined by statute, and embraces word for word the newspaper report alleged to be libelous. It is not necessary for the pleader to anticipate and avoid that which, if pleaded and proved, would defeat the plaintiff's action. *Townes on Pleading*, 272.

2. That portion of the petition assailed by defendant's special exception, referred to in the second assignment of error, is such as has been used for ages to charge malice in declarations of slander and libel, and has always been taken as an allegation of fact rather than as a conclusion of the pleader. Though the fact of malice may be inferred or deduced from other matters pleaded, the rules of good pleading require a specific allegation, in appropriate language, of such fact; and that employed in the petition is so generally used in alleging malice in actions of this character that it may be regarded as stereotyped.

3. What is said in disposing of the second assignment, likewise disposes of the first proposition under the third, which simply repeats the objection to the same part of the petition. In regard to the second proposition, it is enough to say that it was not essential to aver that the alleged libelous publication exposed, or tended to expose, the plaintiff to financial injury. Damages, which are necessarily pecuniary, follow, as a matter of law, unprivileged libelous utterances.

If the publication tended to injure plaintiff's reputation and thereby expose her to public hatred, contempt, or ridicule, or to impeach her honesty, integrity, or reputation, unless it was privileged, as alleged in the petition, it was no more necessary to aver that it tended to her financial injury than to allege that it tended to impeach her virtue. For it is not necessary to aver all the injurious or pernicious tendencies enumerated in the statute of a publication in order to state a cause of action. A newspaper report which has any of such injurious or pernicious tendencies is actionable.

4. Nor was it essential for the plaintiff to charge in her petition "that said publication tended to expose her to, or that it did expose her to, public hatred, contempt, and disgrace among her neighbors and all good citizens of this state, and cause it to be suspected and believed by those neighbors and citizens that she had been guilty of the crime of smuggling and bribery of the customs officers of the United States," as is contended by appellant in the fourth assignment of error. This is too obvious to admit of discussion.

5. This assignment of error complains of the court's overruling defendant's special exception to a certain innuendo following the third paragraph of plaintiff's petition. In disposing of this assignment we deem it only necessary to make this quotation: "The defendant is in no way embarrassed by the presence of the innuendo in the statement of the claim; in fact, it is to him an advantage. He can either deny that he spoke the words, or he can admit that he spoke them, but deny that they conveyed that meaning. He can also plead that the words were true, either with or without the alleged meaning. It will then be for the jury to say from the proofs whether the plaintiff's innuendo is sustained. If not, the plaintiff may fall back upon the words themselves, and urge that, taken in their natural and obvious signification, they are actionable in themselves without the alleged meaning, and that therefore his unproved innuendo may be rejected as surplusage." *Newell on Slander & Libel*, p. 628, § 38. See, also, *Odgers on Libel & Slander*, 101; *Townshend on Slander & Libel*, § 336.

6. The principle of law quoted in disposing of the fifth assignment is alike applicable to the sixth, and demonstrates the correctness of the court's ruling upon the exception to plaintiff's petition which is complained of.

7. It was not necessary to aver the nature, character, nor extent of the mental suffering caused her by the publication of the libelous article. It would baffle the powers of the most skilled anatomist to describe or measure one's mental suffering. He may "minister to a mind diseased," but an accurate description or measurement of mental suffering is "past all surgery." Indeed, it was not at all necessary for the plaintiff to allege that she suffered any agony on account of

the libelous publication. It was enough for her to aver the damages she sustained by reason thereof, for upon the mere proof of the libel the jury could give such substantial damages as would compensate her for the defamation.

8. The allegation, "The defendant published and caused to be published of and concerning plaintiff the aforesaid libelous article recklessly and willfully, without having made any proper and sufficient investigation of the truth of the charges contained," is not obnoxious to the objection urged by exception to the petition that it "states the mere opinion and conclusion of the pleader, and does not charge or aver any facts showing that the article was recklessly and willfully made and published." To have stated the facts showing the animus of the defendant in making the publication would have been to allege the evidence by which the fact, that the defendant published the article recklessly and willfully, could be proved. The rules of pleading do not require, but condemn, pleading the evidence which a party relies upon to prove his allegations.

9. The court in its charge defined a libel as follows: "A libel is a defamation expressed in printing, tending to injure the reputation of one who is alive and thereby expose him to public hatred, contempt, or ridicule, or financial injury, or to impeach the honesty, integrity, or reputation of any one." The objection assigned to it is that it "was calculated to, and did, lead the jury to believe that plaintiff had suffered financial injury, when * * * no such issue was before the jury, in that there was no sufficient pleading and proof to establish such an issue." The proposition advanced is: "The court, in defining libel, should have limited the definition to the character of the libel made by the case on trial, and not include therein an element of damage, positively excluded by the special charge of appellant, given by the court." Abstractly speaking, it was improper to include in the definition of libel a matter neither alleged nor proved; and, if such inclusion could have prejudiced the defendant, it might afford reasonable ground of complaint. But, as the third paragraph of the court's charge only submitted to the finding of the jury such matters contained in its definition of libel as were pleaded and proved, and the court having, at appellant's request, instructed the jury that "in estimating plaintiff's damages, if any, they should not consider any financial injury suffered by her," we cannot perceive how it was possible for the defendant to have been prejudiced by the definition of libel contained in the charge. For it is clear that, if the jury regarded the evidence and special charge referred to, financial injury to plaintiff did not enter into the verdict, and was necessarily excluded therefrom.

10. The subject of this assignment is the second paragraph of the charge, which is as

follows: "If you find from a preponderance of the evidence that the article complained of by plaintiff in her petition and set forth therein, and as published by the defendant, is libelous, as above defined; or if you believe from the evidence that certain parts of said article are susceptible of the meaning or innuendoes placed thereon by the plaintiff and as set out in her petition, and that such innuendoes are legitimate inferences from the words composing such parts of said article, and that such parts of said article with the innuendoes set out by the plaintiff in her petition are libelous; and if you believe from the evidence that the plaintiff is the person referred to in said article, or in the innuendoes placed thereon to certain parts of said article by plaintiff—then you are instructed to return a verdict for the plaintiff, unless you find for the defendant under instructions hereafter given you." The objections urged are: (1) That it assumes the alleged libelous article was published by the defendant, is upon the weight of the evidence, and gives undue prominence to claim of plaintiff that the article is libelous. (2) That in again referring to the definition of libel, before given in the charge, it induced the jury to believe the plaintiff was entitled to recover for financial injury, though the court had directed the jury that such an issue was not before them. In answer to the first objection it is sufficient to say that the undisputed testimony shows the alleged libelous article was published, as alleged by plaintiff, in the San Antonio Sunday Light on February 11, 1906, and that the San Antonio Light Publishing Company owned and published said paper at that time. This evidence being undisputed, the court had the right to assume as a fact that the article was published by the defendant, the evidence raising no issue as to such fact. What we have said in disposing of the ninth assignment of error is applicable to the second objection, and requires that it be overruled.

11. This assignment complains of the third paragraph of the charge, which is as follows:

"If you believe from the evidence that the article published in the defendant's newspaper of date February 11, 1906, was calculated to expose the plaintiff to public hatred, contempt, or ridicule, or to impeach the honesty, integrity, and good name of the plaintiff, then you will return a verdict for the plaintiff, regardless of whether you believe said article was true or false. But the defense of privilege, when made out, is a perfect defense to an action for libel; so that if in this case you believe that the government, through its officers, was engaged in an official proceeding for the purpose of forfeiting the goods brought into this country by the plaintiff for nonpayment of duty, and the defendant, through its servants, was informed of such proceeding and published the article complained of, and that the said article is a true, fair, and impartial account of

such official proceeding, then you will find for the defendant."

The objection that it unduly emphasizes an issue, and is upon the weight of the evidence, was considered and disposed of in passing upon the two last preceding assignments.

The other, covered by the proposition—"The truthfulness of a publication is a perfect defense to a libel suit"—has no application to the case, as it is presented by the record. While the truth of the matter published is, and has always been, a complete defense to an action of libel, yet it must be pleaded by the defendant in order for it to be available. *Cranfill v. Hayden*, 97 Tex. 565, 80 S. W. 609; *Townshend on Slander*, §§ 211, 354, 409; *Newell on Slander & Libel*, 658. The act of March 26, 1901, p. 30, c. 26, which declares that "the truth of the statement in such publication shall be a defense of such an action," is simply an enunciation of the common law as it theretofore existed, and does not abrogate or affect the rule requiring such defense to be specially pleaded in order that it may be proved. Therefore the defendant, not having pleaded the truth of the matters contained in the publication, cannot complain of the charge by reason of its omission of such an issue.

The phrase, "Good name," as used in the charge, can mean nothing else than reputation, and has always been so regarded, which is illustrated by this quotation: "Good name in man or woman * * * is the immediate jewel of their souls. * * * He that filches from me my 'good name' robs me of that which not enriches him, and makes me poor indeed."

12. The twelfth assignment of error assails the fourth paragraph of the charge which is as follows: "If you find for the plaintiff, then you should award her such compensatory damages as would ordinarily and probably result from the article as published, and in estimating her damages, if any, you may consider plaintiff's mental suffering, if any, caused by the publication of said article, but you cannot allow her any exemplary damages." This part of the charge did not of itself, nor when taken with the entire charge (including the special instruction given at defendant's request), authorize a recovery for financial loss. On the measure of damages, it is in perfect harmony with other decisions of the courts in similar cases. *Belo & Co. v. Fuller*, 84 Tex. 453, 19 S. W. 616, 31 Am. St. Rep. 75; *Forke v. Homann*, 14 Tex. Civ. App. 670, 39 S. W. 210; *Rosenbaum v. Roche* (Tex. Civ. App.) 101 S. W. 1164. The act of 1901 does not undertake to state the elements of damages in a civil action for a libelous publication in a newspaper, but leaves the measure of damages, save as to certain matters which it provides may be pleaded and proved in mitigation, as it was before the enactment.

13. This assignment complains of the court's

refusing this special charge: "If in the article complained of as libelous you find any comments or statements of matters of public concern that are libelous, yet if they were made by defendant upon probable cause, and the defendant published the same for general information, then as to such matters you will find for the defendant"—requested by defendant. This charge was evidently asked in view of subdivision 4, § 3, p. 30, c. 26, of the act of 1901, which privileges "a reasonable and fair criticism of official acts of public officials and of other matters of public concern published for general information." This relates solely to comment or criticism of official acts and matters of public concern. "Probable cause" for making the comment or criticism is not even a factor to be considered in determining whether it is privileged or not. If comment or criticism of such acts and matters is made and published, and it is libelous, the privilege of immunity from the consequences of the publication is not extended by the statute, unless it be shown such comment and criticism is reasonable and fair.

Besides, if it should be conceded that the construction of the statute, as contended for by appellant's counsel, is correct, the charge was properly refused. For it will be noticed from the article that the comment or criticism is not confined to plaintiff, but extends to the customs officers of the government at Galveston. If, then, there were probable cause for the comment or criticism of such officers, although there should be none for the plaintiff, the jury under the requested charge would be required to find for the defendant.

14. The proposition by appellant, under this assignment, that, under the laws of the United States, their agent in the customs service is authorized to enter one's house, search for and seize property without a warrant, if he have reasonable cause to suspect it has been imported contrary to law, is astonishing to any one who has any knowledge of the Constitution, laws, history, and genius of our government. Article 4, Amend. Const. U. S.; section 3066, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2008); *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. Almost as startling is appellant's effort to prove the laws of the United States by the testimony of the officer who made the unwarranted search and seizure. The courts of the several states take judicial knowledge of the laws of the federal government, and no principle of evidence permits them to substitute the testimony of any of its officers, even though he be a revenue agent, for such knowledge.

But if it were possible to conceive that the law regarding the authority of an officer in the custom's service is as contended for in the assignment, we would be unable to perceive its applicability. The comment and criticism is not upon the revenue officer or his acts. He is made the hero of the story.

The public is led to believe from the article that his acts are praiseworthy and in accordance with law, and that he is a "marvelous proper man." It is the widow to whom the chivalric reporter, by his comment and criticism, pays the humble tribute of his respects, in the display of his knowledge of the "value of addition, division," if not of "silence" (which he foregoes in order to avail his paper of the "scoop" he has made on the other newspapers of the city), for the purpose of demonstrating that she has been guilty of smuggling, and, perhaps, of bribing the government's customs officers at the port of Galveston; which is not "a reasonable or fair criticism of official acts of public officials."

15. The special charge, the refusal of which is the subject of this assignment, omits the issue of actual malice, made by the pleadings and evidence, and authorizes a finding for defendant upon the finding of certain facts, without regard to whether the publication was made by it with actual malice. Proof of actual malice on the part of the publisher of a libelous article prevents the publication from being privileged. The law does not permit a publisher to glut his malice against a citizen by publishing matter which, in the absence of actual malice, would be privileged. Besides, as shown in considering a prior assignment, the comments published are not upon "official proceedings," but upon the supposed acts of a private citizen.

16. This assignment complains of the refusal of the following charge: "If, in construing the article complained of as libelous, you find comments upon said official proceedings, if any, which were not fair, true, and impartial statements of said proceedings, you may find such matter or matters of comment privileged, provided they were reasonable and fair comments upon matters of public concern and published by the defendant for general information, and in this event you will find for the defendant upon any such comments." This charge would make comments on official proceedings, which are neither true, fair, nor impartial, privileged, provided they are upon matters of public concern and published for general information. We are not able to perceive how comments upon official proceedings, which are untrue and unfair, can become reasonable and fair by reason of the official proceedings being matters of public concern. Official proceedings, though they may relate to matters of public concern, must be viewed as official proceedings; and if newspaper comments upon them are not fair, true, and impartial, they cannot under the law be deemed privileged. If, as applied to official proceedings, the comments are untrue, they must necessarily be untrue as to the same proceedings when viewed as matters of public concern.

17. This assignment complains of the refusal of the following charge: "If you believe that any of the matters of comment in

the article complained of are libelous, still, if they were reasonable and fair inferences in reference to matters of public concern and published in good faith and upon probable cause for the general information, then you will find that such inferences were privileged, and that the plaintiff is not entitled to recover therefor." What we have said in considering previous assignments, we deem a sufficient demonstration of the fallacy of the requested instruction. We will only add that probable cause for believing the truth of matters contained in a libelous article, while it may mitigate the damages, does not justify its publication.

18. The defendant, having failed to plead the truth of any matter contained in the libelous article, was not entitled to have the question, as to whether the plaintiff was guilty of the offense of smuggling, determined. Therefore the court did not err in refusing the special charge presenting such an issue. Even if such an issue had been presented, the charge should not have been given, for it omits an essential ingredient of the offense.

19. The same may be said of the special charge, the refusal of which is the subject of this assignment. In order to constitute the offense of smuggling, there must be clandestine introduction of goods subject to duty with the intent to defraud the government. These essential ingredients of the offense were not included in the requested charge.

20. The quotation we made from Newell on Slander and Libel in disposing of the fifth assignment of error demonstrates that the requested charge, made the subject of this one, was properly refused.

21. This assignment of error complains of the refusal of the defendant's request to give this special charge: "In determining the existence of probable cause as to any of the issues in which the existence of probable cause is submitted to you, you may look to and may inquire whether plaintiff was guilty of smuggling in bringing into this country, without the payment of duty, any of the articles brought by her." It is enough to say that as the trial court did not submit in the main charge, or in any charge requested by defendant, any question of "probable cause" for the publication of the libelous article, there was nothing to which this instruction could relate, and that, therefore, it was properly refused.

22. As mental suffering on the part of the person defamed is one of the direct results of the publication of libelous matter, and in an action for libel the plaintiff may recover compensation therefor (Sedg. on Dam. § 443; Suth. on Dam. § 1206; Newell on Slander & Libel, 863, 864, § 35), the court did not err in refusing defendant's request to instruct the jury that they could not consider or allow plaintiff any damages for mental anguish.

23. The defendant itself introduced in evidence the judgment of the federal district

court in the proceedings to forfeit and confiscate the goods, or some of them, referred to in the libelous article, which was against the United States. It is not shown by the record for what purpose such judgment was introduced as evidence. The defendant here complains of the refusal of the court to instruct the jury at its request that such judgment should have no influence upon them in their deliberations upon the issues submitted to them. The purpose of the charge was to relieve the defendant from what might be the effect of evidence it introduced on its own account. It might as well predicate error upon the plaintiff's permitting it to be introduced without objection as to complain that the court erred in failing to relieve it from the consequences of its own error. One may not deliberately, in the trial of a case, do an erroneous act which may be prejudicial to him, and obtain a reversal of the judgment because the trial court refused his request to give a charge which would nullify the effect of such action on his part. If this were permissible, counsel for a party might exhaust his ingenuity in conjuring up and introducing irrelevant evidence for the purpose of obtaining a reversal of a judgment against his client because the trial court refused his request to charge the jury to disregard it.

24. There was no error in the refusal of defendant's request to charge the jury that it was not required to prove its defense of privilege literally, and that such defense is made out if proven in substance and fact. The charge of the court upon the issue of privilege is in the language of the statute, which clearly defines and enumerates such libelous matter as it makes privileged, and the court could add nothing to nor subtract anything from the law, but it was for the jury to say whether, under the statute and from the evidence before them, the matter contained in the publication was privileged.

25. Special charge No. 15 requested by defendant was properly refused. There is no language in the article so limiting and qualifying its meaning as to make it not libelous when taken as a whole. Its meaning is too clear to admit of any doubt upon this point. The only possible question concerning it is, was it privileged?

26. The special charge made the subject of this assignment is given in substance in the main charge, and for that reason there was no error in its refusal.

27. The special charge referred to in this assignment was properly refused for the reasons stated in our consideration of the thirteenth and fourteenth assignments of error.

28. We can perceive no error in the refusal of the court to instruct the jury to disregard the remarks made in argument by plaintiff's counsel, referred to in this assignment. They seem to us to have been proper and in legiti-

mate argument, upon evidence before the jury upon the issue of damages.

29. The defendant having failed to plead as a matter of defense that the plaintiff was guilty of smuggling, there was, as we have intimated in disposing of another assignment, no issue in regard to her being guilty of such offense. Therefore the court properly refused to submit such issue as requested by defendant in the special charge referred to in this assignment.

30. The testimony referred to by us in disposing of the tenth assignment of error was amply sufficient to authorize the admission in evidence of a copy of the San Antonio Sunday Light of February 11, 1906, over appellant's objection that there was no evidence that defendant published and circulated said newspaper. Therefore we overrule the thirtieth as well as the thirty-first assignment of error.

31. The testimony of the witness Smith, referred to in the thirty-second assignment of error, was clearly hearsay and irrelevant to any issue in the case, and for these reasons was properly excluded.

32. The question asked the witness Smith, by defendant's counsel, was obviously improper, in that it sought to elicit the conclusion arrived at by the witness from the conversation he had with the plaintiff; and the court did not err in sustaining plaintiff's objections to it, as is complained in the thirty-third assignment.

33. As the report of Smith to Cummings is not mentioned nor commented on in the libelous article, even if it should be deemed "official proceedings" within the meaning of the statute, we fail to perceive its relevancy as evidence in this case. Certainly it was inadmissible as evidence of the fact stated in it, for as to such matters it was purely hearsay. Therefore we overrule the thirty-fourth, thirty-fifth, and thirty-sixth assignments.

34. There is no merit in the thirty-seventh, thirty-eighth, thirty-ninth, nor fortieth assignments of error, and all are overruled.

There is no error in the judgment, and it is affirmed.

GULF, C. & S. F. RY. CO. v. ROGERS.

(Court of Civil Appeals of Texas. Oct. 14, 1908, Rehearing Denied Nov. 25, 1908.)

EVIDENCE (§ 493*) — OPINION EVIDENCE — SHIPMENT OF LIVE STOCK—DETERIORATION.

In an action for damages to animals during transportation, a witness could testify as to the extent of loss in value and weight of the animals, predicated upon their condition when they arrived at a certain place, and as to what in his opinion was the cause of that condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2275, 2276; Dec. Dig. § 493.*]

Appeal from Llano County Court, A. H. Wilbern, Judge.

Action by W. J. Rogers against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 102 S. W. 739.

S. R. Fisher, J. H. Tallichet, S. W. Fisher, and Terry, Cavin & Mills, for appellant. McLean & Spears, for appellee.

FISHER, C. J. There was no error in the trial court admitting the evidence of the witness Barse. His testimony did not come within the rule announced by the Supreme Court in *H. & T. O. R. Co. v. Roberts* (Tex.) 108 S. W. 808, but it was merely to the effect of the extent of the loss in value and weight of the cattle predicated upon the condition they were in when they arrived at Ft. Worth, and as to what in his opinion was the cause of that condition. Having held this evidence to be admissible, there was sufficient evidence of the amount of damages sustained to support the judgment of the trial court.

We find no error in the record, and the judgment is affirmed.

BABCOCK v. LEWIS.†

(Court of Civil Appeals of Texas. Oct. 21, 1908. Rehearing Denied Nov. 25, 1908.)

1. SPECIFIC PERFORMANCE (§ 46*)—CONTRACTS ENFORCEABLE—PART PERFORMANCE OF ORAL CONTRACT.

Where plaintiff, a contract purchaser of land, took possession, dug a well thereon, and put in the foundation of a stable, he was in exclusive possession so as to entitle him to specific performance of a parol contract for its sale to him, though he afterwards allowed the vendor to occupy the property with him, if the vendor's possession was subordinate to plaintiff's.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 123, 129; Dec. Dig. § 46.*]

2. SPECIFIC PERFORMANCE (§ 97*)—TENDER OF CONSIDERATION—REPUDIATION OF CONTRACT.

Where the contract purchaser of land attempted to settle with the vendor by paying the balance due under the contract, and could have paid it, but the vendor refused to settle on the basis of the contract, his acts constituted a repudiation of the contract and made unnecessary a formal tender by the purchaser of the amount actually due as a condition precedent to suit for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 294; Dec. Dig. § 97.*]

3. SPECIFIC PERFORMANCE (§ 43*)—CONTRACTS ENFORCEABLE—PART PERFORMANCE OF ORAL CONTRACT—SALE OF LAND.

The payment of \$37 of the contract purchase price of \$100 for land, and the digging of a well on the premises, and laying of the foundation for a stable by the contract purchaser, is a sufficient part performance to entitle him to specific performance of an oral contract for the sale of the land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 135, 136, 138; Dec. Dig. § 43.*]

4. SPECIFIC PERFORMANCE (§ 43*)—CONTRACTS ENFORCEABLE—IMPROVEMENTS AND EXPENDITURES.

A payment of one-third of the price of the land and improvements were not so insignificant as to warrant a refusal of specific performance of the contract, even though they did not equal in value what the purchaser had gained by his occupancy of the land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 136, 138; Dec. Dig. § 43.*]

5. SPECIFIC PERFORMANCE (§ 121*)—PROCEEDINGS—EVIDENCE.

In a suit by a contract purchaser of land for the specific performance of the contract, evidence held not to show that the purchaser ceased to improve the premises and yielded possession to the vendor, nor that materials and labor furnished by the vendor in making improvements constituted improvements thereon by him and a charge against the land and the purchaser.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 390; Dec. Dig. § 121.*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Action by Andrew Lewis against J. W. Babcock for specific performance of a contract for the sale of land. Judgment for plaintiff, and defendant appeals. Affirmed.

J. F. Dabney and E. B. Pickett, for appellant. F. M. Stevens and C. F. Stevens, for appellee.

KEY, J. This is a suit for the specific performance of a contract for the sale of land. The plaintiff pleaded a written contract which the trial court held did not sufficiently describe the land, and the case was submitted to the jury upon the plaintiff's contention that he had paid such portion of the purchase money, held such possession, and made such improvements as entitled him in equity to a decree for specific performance. Upon a verdict rendered in his favor the court entered judgment for the plaintiff, and the defendant has appealed.

No complaint is urged by appellant against the court's charge, or any ruling made during the progress of the trial. All the assignments in appellant's brief assail the verdict of the jury. The first contention is that the evidence falls to show such exclusive possession by the plaintiff as is required for the enforcement of a parol contract for the sale of land. This assignment is overruled, because the testimony of both the plaintiff and defendant shows that the plaintiff took possession of the land under the contract of sale, dug a well thereon, and put in the foundation of a building intended to be used as a stable for live stock. According to the plaintiff's testimony, by agreement between him and the defendant the latter was thereafter admitted into joint possession with the plaintiff, and, acting together, they changed the plaintiff's plan and erected a larger stable, which was used for more than a year by both of them, each using practically half of the build-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

ing. This joint possession of the property by the consent of the plaintiff did not change the fact that the plaintiff took exclusive possession of the land under the contract of sale and made valuable and permanent improvements thereon. In fact, according to his testimony, and that given by the witness Rush, which seems to have been accepted by the jury, the defendant's possession was under contract with and subordinate to the possession of plaintiff. If such was the case, and the defendant occupied toward the plaintiff the relation of tenant, then the defendant's possession was in legal contemplation possession by the plaintiff.

The second assignment challenges the verdict upon the contention that the testimony shows that there was never any tender on the part of the plaintiff to pay the balance of the agreed purchase price for the land. This assignment is not regarded as tenable. The agreed price of the land was \$100, of which amount the proof shows the plaintiff had paid to the defendant \$37, leaving a balance due on the land of \$63. The plaintiff admitted and testified that he was indebted to the defendant \$97 more for material used in constructing the stable and paid for by the defendant. His testimony also shows with reasonable certainty that he could and would have paid the defendant these two sums, amounting to \$160; that he attempted to settle with him upon that basis, and the defendant refused to do so, and declared that he would not convey the land to the plaintiff or any one else for less than \$450. That declaration by the defendant constituted a repudiation of the contract, and rendered it unnecessary for the plaintiff to make a formal tender of the amount actually due.

Under the third assignment two propositions are presented. The first is that the improvements made on the land by the plaintiff and the amount of purchase money paid by him were too slight and trivial to entitle him to hold the land. On that proposition the evidence is clearly against appellant, and that contention cannot be sustained. The second proposition asserts that trivial and insignificant expenditures and improvements which do not equal in value what the vendee has gained by his occupancy of the land do not entitle him to have enforced a verbal contract for the sale of such land. The purchase money paid by the plaintiff and the improvements made on the land by him were not trivial and insignificant, and for that reason we rule against him on the point under consideration. *Wells v. Davis*, 77 Tex. 636, 14 S. W. 237.

The fourth and last assignment of error asserts that the uncontradicted evidence shows that the plaintiff ceased all effort to place any improvements on the premises in controversy, and yielded possession to the defendant, and agreed that the latter might

complete the improvements, which he did, and consequently the plaintiff should not recover the land without refunding to the defendant the value of the improvements so placed thereon by the defendant, which value the evidence shows was \$300 or more. The record does not sustain this assignment. The uncontradicted evidence does not show that the plaintiff ceased all effort to place improvements on the land. On the contrary, according to the plaintiff's testimony, after he consented for the defendant to join him in building the stable, he furnished material and aided in person in its construction. It may be conceded that the defendant furnished most of the material that was used in the building, but according to the plaintiff's testimony it was agreed that he was to become liable for only the \$97 lumber bill paid by the defendant, and which the judgment of the court below fixes as a charge against the land, and requires the plaintiff to pay in order to recover the land. It may also be conceded that the defendant furnished and paid for most of the labor that was used in constructing the building, but according to the plaintiff's testimony he agreed to do that for the joint use of the building, which he subsequently enjoyed. Such being the case, it constituted no charge against the plaintiff or the land.

This disposes of all the questions presented in appellant's brief, and our conclusion is that upon all the issues submitted to the jury the verdict finding for the plaintiff is supported by testimony.

No error has been pointed out, and the judgment is affirmed.

CITY OF GALVESTON v. J. M. GUFFEY PETROLEUM CO.

(Court of Civil Appeals of Texas. Oct. 21, 1908. Rehearing Denied Nov. 25, 1908.)

1. TAXATION (§ 260*) — SITUS — PERSONAL PROPERTY.

When the property is physical in character, and of a nature that can acquire an actual situs, it must be taxed in the county where actually situated or located.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 433; Dec. Dig. § 260.*]

2. TAXATION (§ 262*)—VESSELS—PLACE OF ENROLLMENT.

For the purpose of taxation, vessels may acquire an actual situs, and the place of enrollment and registration is not controlling, if the actual situs is elsewhere.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 436; Dec. Dig. § 262.*]

3. TAXATION (§ 262*)—SITUS OF VESSELS.

A city has no jurisdiction to assess for taxation vessels which have acquired an actual situs at another place, although enrolled in the United States customhouse in such city.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 436; Dec. Dig. § 262.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by the city of Galveston against the J. M. Guffey Petroleum Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This is a suit by the city of Galveston to recover of appellee \$4,938.40, with interest and penalties, alleged by appellant to be due it for taxes levied and assessed upon certain vessels owned by appellee, which are enrolled and registered in the United States customhouse in the city and county of Galveston.

The trial court held that these vessels were not subject to taxation in the city of Galveston, and rendered judgment in favor of appellee. The court found no conclusions of law, but found conclusions of fact which are as follows:

"(1) That the city of Galveston is a municipal corporation, duly chartered and incorporated by public law of the state of Texas, and that it is a separate and independent school district, and has power, and is bound by ordinances, to annually levy and collect a tax of 20 cents on the \$100 valuation, upon the taxable property within the limits of said city, for the support and maintenance of public free schools in said city of Galveston.

"(2) That all the barges, schooners, steamers, and vessels of every kind mentioned in plaintiff's petition are owned by defendant, and were enrolled in the United States customhouse in the city of Galveston on the several dates mentioned in plaintiff's petition.

"(3) That plaintiff was authorized to levy, assess, and collect taxes for the year 1905, and that the levy and assessment of the taxes for the year 1905 made by the city of Galveston, including a school tax, as set forth in plaintiff's petition, were properly and regularly made, and that all requirements for a legal levy and assessment have been complied with.

"(4) That defendant failed to render the said barges, steamers, etc., to plaintiff's assessor for listing and assessment on or before June 1, 1905, and the said assessor thereupon listed the said property for taxation as unrendered; that same was referred to plaintiff's board of equalization, by which, after due notice as required by law, the said property was appraised at the valuation stated in plaintiff's petition.

"(5) That the levy for municipal taxes for the year 1905 was \$1.52 on the \$100 valuation, and that the levy for school taxes was 20 cents on the \$100 valuation for said year.

"(6) That defendant has failed and refused to pay the amount of taxes charged against it by plaintiff, and still fails and refuses to pay the same.

"(7) That the United States customhouse, where said vessels of the defendant are enrolled, is situated within the territorial limits of the city of Galveston in the state of Texas.

"(8) That the defendant is justly indebted to the city of Galveston in the sum of \$4,938.40, with interest thereon at the rate of 6 per cent. per annum from the 1st day of January, 1906, and a penalty of 5 per cent., if the property of said defendant described in plaintiff's petition was subject to taxation by the city of Galveston.

"(9) That it is a fact that each and all of the barges, steamers, schooners, and vessels of every kind described in the plaintiff's petition are owned by the J. M. Guffey Petroleum Company, and no other person or corporation has any interest therein.

"(10) That the J. M. Guffey Petroleum Company is a private corporation, chartered under the laws of the state of Texas, for the purposes of mining for and producing petroleum oil and other minerals. That the principal place of business stated in the charter of the corporation and domicile is the city of Beaumont, Jefferson county, Tex., and that in said city of Beaumont, Jefferson county, Tex., it has and maintains its general offices, and not elsewhere, and that its managing officers and agents reside and have their offices in said city of Beaumont, and not elsewhere.

"(11) That at each and all of the times mentioned in plaintiff's petition, at which the vessels therein described were registered and enrolled at the port of Galveston, said port of Galveston was the only port of entry situated within the collection district in which the city of Beaumont is situated, and said vessels were enrolled at said port of Galveston in compliance with the navigation laws of the United States, because said city was the nearest port of entry at which they could be registered or enrolled to the residence of the owner, to wit, the nearest port of entry to Beaumont, Jefferson county, Tex.

"(12) That each and all of said vessels have painted on the stern, in white letters on black ground, the name of the vessel and the words 'of Port Arthur' in compliance with the navigation laws of the United States, requiring that each vessel shall have its name, and the name of the port nearest to the place where the owner resides, so painted on the stern; it being shown that Port Arthur is situated 20 miles from the city of Beaumont, the residence of the J. M. Guffey Petroleum Company, and that Galveston is some 90 miles from said city of Beaumont.

"(13) That Port Arthur is situated in Jefferson county, Tex., and is a port at which ocean-going vessels receive and discharge freight and passengers doing an interstate and international business, and at which numerous barges, schooners, and water craft of all kind receive and discharge cargo in an interstate and coastwise trade. That Port Arthur is 20 miles from Beaumont and about 90 miles from Galveston, and is situated on Sabine Lake or Sabine Bay, at the north end of Port Arthur Canal, which canal is navigable for vessels drawing 22 feet, and connects

the town of Port Arthur with Sabine Pass, and thence through the jetties to the Gulf of Mexico. That Port Arthur is not a port of entry, and vessels cannot be registered or enrolled there, under the laws of the United States.

"(14) That not one of the vessels described in plaintiff's petition has ever been actually or physically in the city of Galveston, or in Galveston bay, and none of them have ever done any business to or from the port of Galveston. But there is nothing to prevent said vessels from entering the port of Galveston, and doing business there, in the event their owners should deem it proper to do so.

"(15) That all of the steamers described in the petition ply between Port Arthur and Philadelphia and New York and other points along the Atlantic seaboard, and are engaged in the business of carrying oil, crude and refined, from Port Arthur to the above-named ports. That when not actually engaged on the seas in carrying oil, or at the port of destination in unloading same, said steamers are at Port Arthur, Jefferson county, Tex., awaiting cargo or taking on cargo, and have never been in the port of Galveston for any purpose whatever.

"(16) That all the barges and vessels, except steamers described in plaintiff's petition, are engaged in the transportation of oil, crude and refined, from Port Arthur, Tex., to points along the coast, and sometimes to points in the interior reached by rivers, but that at all times when said vessels are not engaged in the actual carrying of oil away from Port Arthur they are stationed there and remain at Port Arthur in Jefferson county, Tex., and none of them have ever been in Galveston, or the waters of Galveston Bay, for any purpose whatever.

"(17) It is further agreed that the J. M. Guffey Petroleum Company has and maintains no office or agent of any kind in the city of Galveston, Tex., and conducts no business of any kind or character at or from said city.

"(18) That all the vessels described in plaintiff's petition are specially built and fitted for the carrying of petroleum oil, crude or refined, and could not be used for carrying other kinds of freight without extensive and costly alterations, are engaged solely in said business, and were so engaged during all the times mentioned in the petition; that said vessels take cargo only at Port Arthur, and carry no passengers and no freight, except oil, and always come back to Port Arthur empty, carrying no return cargo."

M. E. Kleberg, for appellant. F. C. Proctor and D. Edward Greer, for appellee.

FISHER, C. J. (after stating the facts as above). The Legislature may, in certain instances, give to property an artificial situs

for the purposes of taxation; but when the property is physical in character, or of a nature that can acquire an actual situs, it must under our Constitution be taxed in the county where actually situated or located. The finding of the court is to the effect that these vessels so taxed have an actual situs at Port Arthur, in the county of Jefferson, and are not and have never been within waters located within the territorial jurisdiction of the city of Galveston.

That vessels may acquire an actual situs is a proposition too well settled to be questioned, and that the place of enrollment and registration is not controlling, if the actual situs is elsewhere. *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. Ed. 1059; *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 410, 26 Sup. Ct. 679, 50 L. Ed. 1082; *Mayor v. Baldwin*, 57 Ala. 61, 29 Am. Rep. 713.

The court having determined by a finding, which is not disputed, that the actual situs of these vessels was at a place other than the city of Galveston, the latter was wanting in jurisdiction to assess the vessels for taxation. Its power in this respect is limited to property within the limits of the city, or that of a nature intangible and personal, which has not acquired an actual situs elsewhere owned by the citizens of that city.

We find no error in the record, and the judgment is affirmed.

SLOAN v. McMILLIN.

(Court of Civil Appeals of Texas. Oct. 14, 1908. On Rehearing, Nov. 18, 1908.)

1. APPEAL AND ERROR (§ 1127*)—AFFIRMANCE ON CERTIFICATE — TRANSCRIPT — COPY OF JUDGMENT.

Motion to affirm on certificate, not being accompanied by a certified copy of the judgment, as required by law, cannot be granted.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4434; Dec. Dig. § 1127.*]

2. APPEAL AND ERROR (§ 1127*)—AFFIRMANCE ON CERTIFICATE—TRANSCRIPT—SHOWING JURISDICTION.

A judgment for a sum below the original jurisdiction of the trial court cannot be affirmed, even on certificate, the transcript failing to show how the case came into that court; there thus being a failure to show jurisdiction in the trial court, and consequently in the appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1127.*]

3. APPEAL AND ERROR (§ 508*)—APPEAL BOND —SHOWING AS TO TIME OF FILING.

It does not affirmatively appear, as is necessary, that the appeal bond was filed in time to give the appellate court jurisdiction; the statute requiring it to be filed in a certain time after adjournment of the trial court, or, when by law the term may continue more than eight weeks, within a certain time after notice of appeal; and the record, though giving the date of approval of the bond, not showing when the court adjourned, how long the term could

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dissolves the temporary restraining order which had theretofore been issued at the instance of the appellant, but commands the appellant to remove the obstructions which she has placed within the limits of the streets adjacent to her property, and perpetually enjoins her from further obstructing said streets. While this suit was apparently instituted for the purpose of enjoining the appellees from interfering with certain fences and houses claimed by the city of Texarkana to be obstructions in Oak and Tenth streets, we think it is merely a controversy over a boundary line, and the issue is the location of the lines of the aforesaid streets adjacent to the property of the appellant in block No. 98 of said city.

The record contains 22 assignments of error filed in the court below, but only 9 of them have been copied into the appellant's brief. Numbering these in the order in which they appear in the brief, and not as there numbered, they are as follows:

(1) "The trial court should have held and found that the evidence clearly showed that plaintiff had acquired an absolute title by possession and occupancy through herself and her predecessors in title, of more than thirty-three (33) years, which possession had never been disturbed nor interrupted by adverse claimants or possessors."

(2) "Because the judgment of the court allows the defendants to take the property of the plaintiff, without adequate compensation having first been paid to her, and without ever having condemned the same and paying its value into court (or to her), under the statutes providing for condemnation proceedings. And it virtually permits the defendants to confiscate her property, for the public use, without the due course of the law of the land."

(3) "The trial court should have held that the evidence clearly showed that the defendants had no right to open up a street over plaintiff's property without making adequate compensation therefor, and that all of said defendants were and are joint wrongdoers, and that the plaintiff is entitled to a mandatory injunction, restraining each and all of them from so doing and acting."

(4) "The trial court erred in not deciding that the defendants 'and the city have no right, as a municipal corporation, to take—after 32 years' continuous adverse possession and occupancy—the property of the plaintiff, and confiscate the same, without adequate compensation, and destroy her improvements.'"

(5) "The trial court erred in not finding that the evidence (which was absolutely undisputed) established the fact that the land in controversy was never at any time whatsoever dedicated, used, or occupied by the city or by the public as a street, road, or thoroughfare; that said city has never obtained nor acquired by dedication, purchase, or use, or in any other way, a public street

across said land, as shown by the maps, annexed to the affidavit of F. M. Henry, as exhibits, and thereby referred to and which were made a part of her motion for a new trial."

(6) "The trial court erred in not finding and holding that there is absolutely no evidence whatever, by any witness, showing that the land in controversy was ever mapped or platted, or laid out in town lots or blocks, when the land was sold to Mary B. Ake, or was ever so mapped, etc., prior to the year 1886, by any one."

(7) "The trial court erred in not finding and holding that the evidence showed that there was at the present time—and had been for some 8 or 9 years—a 'sufficient street,' known as 'Oak street,' about 25 or 30 feet wide, just west of and in front of plaintiff's land in controversy, facing west, and running almost due north and south, for 'the public use, travel and convenience,' and that there was not such travel upon nor use of said Oak street during all of said time."

(8) "The lower court should have held and found that the undisputed evidence clearly established the fact that the plaintiff and her predecessors had been in the actual, peaceable, and adverse possession of the land and premises, and paying all the taxes thereon, and claiming to own the same, for more than five years next before the defendants filed their answer and cross-action herein, cultivating same and same fenced up and occupied, and should have found for her on her plea of five-year limitation."

(9) "The lower court erred in not holding that appellant had title to the land bounded and described, as shown in her pleadings and hereinafter described, and so as to include all of her improvements, and had had and held peaceable and adverse possession of the same, cultivating, using, and enjoying the same for a period of more than ten years, before the commencement of this suit."

These assignments seem to be mainly directed against what might be termed the court's conclusions of fact incorporated in the judgment as the basis for same. We do not think any of these assignments comply with the rules adopted by our Supreme Court or the statute governing the framing of assignments of error. In addition to being too general, there are many other serious objections to some of them which would be a sufficient justification for a refusal to consider them. But, assuming that they all, when taken and considered together as an entirety, raise the question of whether the judgment of the court is sustained by the evidence, we have reached the conclusion that the judgment should be affirmed.

It is evident from the appellant's pleadings that her property is situated within the corporate limits of the city of Texarkana, Tex.; that it consists of lots 1, 2, 3, 10, 11, and 12 of block 98, as shown on the plat of said city; that it is bounded on two sides, the

north and the west, by Tenth and Oak streets. She thus recognizes the corporate existence of the city, and these public streets. Under the law, cities and towns have the right to summarily open their streets and clear the same of obstructions. *City of Corsicana v. Zorn*, 97 Tex. 317, 78 S. W. 924. It therefore devolved upon the appellant to show that the boundaries of her property were not in conflict with the public streets of the city. The appellant began her ownership and possession in 1897, and her deed, which was offered in evidence by the appellees, described the property as follows: "All that certain lot, tract or parcel of land, situated in the county of Bowie, and state of Texas, described as follows, to wit: Lots One, Two, & Three, Ten, Eleven & Twelve, in Block No. Ninety Eight, as laid down, on the map or plat of the city of Texarkana, Texas, said lots fronting 150 ft. on Spruce St., 150 ft., on Oak St., and bounded on the North by 10th St." From this it appears that her property had been platted and mapped, and that the streets in controversy had been designated on the map and plat, even if they had not been actually laid out on the ground. In determining the boundaries of the appellant's purchase, recourse must be had to the plats as shown on the recognized map of the city. While the maps used in the trial in the court below have been brought to us in a very unsatisfactory condition, and without sufficient identification to enable us to consider them, if any question should be raised, we have taken the pains to carefully examine them. All of the maps referred to in the oral argument before us by the attorneys for both parties are now before us. Those which show the platting of the block in controversy show also Tenth street to be 60 feet in width and Oak street to be 80 feet in width, or at least they show that both of those streets were of uniform width for their entire length, and the testimony of witnesses is to the effect that they were 60 and 80 feet in width. It is immaterial that those under whom appellant claims may have owned the land upon which the streets were located, and that their deeds fail to show any allowance for streets. If the appellant, after the opening of Tenth and Oak streets for the full width claimed by the city, has all of the land to which she is entitled under her deeds, clearly she is not entitled to any relief. If her fences and houses at the time of opening those streets extended beyond her lines and into the streets or the grounds that were platted for streets, then the city has the right to affirmative relief against such intrusion.

The appellant seems to insist that the court should have found that she had a prescriptive right to the portion of the street within her inclosure. This claim is based upon the contention that she and those under whom she claims have had adverse possession for more than 30 years before this suit was filed. The pleading upon which this claim is

based is as follows: "That on January, 1906, and on February 5, 1907, plaintiff was lawfully seized and possessed of the herein-after described tract and parcel of land and town lots and the improvements thereon situated, owning and holding the same in fee-simple title, and she then being and still is the legal and equitable owner of same and entitled to the possession thereof, and that she has been such owner and possessor of same for more than nine years, and that her predecessors in title to said land and premises were the legal owners and possessors of same for about 15 or 20 years or more or less, and in the actual, exclusive, open, notorious, hostile, and adverse possession thereof for said length of time, before this plaintiff became the owner and possessor thereof (under whom she claims title), and that she is entitled to the possession thereof." The writer does not think this is a sufficient allegation of title by limitation. Where a party relies upon limitation to support a recovery, or as a defense, it must be specially pleaded. *Mayer v. Paxton*, 78 Tex. 196, 14 S. W. 568. But, admitting that such a pleading might be considered sufficient, in the absence of any exception, where testimony in its support has been received without objection and there has been a finding by the court or a jury in favor of a title by limitation, still no such condition is here before us. Since the enactment of the statute of 1887 no such right can be acquired against any county or town or city to any public road or street. Article 3351, Sayles' Ann. Civ. St. 1897. If any rights existed which would authorize any of the appellant's grantees to hold by limitation the encroachments upon the streets, it must have been perfected prior to the enactment of this statute. There is testimony which will justify a finding that the land upon which the appellant's property is located was mapped and platted as early as 1874 or 1873, but that no streets were ever opened until some time later. The exact time when they were opened is not made clear by the evidence. The only witness for the appellant who seemed to be at all certain as to the inclosures of the property of the appellant says that in 1878 it belonged to a man by the name of Barron, that the latter had a fence on the west side, where Oak street is now, and that the fence was about where it was when the controversy arose between the appellant and the city. Taking this in its most favorable light, it would fall one year short of giving the 10 years' possession, and that is the only period of limitation that is pleaded, if we can regard that as having been sufficiently done. Appellant's attorney, who testified upon the trial of the case, stated that he was familiar with the location of the lots of land in controversy; that he had known them for many years; that in 1878 and 1879 this land was not laid off into lots, blocks, and streets; that the streets had not then been dedicated,

and were not dedicated till about September, 1886, about the time of a friendly suit between Trigg, Henry, and Estes. If this be true, and it would appear that the appellant cannot dispute it, limitation could not have been running against the city more than one year till it was terminated by the statute. Limitation could not have commenced till the streets were laid off or dedicated to public use.

We consider it unnecessary to further discuss the facts of this case, and fully concur in the conclusion reached by the trial court.

The judgment is affirmed.

FREY v. MYERS et al.

(Court of Civil Appeals of Texas. Oct. 28, 1908. Rehearing Denied Nov. 25, 1908.)

1. TRIAL (§ 35*)—RECEPTION OF EVIDENCE—STIPULATIONS.

An admission for the purposes of the suit by the attorneys of record is conclusive of the facts admitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 88; Dec. Dig. § 35.*]

2. HUSBAND AND WIFE (§ 264*)—COMMUNITY PROPERTY—EVIDENCE.

It being admitted by counsel that the consideration of a deed to a husband during coverture was cash, and there being no evidence that the money was his separate property, the land in the possession of him and his wife when the marriage was dissolved by his death must, under Rev. St. 1895, arts. 2968, 2969, be deemed community property, as against persons claiming it under devise from him as his separate property.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 264.*]

3. DEEDS (§ 116*)—WARRANTY DEED—AFTER-ACQUIRED TITLE.

Even if B., the purchaser at execution sale under a final judgment, got no title, the same property having been sold to W. at execution sale under a prior judgment, in the same action, for costs, yet the title acquired by B. by quitclaim from M. after, B. had given a warranty deed of the property inured to the benefit of his grantee.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 116.*]

4. LIS PENDENS (§ 24*)—INNOCENT PURCHASER—CONSIDERATION.

The grantees in a voluntary deed made pending action against the grantor take subject to the judgment afterwards rendered against her in the action.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 38; Dec. Dig. § 24.*]

5. TENANCY IN COMMON (§ 15*) — ADVERSE POSSESSION.

The possession of a tenant in common, who repudiates the co-tenancy of the other owner, to the knowledge of the other, and whose possession is clearly adverse to and incompatible with her interest as a co-tenant, gives title against the co-tenant.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

6. ADVERSE POSSESSION (§ 62*)—MATTERS INCONSISTENT.

That community property is inventoried by the executor as the estate of testator is not in-

consistent with possession of the devisee of the property being adverse to testator's wife, to the extent of her half interest.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 62.*]

7. ADVERSE POSSESSION (§ 62*)—EFFECT OF ACCEPTING DEED.

The adverse possession of devisees of community property, as against the widow of testator, is not destroyed by their acceptance of a deed from her, they continuing their adverse possession, as it commenced, claiming title as devisees, and their acceptance of the deed being merely to avoid any possible question that might arise because of the grantor being the widow of testator, and his wife when he acquired the property.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 62.*]

8. ADVERSE POSSESSION (§ 25*)—POSSESSION BY ONE FOR HERSELF AND ANOTHER.

For one to acquire title by adverse possession there must have been actual occupancy by him in person, or through a tenant, so that where R., who with her minor brother owns an undivided half interest in land, takes possession and claims the entire property as theirs, without any understanding with or authority from him, her possession gives him no title by adverse possession, and gives her such title only to one-half of the outstanding one-half interest.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 116, 117; Dec. Dig. § 25.*]

Appeal from District Court, Harris County; Charles E. Ashe, Judge.

Action by B. F. Frey against C. H. Myers and others. Judgment for defendants. Plaintiff appeals. Reversed and rendered.

Mark G. Fakes, for appellant. Fisher, Sears & Campbell and W. G. Sears, for appellees.

NEILL, J. On June 10, 1905, the appellant, B. F. Frey, sued the appellees, C. H. Myers and his wife, J. M. Myers, and W. G. Sears, as executor of the estate of Roberta C. Lankford, in trespass to try title, to recover an undivided one-half interest in lots 1, 2, and 50 by 100 feet off of lot 12 lying next to and adjoining the two lots, all of which property is in block 382 on south side of Buffalo bayou in the city of Houston, Harris county, Tex. The petition contains the ordinary averments in an action of this character, and, in addition, pleads title by virtue of the three, five, and ten year statutes of limitation. It also alleges that the defendant Sears, as executor of his testatrix, holds one or more lien notes against the interest of Myers in said premises. A partition of the lots between plaintiff and defendants is also prayed for. The defendants Myers pleaded not guilty, the three, five, and ten year statutes of limitation and improvements in good faith, and that they had purchased property from W. G. Sears, as independent executor of Roberta C. Lankford, the consideration being \$200 cash and two notes, each for the sum of \$450, secured by a vendor's lien on the lots, who, as such

executor, made them a general warranty deed to said premises, and they prayed judgment against him on such warranty, in the event of a recovery by the plaintiff. The defendant Sears excepted to that part of the Myers' answer making him a party and asking judgment on his alleged warranty, upon the ground that it appeared therefrom that he only warranted the title in his capacity as executor, and that he had no power or authority to make a general warranty of the title to the property. The case was tried without a jury, and judgment, upon findings of fact and law filed by the court, was rendered for the defendants. From the judgment plaintiff has appealed. The defendants have also assigned error upon certain findings and conclusions of the court.

Conclusions of Law and Fact.

1. The plaintiff claims an undivided half interest in the land sued for under certain sales, hereinafter mentioned, made of it as the property of Mrs. Mary F. Boyce, surviving wife of R. P. Boyce, deceased. The defendants claim (1) under the will of R. P. Boyce, and (2) under the 10-year statute of limitations; the contention of plaintiff being that the property was the community property of Boyce and wife, and that, upon his death, his devisees took only an undivided half interest, and his surviving wife being the owner of the other undivided half interest. That of the defendants is that it was his separate property, and that his devisees took the entire estate. If this last contention were established, it would defeat plaintiff's claim and relieve the case of any other question presented by the assignments. The trial court decided it against the defendants, and its ruling is the subject of appellants' cross-assignment of error. The evidence relating to this matter is substantially as follows: On May 19, 1884, Jacob Kilpper, by his warranty deed of that date, conveyed the lots in question to R. P. Boyce; the consideration expressed being \$500, which the deed recites as paid by the grantee to the grantor. At the time the property was thus acquired, Mary F. Boyce was the wife of R. P. Boyce. He died February 14, 1890, leaving surviving him his wife and three children, namely, Robert P. Boyce, Jr., Maria Lanier, and Roberta C., who was first the wife of William Howard, afterwards of one Smith, and after his death of one Lankford. In these conclusions she will be called Mrs. Lankford. R. P. Boyce left a will, in which he devised all his property to his son and daughter, Roberta C. (Mrs. Lankford). The will was duly probated; the testator's wife, Mary F., and James A. Breeding, being the executors. Breeding filed an inventory, which included the property in controversy. Neither he nor Mrs. Boyce claimed the same as property of the estate after the inventory was filed, but it was claimed by Mrs. Lankford that it

was of the separate estate of her father. There was some evidence introduced by the defendants tending to show that a bounty warrant, issued to Boyce prior to the date of his marriage, was the real consideration paid for the land; but, as it was admitted in writing by counsel for plaintiff and defendants, for the purposes of this suit, "that Jacob Kilpper sold the lots in controversy to R. P. Boyce for a cash consideration of \$500, recited in said deed, and that no land certificate or bounty warrant was a part of the consideration," we deem it unnecessary to recite such evidence. The trial court held that the evidence was not sufficient to overthrow the presumption that the lots were the community property of Boyce and his wife.

The burden being upon the defendants to overcome the presumption arising from the facts that the property was acquired during the marriage of the parties and was possessed by them when the marriage was dissolved (articles 2968, 2969, Rev. St. 1895), it was for the trial judge, sitting as a jury, to determine whether defendants' evidence was sufficient to sustain the burden of overcoming such presumption, we have no authority to disturb his decision of the question. Besides, we cannot, in view of the admission of the attorneys of record, above referred to, perceive how the question could have been disposed of any other way. Such admission was conclusive of the facts admitted (1 Ell. Ev. § 256; 1 Greenl. Ev. § 186), and, as there was no evidence tending to show that the money paid for the land was the separate property of the husband, it followed that the land must be deemed community property. And, as it was community, the devisees in the will took title to only the testator's undivided half interest; the title to the other half remaining in his wife.

2. If, then, the plaintiff acquired the half interest of Mary F. Boyce, the surviving wife of R. P. Boyce, and his right of entry was not barred by the 10-year statute of limitation, he is entitled to recover. Both these questions were decided against him in the court below. The facts relating to the first are practically as follows: In a suit then pending in the county court of Harris county, No. 371, styled "Boyd & Boyd v. Mary F. Boyce," an original attachment was, on March 20, 1897, issued against the property of Mary F. Boyce, which was on March 22, 1897, duly executed by levying upon, as well as other property, an undivided one-half interest in the lots in controversy as the property of Mrs. Boyce. The writ of attachment and the sheriff's return thereon, showing the levy, were duly recorded on the same day the levy was made in the record of attachment liens of Harris county, Tex. Upon the first trial of the case a judgment was rendered in favor of the defendant Mary F. Boyce, from which the plaintiffs appealed to

the Court of Civil Appeals of the First Supreme Judicial District, which, on October 12, 1889, reversed the judgment and remanded the cause to the county court for further proceedings, adjudging the costs against the appellee Mary F. Boyce. Thereafter Boyd & Boyd procured from said Court of Appeals an execution against Mary F. Boyce for the sum of \$68.25; it being the amount adjudged against her for costs on said appeal. This execution was executed by a constable of Harris county by levying upon an undivided one-half interest in the property involved in this suit, which was sold by virtue thereof on April 3, 1900, to N. P. Woodward, to whom the constable executed a deed therefor on April 6, 1900. On December 21, 1900, final judgment was recovered in the county court of Harris county for plaintiffs in said case of Boyd & Boyd v. Mary F. Boyce against the defendant for the sum of \$371, with interest and costs of suit, which judgment recited the issuance and levy of the attachment, above referred to, upon the property involved in this suit. On February 9, 1901, an execution on the judgment was issued to the sheriff of Harris county and executed by him on the same day by levying upon said property, which, after duly advertising the same for sale, he, on March 5, 1901, sold to B. F. Boyd, one of plaintiffs in the execution, for \$250, and on March 8, 1901, executed to him a deed conveying him all the interest and claim that Mary F. Boyce had therein on November 20, 1900, or at any time since. On September 15, 1899, B. F. Boyd executed to his brother, A. W. Boyd, a power of attorney empowering him to sell and dispose of all property, real or personal, that he (B. F. Boyd) then owned or might thereafter acquire in Harris county, Tex., and to execute deeds and bills of sale to same in his name, etc. On July 14, 1902, B. F. Boyd, by his attorney in fact, A. W. Boyd, acting under the power of attorney just referred to, by his general warranty deed of that date, conveyed the property in controversy, together with other property, to B. F. Frey, who is the plaintiff in this case. On July 15, 1902, N. P. Woodward executed a deed to B. F. Boyd by which he sold and quitclaimed to him all of his (Woodward's) right, title, and interest in the property involved in this suit. On July 12, 1897, Mary F. Boyce conveyed the property in controversy to Robert Boyce and Roberta Smith, afterwards Lankford, in furtherance of their claim that it was their father's separate property, and to settle the affairs of the estate. From these facts, which were found by the trial judge, the court below concluded as matters of law that plaintiff derived no benefit from the attachment levy on the property, for the reason that Boyd & Boyd, plaintiffs in the attachment suit, had the property sold to N. P. Woodward by virtue of the execution issued upon the judgment of the Court of Civil Appeals against Mrs.

Boyce, "and that, having sold the same out of the case and from under the attachment lien," such lien became of no effect. The court further concluded that the plaintiff had failed to show the superior title to said property from a common source.

Under our view of the law applicable to these facts, we deem it immaterial whether the court's conclusion was that the effect of the execution sale to Woodward was to relieve or discharge the land from the attachment lien, for, if it should be conceded that such was its effect, the judgment was none the less valid. If its effect was as held by the trial court, B. F. Boyd, who purchased the property at a subsequent sale made by virtue of an execution issued on it, took title subject to the superior title previously acquired by Woodward. If, then, Woodward's title was superior to Boyd's, its superiority could not render the latter any worse than no title at all, and Boyd having on July 14, 1902, made a general warranty deed to Frey, when he had no title to the property, it being outstanding in Woodward, when, on the next day, Woodward by his deed conveyed his title to Boyd, such title passed *eo instante* by estoppel to Frey by virtue of Boyd's warranty. Jones on Real Prop. in Convey. § 990; Rawle on Cov. § 248. Thus it appears that Frey's unbroken chain of title emanates from the deed of Jacob Kilpper to R. P. Boyce, which is also the source of appellee's title, and that, under this common source, plaintiff's is the superior title, unless it is affected by the deed of July 12, 1897, from Mary F. Boyce to Robert Boyce and Roberta Smith.

As will be seen from our preceding statement of the facts, this conveyance was purely voluntary, and was made pending the suit of Boyd & Boyd against the grantor, after the writ of attachment had been levied upon and became a valid and subsisting lien upon the property, of which the grantees, as well as all others, had record notice. If, then, the effect of the sale of the property under the execution issued out of the Court of Civil Appeals was to render the attachment lien of no further effect or avail in the suit, it would seem that the cause of this effect was the merger of the lien in the deed made to the purchaser at the execution sale, for until the property was sold the lien existed, and if the lien then went out of the case it must have gone into the deed of the purchaser, for it was obtained as much for the purpose of securing the costs in the case as to secure the amount sued for. If, however it be conceded that such lien neither continued in the case nor merged in the judgment nor in the deed to the purchaser at such execution sale, still, as the deed of Mrs. Boyce was made *pendente lite* and was purely voluntary, the grantees took the grantor's title subject to the judgment afterwards rendered against her in the case. We think therefore that the plaintiff showed superior title under the common source.

3. The question then is, as before intimated, was this superior title of the plaintiff cut off by the 10-year statute of limitation?

The facts found by the trial judge upon this issue are substantially as follows: The day after the death of R. P. Boyce, which occurred on February 4, 1890, Roberta C. Lankford, for herself and her brother Robert, took possession of the property in controversy, claiming the same as theirs under the will of their father, denying that any one else had an interest in it. Her brother was then a minor, and there was no agreement or understanding between them, or with any one else, authorizing her to take and hold such possession for him. Roberta held possession of the property, it being fenced, using and claiming it as her own and her brother's, from that time until May 24, 1898, when she and her brother partitioned it between them; Robert and his wife conveying to Roberta Lankford lot 1 and the adjoining 50 by 50 feet of lot 12, she and her husband conveying to Edith Boyce, wife of Robert, lot 2 and 50 by 50 feet of lot 12, and each deed reciting that it was for the purpose of partition. Actual possession of Robert Boyce never began until the summer of 1897, when he moved a house onto the part of the land afterwards allotted him by the partition. His occupancy of it as a home continued from that time until August 28, 1900, when he and his wife conveyed it to the defendants, C. H. Myers and wife. The possession of Roberta C. Lankford continued from February, 1890, until in March, 1900, the date of her death, which occurred in March, 1900, and has been continued by her executor, W. G. Sears, and the defendants Myers, to whom the executor conveyed the part partitioned to her by his deed of August 28, 1900, from that date until the time of the trial of this case. The defendants Myers also took possession of that part of the property allotted in the partition to Edith Boyce, and have continued in such possession from then until now. From the date of the partition between Roberta Lankford and her brother, neither the possession of the respective parties to the partition extended beyond the part allotted to her or him. During the entire time of Mrs. Lankford's possession, her mother, Mary F. Boyce, knew that she was claiming all of the land under her father's will as the property of herself and brother, Robert, and, consequently, that such possession was taken and continued adverse to her (Mary F.'s) community interest. Upon these facts the trial court found that the defendants acquired title under the 10-year statute to the undivided half interest in the property sued for.

While Mrs. Lankford and Mary F. Boyce were tenants in common, the facts recited bring the case within the exception to the rule that the possession of a tenant in common is presumably not adverse to his co-tenant, by showing the co-tenancy of her mother

was clearly repudiated by Mrs. Lankford, and that Mrs. Boyce was fully informed of its repudiation, and that her daughter's possession was clearly adverse to and absolutely incompatible with her interest as a co-tenant. That the property was inventoried as the property of the estate of R. P. Boyce by his executor is not inconsistent with the fact of Mrs. Lankford's adverse possession and claim to the entire property, for its devise to her and Robert was, under the law, subject to the testator's debts, which rendered it the executor's duty to inventory it as a part of his estate. If the fact of its being so inventoried should be taken as evidence, it would militate rather against the plaintiff than operate in his favor, for as an inventory is evidence against an administrator or executor, but is not conclusive if it be shown that the property was not separate or community property as specified in the inventory (Heron's Probate Guide, § 231; Simpkin's Admin. of Estate, 80), such inventory might have been regarded as evidence that the property was of the separate estate of the testator, had it not been shown to have been community.

Again, it is contended by appellant that the acceptance by the grantees of the deed of July 12, 1897, from Mary F. Boyce to Robert Boyce and Roberta Smith, destroyed the adverse possession. The rule seems to be that the fact that the disseisor accepts a deed of conveyance to the land which he previously had in adverse possession does not necessarily destroy the adverse character of the possession. *Sanders v. Logue*, 88 Tenn. 355, 12 S. W. 722. It is clear from the evidence regarding the conveyance that the adverse possession of the grantees was not affected by their acceptance of the deed in question, but that they continued their adverse possession, as it commenced, claiming title as devisees under the will of their father, and that their acceptance of the deed was merely for the purpose of avoiding any possible question that might arise from the facts that Mary F. Boyce was the surviving wife of the testator, and his wife when the property was acquired by him from Kilpper.

We conclude therefore that Mrs. Lankford's possession, coupled with other acts regarding it, was such as would vest title in her as against the plaintiff, had she entered upon and claimed the land for herself alone during the period of her occupancy; but the entry and adverse holding were made for her brother Robert as well as for herself. They were tenants in common as to an undivided one-half interest only. As to the extent of that interest, her possession was, by operation of law, likewise his possession; but it extended no further, for she took it and held it in hostility to the owner of the other undivided one-half interest, claiming that she took and held the land for her brother as well as for herself. For one to acquire title

to land under the statute of limitation, his possession must be an actual occupancy of the premises, which can only be made by him in person, or through a tenant. There was no such possession by Robert, for his possession was not personal until after the date of the partition between him and his sister. The relation of landlord and tenant as to the undivided interest in the land sued for did not exist between him and Mrs. Lankford, for such relation can only arise from contract or by operation of law. There was no contract between the parties which would authorize Mrs. Lankford to take possession of and occupy any part of the land for her brother. Even if there had been, we do not think he could avail himself of her possession under it for the purpose of acquiring title under the statute of limitation. Her possession, notwithstanding her claim that it was for him as well as for herself, could not, as against the owner, by operation of law, be his possession through a tenant of the interest in land he neither owned nor claimed. This possession claimed by her for her brother Robert gave the owner no cause of action against him for recovery of the land. Consequently, limitations did not run in his favor, for the statute cannot operate so as to bar an action until a cause of action exists. As Mrs. Lankford did not claim nor occupy the entire land described in plaintiff's petition as her own, but only a half interest (the other half being claimed and occupied by her for her brother), she could only acquire title by limitation to a one half interest in the land sued for, and to the extent of such interest the defendants have established title against plaintiff by limitations, but they (defendants) have wholly failed to prove such facts as would show an acquisition of the other undivided half by limitation, or in any other manner. Therefore Mrs. Lankford and her brother, Robert Boyce, having been the undisputed owners of an undivided one-half interest in the two lots and the part of the lot described in plaintiff's petition, and Mrs. Lankford having acquired title by limitations to an undivided one-half interest in the other half, she and Robert Boyce were the owners of an undivided three-fourths interest in the entire property. The defendants Myers acquired only from her and Robert such undivided three-fourths interest in all of the property described in plaintiff's petition, title to the remaining undivided one-fourth interest being in plaintiff, which he is entitled to recover, and to a writ of partition in order that the property may be divided between him and defendants according to their respective interests as above adjudged.

The judgment of the district court is therefore reversed, and judgment is here rendered in favor of the plaintiff for one-fourth interest in the entire property described in his petition, with a writ of partition as above

indicated, and the cause is remanded for the purpose of making partition between the parties.

McDANIEL et al. v. STAPLES.

(Court of Civil Appeals of Texas. Oct. 31, 1908.
Rehearing Denied Nov. 19, 1908.)

1. APPEAL AND ERROR (§ 185*)—PRESENTATION BELOW—OBJECTIONS—OBJECTION TO JURISDICTION—NECESSITY.

An objection to the jurisdiction of the court is available on appeal, though not raised below; it being fundamental.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1166; Dec. Dig. § 185.*]

2. CHATTEL MORTGAGES (§ 273*)—FORECLOSURE—JURISDICTION AND VENUE.

In an action in the county court to foreclose a chattel mortgage, allegations that plaintiff and defendant resided in P. county, where the suit was filed, and that the mortgaged property was of the value of \$345, were sufficient to show proper venue and sufficient value of the subject-matter to sustain the jurisdiction.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 560; Dec. Dig. § 273.*]

3. COURTS (§ 122*)—ALLEGATIONS IN PLEADING—JURISDICTION.

In an action in the county court to foreclose a chattel mortgage, allegations that the property was secreted, or removed from the county, or sold, would not justify the court in assuming that the property had been entirely destroyed, so as to deprive it of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 122.*]

4. COURTS (§ 122*)—JURISDICTION—VALUE—ALLEGATIONS IN PLEADING.

In actions to foreclose chattel mortgages, jurisdiction depends upon the value of the property as alleged.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 122.*]

5. COURTS (§ 19*)—JURISDICTION—LOCATION OF PROPERTY.

Jurisdiction to foreclose a chattel mortgage is not determined by its present locality, and the failure to allege the present locality of the property, the other jurisdictional facts being alleged, would not defeat jurisdiction, since the seizure and sale of the property is merely a part of the relief decreed, and it is not essential that the property remain in the county or be reduced to possession and retained in order to give the court jurisdiction to foreclose the lien; this conclusion being confirmed by Rev. St. 1895, art. 1340, providing that, if the mortgaged property cannot be found, upon the foreclosure of a chattel mortgage, the debt may be satisfied out of other property.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 47-52; Dec. Dig. § 19.*]

6. CHATTEL MORTGAGES (§ 217*)—REMOVAL OF PROPERTY—EFFECT.

The mere change in the locality or possession of a mortgaged chattel would not discharge or affect the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 221, 466; Dec. Dig. § 217.*]

7. COURTS (§ 19*)—JURISDICTION—JURISDICTIONAL FACTS.

In proceedings to foreclose a chattel mortgage, the existence of the lien, the value of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

property, and the amount of the original debt, are the essentials to give the court jurisdiction, and not the present locality of the mortgaged property.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 47-52; Dec. Dig. § 19.*]

S. COURTS (§ 2*)—JURISDICTION—ALLEGATION OF JURISDICTION—SUFFICIENCY.

A petition is sufficient to give jurisdiction which states material facts necessary to empower the court to hear and determine the cause.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 2.*]

9. COURTS (§ 122*)—COURTS OF GENERAL JURISDICTION—VALUE OF PROPERTY IN CONTROVERSY—FICTITIOUS DEMAND—ALLEGATION.

In an action in the county court to foreclose a chattel mortgage, that the proof showed that the value of the property was less than \$200 would not deprive the court of jurisdiction to render judgment, where it was not alleged and proved that the amount was fraudulently or fictitiously alleged so as to give jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 122.*]

10. CHATTEL MORTGAGES (§ 283*)—FORECLOSURE—ACTIONS—PERSONAL JUDGMENT.

In proceedings to foreclose a chattel mortgage, where it is impossible to reach the property so as to satisfy the debt, the court may in the exercise of its equitable powers decree a personal judgment against defendant without foreclosure.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 570; Dec. Dig. § 283.*]

11. CHATTEL MORTGAGES (§ 228*)—CONVERSION—DAMAGES—EXPENDITURES—DEDUCTION.

In an action for the conversion of mortgaged cotton, defendant was properly allowed his rent and the expenses incident to gathering and preparing the cotton for the market.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 478; Dec. Dig. § 228.*]

12. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICT—SUFFICIENCY OF EVIDENCE.

If there was any evidence to sustain a finding of fact by the jury, or inferences from the evidence that would authorize such a finding, it cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

Appeal from Panola County Court; J. H. Lang, Judge.

Action by F. N. Staples against T. W. McDaniel and others. From a judgment for plaintiff, defendants appealed. Affirmed.

W. R. Anderson, for appellant, T. W. McDaniel. H. N. Nelson, for appellant, H. C. McDaniel. Brooke & Woolworth and W. R. Jones, for appellee.

LEVY, J. By his petition appellee sought to recover against the appellant T. W. McDaniel on open account for \$184.05, together with a foreclosure of a chattel mortgage on 10,500 pounds of seed cotton given to secure the account, and which was alleged to be of the value of \$345; and against the appellant H. C. McDaniel, the value of his debt, because of the alleged conversion of the mortgaged property by him. The appellants each

and separately filed answers, and the cause was tried to a jury. In accordance with the verdict of the jury, judgment was rendered in favor of the appellee against the appellants, and each appellant appeals from the judgment.

Appellants, by assignment of error, challenge the jurisdiction of the county court to try the case and render judgment on the petition. Waiving the question as to whether appellants invoked any action on their exceptions by the court below, we think they could avail themselves of such error on appeal by assignment of error, as it is fundamental. *Grant v. Whittlesey*, 42 Tex. 320.

The objection raised by the appellants to the original jurisdiction of the county court over the case rests in the allegations of facts stated in the petition with respect to the conversion of the property by H. C. McDaniel, coupled with the particular allegation therein that "plaintiff says he does not know, and cannot positively state, whether said seed cotton is in Panola county, or whether it has been carried out of said county." The contention in respect thereto is that the facts alleged do not show a cause of action to foreclose the chattel mortgage lien, because there is not affirmatively averred the present locality of the property or its existence, and for that reason it is eliminated as a subject-matter of controversy from the case, leaving only the question of original indebtedness as the subject-matter of controversy between the parties, which is an amount below the original jurisdiction of the county court. It is the subject-matter of the mortgage in this case that would confer jurisdiction upon the court to try, as the debt sued for is below the amount of its original jurisdiction. The petition avers that the residence of both the plaintiff and the defendants is in Panola county, where the suit was filed, and that the mortgaged property is of the value of \$345. This would appear to show proper venue and subject-matter in amount. Referring to the allegations in the petition relating to the manner of conversion of the mortgaged property, we do not think more could reasonably be said in respect thereto than that the intendment was to show a course of wrongful dealing with the property on the part of one of the defendants through means of either secreting same, or removing from Panola county, or selling same; the plaintiff being unable to state which. Because mortgaged property is stated to be secreted, or removed from the county, or sold, would not justify the court, on exception to jurisdiction, in assuming that there had been utter destruction of the property, like being burnt up by fire. By the allegations, however, the present locality of the mortgaged property is rendered uncertain. It is involved in the contention that the present locality of the mortgaged proper-

ty must be affirmatively set forth in the petition as a necessary jurisdictional fact in the foreclosure of the chattel mortgage, and the absence of such averment would operate to deprive the trial court of the power to hear and adjudge the subject-matter of the foreclosure, and thus, in effect, eliminate the foreclosure as a controversy between the parties, leaving the original debt as the only question in controversy, which is below the jurisdiction of the trial court. It is well settled that, in suits to enforce a lien upon personal property, the value of the property determines the jurisdiction of the court. *Cottulla v. Goggan*, 77 Tex. 32, 13 S. W. 742. "The value of the property" therefore is what empowers the particular court to entertain and try the case. "Value" is considered and made the basis of jurisdiction because the jurisdiction of the particular court is confined to amounts in controversy as defined in the law. In chattel mortgage suits the value of the property is made the basis to determine the "amount in controversy" as to jurisdiction of the particular court, because of the fact that there is the existence of a lien in controversy besides the debt, and the lien on the property reaches the full value of the property. In order to exercise jurisdiction over the lien covering the value of the property, the amount of value of the property must be within the proper jurisdiction of the court. The power of the court to try the case being dependent upon the value of the property, and the value of the property being alleged to be within the proper amounts of its authority, it would seem to follow that the trial court had jurisdiction to entertain this case. The statute does not confine the venue of the suit to foreclose the chattel mortgage to the county where the property is situated, though it authorizes suit in such county. There is no statute which requires the mortgaged property, as between the parties to the mortgage, to remain in the county where the mortgage is executed. Nor is it required that by some process the mortgaged property be reduced to possession and retained before the power of the court attaches and can be exercised to foreclose the lien. It is a recognized fact that personal property is movable. Article 1340, Rev. St. 1895, which provides for the foreclosure of chattel mortgages, states, "and if the property cannot be found," then the debts adjudged can be made out of any other property, as under ordinary execution. This language contemplates the probable loss or destruction or removal of the property, and supports the conclusion that it is not the mere present locality of the property mortgaged, but its value, that confers jurisdiction upon the court to try the controversy. Seizure and sale of property is after judgment rendered, and results from the power of the court to entertain the case, and is merely the relief decreed. If reducing

the property to possession is not essential to the power of the court to entertain and try the case in the first instance, then it follows that the failure to allege in the petition with certainty the present locality of the mortgaged property, the proper jurisdiction otherwise being alleged, would not interfere with nor defeat the power of the court over the case. Neither could the contention be sustained, as involving a jurisdictional question in this case, that, because the petition failed to show with certainty the present locality of the mortgaged property, the subject-matter of foreclosure would be eliminated as a controversy between the parties, thus leaving the amount in controversy on original debt. It could not be asserted in sufficient reason as a legal contention that, where a chattel mortgage lien has rightfully attached to the property described, mere change of locality, as between the parties to the mortgage, or a conversion with notice, would displace the lien. If change of locality would not displace or affect the lien between the parties, then the question of mere present locality of the property, as raised in these pleadings, would not relate to a substantive right of the parties. The existence of the lien, the value of the property, and the amount of the original debt, are the defined issues presented in the petition in the "subject-matter" in controversy, and not the present locality of the property, so far as the power of the court to entertain the case is concerned. None of these defined issues would legally be "eliminated," because of the failure to allege the present locality of the property, which affects the remedy only. A petition is sufficient to sustain jurisdiction which states material facts necessary to empower the court to hear and determine the cause. *Brown on Jurisdiction*, § 2. Where the court has jurisdiction of the parties in interest, it is not necessary, to decree a foreclosure, that the property be within the territorial jurisdiction of the court. *Means v. Worthington*, 22 Ohio St. 622.

Appellants complain, by assignment, that the court erred in not granting a new trial, because the evidence showed that the court was without jurisdiction to hear and finally try the case. This assignment cannot be sustained on the ground that the proof showed the value of the property to be less than \$200, even if the record would sustain the contention, because there were no pleadings attacking the jurisdiction on the grounds of fraudulent or fictitious allegation of the value of the mortgaged property in the petition. Courts may render judgment for any amount below jurisdiction, in the absence of pleading and evidence that the amount giving jurisdiction in the petition is fraudulently or fictitiously alleged to obtain jurisdiction. *Dwyer v. Bassett*, 63 Tex. 274; *Ratigan v. Holloway*, 69 Tex. 469, 6 S. W. 785. The assignment cannot be sustained upon the ground

that the evidence showed in the trial that the property was beyond the limits of the court's jurisdiction. The statute, in providing for judgments of foreclosure, contemplates that "the property cannot be found." We do not think that there could reasonably be founded a legal contention that the power and jurisdiction of the court over the case to finally try the same was destroyed and defeated by proof, in the trial, of the removal of the property from the confines of its jurisdiction, occasioned by conversion. The proof would only affect the remedy of the party as to seizure and sale of the property. If the power of the court in the first instance existed on the petition to entertain the case because of the alleged value of the property, its power continued to finally try the case and award such decree and relief as would be proper in the case. Where, by the unlawful or wrongful acts of others, it is made impossible for the plaintiff to reach the property within his lien, it is then the equity power of the court to decree a personal judgment against the defendants, without foreclosure. *Moore v. Masterson*, 19 Tex. Civ. App. 308, 46 S. W. 855. Under the equity power of the court, under such proof, the relief of a strict foreclosure, without order of sale, might be awarded. We do not think that the *Tufts Case* cited can be made applicable in any view to this case.

The remaining assignments are overruled. The verdict found by the jury cannot be set aside by this court as to the appellant H. C. McDaniel. There is some evidence to support the amount found in the verdict. The jury properly allowed his rent claimed and the \$40 money and such other expenses connected with the gathering and preparing for market as would be authorized under the evidence. How much gathering was paid for by this particular appellant, and the value, was for the jury to find. If there is any evidence to sustain their finding in this respect, or inference from the evidence that would authorize them to make the finding, we could not be justified in disturbing such finding. There is no evidence, and inferences from the evidence, that would authorize the jury to find that this appellant did not pay for the picking of all the cotton. There is evidence that as much as two bales were paid for, probably, by this appellant. The plaintiff testified that he let the other appellant have some money with which to pay for picking cotton. All this evidence and inferences to be drawn therefrom are matters for the jury alone to settle, and their finding is not without some support in testimony. If they found in their province that this particular appellant did not pay for the picking, and that there were seven, instead of five, bales of cotton, and that the seven bales were of the value that they fixed, then, after deducting this appellant's proper account and rent

for such total value, the amount they allowed is sustained.

The case was ordered affirmed.

HELSLEY et al. v. MOSS et al.†

(Court of Civil Appeals of Texas. Oct. 24, 1908.
Rehearing Denied Nov. 21, 1908.)

1. APPEAL AND ERROR (§ 664*)—RECORD—CONFLICTING PARTS.

Where the bill of exceptions shows that certain testimony was excluded by the court, and the statement of facts agreed to by counsel for both parties and approved by the judge shows that said testimony was admitted, the assignment of error to the exclusion of the evidence will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2857, 2859; Dec. Dig. § 664.*]

2. WILLS (§ 164*)—SETTING ASIDE—ISSUES AND PROOF.

In an action to annul a will for mental incapacity and undue influence, plaintiff's testimony that her brother died a few days before their father died, that her brother's death was unknown to her father at his death, that their father bequeathed certain property to his three children, and that testatrix, plaintiff's mother, took the interest of the deceased child, was properly excluded as irrelevant to the issues.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 164.*]

3. WILLS (§ 165*)—SETTING ASIDE—EVIDENCE—ADMISSIBILITY.

In an action to set aside a will for mental incapacity and undue influence, there being an absence of testimony on such issues, testimony as to declarations by testatrix prior to making her will as to her intentions was properly excluded.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.*]

4. WILLS (§ 164*)—SETTING ASIDE—EVIDENCE—AGREEMENT.

In an action to set aside a will for mental incompetency and undue influence, plaintiff's testimony as to a purported compromise and promise, made by testatrix 15 years before the will was executed and 18 years before testatrix died, was rightfully excluded as being too remote.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 407; Dec. Dig. § 164.*]

5. WILLS (§ 165*)—SETTING ASIDE—ISSUES AND PROOF.

In an action to set aside a will for mental incompetency and undue influence, testimony as to a promise made by testatrix to plaintiff to make a devise was properly excluded as not within the issues.

[Ed. Note.—For other cases, see Wills; Cent. Dig. §§ 415-420; Dec. Dig. § 165.*]

6. WILLS (§ 165*)—SETTING ASIDE—ISSUES AND PROOF.

In an action to set aside a will for mental incompetency and undue influence, a statement of testatrix during her last illness that she felt like she had all with her when she had certain persons, including plaintiff, was properly excluded as irrelevant to the issues.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.*]

7. WILLS (§ 164*)—SETTING ASIDE—EVIDENCE—ADMISSIBILITY.

In an action to set aside a will for mental incompetency and undue influence, testimony

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

that the husband of testatrix was a very determined man, and when he undertook anything he never gave up, was immaterial, in the absence of evidence to show that he had exercised undue influence on testatrix in making her will.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 164.*]

8. WILLS (§ 165*)—SETTING ASIDE—EVIDENCE—ADMISSIBILITY—REMOTE TRANSACTIONS.

In an action to set aside a will for mental incompetency and undue influence, exercised by the husband of testatrix, evidence as to statements by him nine years before the will was made, that plaintiff had received all she would get, was too remote to be admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 416; Dec. Dig. § 165.*]

9. EVIDENCE (§ 226*)—ADMISSIONS—PARTIES—JOINT INTEREST.

In an action to set aside a will for undue influence, evidence as to declarations by one legatee, since deceased, is not admissible to affect the interest of the other legatees, where no collusion is shown to have existed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 821; Dec. Dig. § 226; * Wills, Cent. Dig. §§ 135, 410.]

10. WILLS (§ 165*)—SETTING ASIDE—EVIDENCE—STATEMENTS BY TESTATRIX.

In an action to set aside a will, evidence that testatrix said that, if she ever made a will, each of her children should share alike, and that she would never leave out one of her children, was properly excluded.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 165.*]

11. APPEAL AND ERROR (§ 1056*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—EFFECT.

The exclusion of evidence was harmless, where, if it had been admitted, it would have been insufficient, with the testimony adduced, to have changed the result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4187; Dec. Dig. § 1056.*]

12. WILLS (§ 166*)—SETTING ASIDE—SUFFICIENCY OF EVIDENCE—UNDUE INFLUENCE.

To show undue influence, the evidence must be direct, or all circumstances showing it must be of a reasonably satisfactory and convincing character.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421, 437; Dec. Dig. § 166.*]

13. WILLS (§ 163*)—UNDUE INFLUENCE—PRESUMPTION.

That a daughter of testatrix did not receive as much through the will as she thought she should raises no presumption of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 398; Dec. Dig. § 163.*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by Florence Helsley and another against J. S. Moss and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Davis & Davis and Cleveland & Haynes, for appellants. Brown & Lomax. Poindexter & Padelford, Odell & Johnson, and Ramsey & Odell, for appellees.

RAINEY, C. J. This suit was brought by Florence Helsley and husband against J. S. Moss, W. H. F. Moss, Mrs. Fannie Barnes, Mrs. L. B. Taylor and husband, A. L. Taylor,

Eula Holdman and husband, James Holdman, and Roy Hedges, to set aside the last will and testament of Mrs. L. E. W. Moss, on the ground of undue influence and mental incapacity. On the trial the court instructed a verdict for defendants, and plaintiffs appealed the case to this court.

The evidence shows that when Mrs. L. E. W. Moss married J. S. Moss, about 1865, she was a widow Pearce, and had two children, Florence Pearce and Mollie Pearce. The latter died, leaving two children, Eula and Roy Hedges. Florence Helsley, née Pearce, and husband, are the plaintiffs herein. Mrs. L. E. W. Moss had three children by Moss, who survive her, to wit, W. H. F. Moss, Fannie E. Barnes, and Mrs. L. B. Taylor. Her two grandchildren, Eula and Roy Hedges, also survive her. At the time she executed her will she was of sound mind, and the evidence fails to show that any undue influence operated upon her in the execution of the will.

Appellants' first assignment complains of the court in excluding the testimony of Mrs. Helsley, as follows: "She proposed to prove by her own evidence that about 1886 her mother, Mrs. Moss, was sick, and that she was there, and that J. S. Moss brought a gentleman in the room that her mother was in, and gave him a seat by the stove, and after he had been there a short time her mother opened her eyes and looked at the man, and asked who the man was, and that J. S. Moss answered it was Col. Oatis, and told her mother that he (J. S. Moss) wanted her to make a will and fix it up, and her mother told J. S. Moss to take Col. Oatis back as quick as he had brought him there." The bill of exceptions shows that said testimony was offered, but that the court excluded and refused to admit it. The statement of facts shows that said testimony was admitted. The statement of facts is agreed to and signed by counsel for both parties and approved by the trial judge. This being the condition of the record, we are unable to say which is correct, and the assignment will not be considered by this court. *Ramsey v. Hurley*, 72 Tex. 194, 12 S. W. 56; *Wiseman v. Baylor*, 69 Tex. 63, 6 S. W. 743; *Scott v. Childers*, 24 Tex. Civ. App. 349, 60 S. W. 775.

Appellants' second complaint is that the court erred in not admitting the testimony of Mrs. Helsley, to the effect "that her brother Jackson Hill Pearce died a few days before their father died, and that her brother's death was unknown to her father at his death." The will of George M. Pearce, the first husband of Mrs. Moss, bequeathed his interest in certain property to his three children; but one of the children, the boy, died before George M. Pearce did. The appellants insist that, as her mother took that interest, she was entitled to prove the facts stated, as she was entitled to an interest in the estate that had been willed to the boy.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

We do not think the evidence pertinent to the issue raised by the pleadings. The suit was to annul Mrs. Moss' will on the ground of mental incapacity and undue influence. The testimony did not bear on that issue. Mrs. Helsley had sued for her part of the property that had been left by her father, which she had received. Pearce died in 1863, and more than 40 years had elapsed before this claim was asserted by her.

Appellants' third assignment of error complains of the court in refusing to admit the testimony of Mrs. Helsley, to the effect: "That her mother, Mrs. L. E. W. Moss, was at her house in 1900, and that a buggy came in at plaintiff's pasture gate, and witness said she wondered who that was. That she had never seen that rig go through there before, and her mother said she guessed it was somebody that the Driskill's folks had sent for. That the Driskills were trying to get Mr. Driskill's mother to make a will, and they were dingdonging the life out of her, and said it was not right, and she said they wanted the old lady's property, and that she did not think that it was right to do that way, and cut Mollie Scroggins out, and if she was Mollie, and they did, she would fight them as long as she had a dollar. And a few minutes after this conversation her mother said: 'I thought something of making a will. I don't know how to fix it up.' That she had thought about leaving her home place to Mr. Moss for his lifetime. She wanted to leave him plenty, and she thought that ought to be enough to keep him up as long as he lived. She wanted to fix it so her children should have what she had; that she did not want no woman to come there and enjoy it." We think there was no error in this action of the court. Mrs. Moss' will was executed in 1900. There was no evidence of mental incapacity on her part to make her will at that time, nor was it shown that the will was made under undue influence, or that it was not her voluntary act.

Appellants' fourth assignment is, in effect: "That plaintiff offered to prove by Mrs. Helsley, while she was on the stand, and after it had been shown that her father was dead and had left considerable property and had disposed of same by will, giving certain property to his wife and to his children, and that her mother had married one J. S. Moss, and the witness had married, that she, the witness had brought suit against her mother and J. S. Moss for the property that was coming to her from her father's estate, and that during the pendency of said suit the same was compromised, and that leading up to the compromise, her mother came to her and told her, if she would compromise and take what was left in the will—that is, the land—she would make same as the balance of her children at her death, but, if she did not, she would debar her. And that witness accepted her mother's proposition, and the suit was settled on said basis. The evidence was

objected to because it was irrelevant, and did not tend to prove any issue in the case, etc., and the same was excluded." "This evidence was offered, as appellants claim, to show the state of Mrs. Moss' mind at that time, 1884 or 1885, and the obligation of Mrs. Moss morally to carry out her promise to witness." The testimony was rightfully excluded. The purported compromise and promise were made 15 years before the will was executed, and 18 years before Mrs. Moss died. It was subject to the objection of being too remote. Besides, if it was sufficient upon which to base a right, there is no pleading alleging such a ground as a cause for setting aside the will.

It was not error to exclude the statement of Mrs. Moss, made during her last illness "that she felt like she had all with her when she had Henry and the witness." It tended to prove no issue in the case.

The court did not err in excluding the testimony of O. L. Bonham and J. Q. Bonham, to the effect that J. S. Moss was a very determined man, and when he undertook anything he did not let up until he accomplished it. This evidence was immaterial, unless there was some evidence tending to show that Moss had exercised undue influence upon Mrs. Moss in making her will.

Appellant offered to show by O. L. Bonham: That he had heard J. S. Moss say, soon after he went on the Moss place, and at different times and places during the entire time that he remained on said place, that Mrs. Helsley had gotten all her estate, and all that she would get; that she had received her part and would get no more. And also offered to prove by J. Q. Bonham that in 1891 he was at J. S. Moss' house, and was sitting with Moss and wife on their front gallery, and that Mrs. Moss stated that she intended for all of her property that she had left at her death to be equally divided among her children, and that Moss objected to it and said that the Pearce heirs would not get any more, if he could help it. The matter was discussed between Moss and wife, could not tell how long, might have lasted half of an hour. Moss kinder got mad, like he generally did in conversation, and left. This testimony, on objection, was not admitted, and exceptions reserved. O. L. Bonham had lived on the Moss place about 16 years, leaving there about 5 years before the trial. The conversation heard by J. Q. Bonham was in 1891, 9 years before the will was made. This evidence we think too remote to be admissible on the question of undue influence. *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025; *Johnson v. Brown*, 51 Tex. 65-79.

The evidence as to both Bonhams as to the declarations of J. S. Moss was inadmissible. Moss at the time of trial was dead, therefore not a party to the suit. There was no collusion shown to have existed between him and the other legatees to use any influence whatever upon Mrs. Moss as to how she should

make her will. The testimony therefore, as to the other legatees, was not admissible to affect their interest. This applies also to appellants' tenth assignment of error, and said assignment is overruled. *Selbert v. Hatcher*, 205 Mo. 83, 102 S. W. 962.

The evidence of Mrs. Driskill, offered to show that Mrs. Moss said that, if she ever made a will, each of her children should share alike, that she would never leave out one of her children, was properly excluded.

The appellant complains of the action of the court in instructing a verdict. We do not think the court erred in this respect. The evidence admitted by the court utterly failed to show that Mrs. Moss at the time was mentally incapacitated to execute a will, or that undue influence was exercised upon her in the execution thereof. We also think that, if the testimony excluded had been admitted and considered, it, with the testimony adduced, was insufficient to have set aside the will. Therefore no harm resulted by the exclusion of the evidence complained of. There is no direct evidence of any fact that Mrs. Moss was unduly influenced to make her will as she did. To show undue influence, the evidence must be direct, or the circumstances showing such "must be of a reasonably satisfactory and convincing character." *Underhill on Wills*, vol. 1, § 132. Evidently Moss and the other legatees desired that the will be made as it was, but that Mrs. Moss did not exercise her own volition of mind in its execution the evidence fails to show. She lived three years after its execution, and there is nothing to show that she desired to revoke it.

If it could be said that appellant did not receive as much through the will as she thought she should, it raises no presumption of undue influence. *Id.*, § 135. The will purported to dispose of property owned by Mrs. Moss. The legatees, besides J. S. Moss, were the children and grandchildren of Mrs. Moss, and she probably considered that the disposition of the property made by her would make the legatees equal in amount to that possessed by appellant, and this of her own volition.

We find no reversible error in the record, and the judgment is affirmed.

Affirmed.

KLUMPP et al. v. STANLEY et al.
(Court of Civil Appeals of Texas. Nov. 4, 1908.)

1. ACKNOWLEDGMENT (§ 5*)—DEEDS OF MARRIED WOMEN—CURATIVE STATUTES.

Act April 23, 1907 (Laws 1907, p. 308, c. 163), amending Rev. St. 1895, art. 2312, and providing that every instrument which has been recorded for 10 years, whether acknowledged as provided by law or not, shall be admitted as evidence without proving its execution, etc., simply renders admissible in certain cases instruments

which had been recorded a designated period of time, and which could not otherwise be introduced, but would have to be proved as at common law, and did not validate a deed of a married woman void from its inception because not executed or acknowledged as required by Act April 30, 1846 (Laws 1846, p. 156).

[Ed. Note.—For other cases, see Acknowledgment, Dec. Dig. § 5.*]

2. DEEDS (§ 52*)—EXECUTION—DEFECTIVE EXECUTION—CURATIVE STATUTES.

The Legislature cannot validate a deed of an individual which was absolutely void from its inception.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 98; Dec. Dig. § 52.*]

Appeal from District Court, Leon County; Gordon Boone, Judge.

Action by M. A. Stanley and others against W. F. Klumpp and others. From the judgment, said Klumpp and others appeal. Affirmed.

W. D. Lacey and J. H. Seale, for appellants. Wm. Watson and S. W. Dean, for appellees.

NEILL, J. This was a suit in trespass to try title, and also for partition, brought, on January 22, 1906, by appellees, M. A. Stanley, T. B. Brandin, S. B. Brandin, J. E. Therrell, and Earnest Irvin, the heirs of J. E. Therrell, deceased, in the district court of Leon county, Tex., against W. F. Klumpp, G. W. Burkett, W. E. Beene, W. T. Mattison, Isriel Fulsom, J. W. Beene, the Singer Sewing Machine Company, L. Higgins, W. W. Higgins, Jas. Fulsom, W. Harnes, Mary Mills, Robt. G. Mills, Amanda Davis, E. G. Davis, Windsor Pipes, Jack Redhead, Joe Redhead, Julia Redhead, Ella Redhead, E. K. Street, Thos. R. Street, Mary Lyons, Tom Lyons, Joe Norwood, A. D. Norwood, A. J. Norwood, I. D. Norwood, Louisa S. Klumpp, Kate Klumpp Stahl and her husband, Mr. Stahl, C. C. Klumpp, Julius G. Klumpp, F. B. Enochs, Felice Enochs, and Mrs. W. N. Parks, to recover the lands described in plaintiff's original petition, which said lands were patented to J. B. and J. E. Therrell by the state of Texas, in which suit Mrs. Mary E. Therrell intervened, claiming that she was entitled to an undivided one-half interest in the lands described in intervenor's petition, as against both plaintiffs and defendants. The defendant G. W. Burkett answered by a plea of not guilty, and also pleaded for a repartition in case the deed from M. A. Stanley et al. to A. J. Norwood should from any cause be declared to be a forgery. The defendants Norwood, Klumpp, and Singer Sewing Machine Company pleaded not guilty. There was a trial in which a jury was impaneled and sworn to try the cause and heard the evidence, or a part of it; but the jury was withdrawn, and the court rendered judgment as follows, to wit: Plaintiffs M. A. Stanley and T. B. Brandin own an undivided one-fourth interest. The defendants G. W. Bur-

kett, W. E. Beene, W. T. Mattison, Isriel Fulsom, and J. W. Beene own an undivided one-fourth interest. That the defendant the Singer Sewing Machine Company owns an undivided one-seventeenth interest, and the defendants L. Higgins, W. W. Higgins, Jas. Fulsom, and W. Harmes own an undivided one-eighth interest, and that the intervener, Mary E. Therrell, owns an undivided five-sixteenth interest in the lands described in plaintiffs' petition, and that all the other parties hereto, both plaintiffs and defendants, own no interest in the lands in this suit. The land in controversy was patented to J. B. and J. E. Therrell, both of whom are dead; the latter having died prior to January 23, 1873, and his undivided one-half interest in the premises having descended by inheritance to plaintiffs M. A. Stanley, T. B. Brandin, J. E. Therrell, and to Sarah E. Irvin, deceased, who was the mother of the plaintiff Earnest Irvin. On the date stated M. A. Stanley was the wife of C. A. Stanley, and T. B. Brandin was the wife of S. B. Brandin, and Sarah E. Irvin was a widow.

There is no controversy in regard to the one-half interest in the lands of the patentee, J. B. Therrell; it being held by defendants, or some of them, and the only controversy in the court below being as to the interest of J. E. Therrell inherited by plaintiffs, and that controversy is confined on this appeal to the interests of M. A. Stanley and Theresa B. Brandin. Their interest is claimed by appellants under a certain instrument or deed, generally designated as a "protocol," made on January 23, 1873, in the state of Louisiana, East Feliciana parish, by M. A. Stanley in person, and by Theresa B. Brandin by her agent, C. A. Stanley, and Sarah E. Irvin to Abel J. Norwood, before Tony M. J. Clark, the recorder of said parish, purporting to convey their interest in the lands sued for, which instrument was recorded in Leon county, Tex., February 2, 1873. The original, as well as the record thereof on the deed records of Leon county, was introduced in evidence by the appellants over certain objections of the appellee, not necessary to mention or consider here. This document, together with the power of attorney made by Theresa B. Brandin, appointing C. A. Stanley her agent to sell and convey the land to A. J. Norwood and other writings attached thereto, appear at length in the trial court's conclusions of fact. It is deemed sufficient to say: That such instrument and the certificates attached to it are in the ordinary form of a protocol, or such as are employed in the state of Louisiana for conveying land situated in that state; that it appears upon its face that M. A. Stanley and Theresa Brandin were at the time it was made both married women; that

it does not appear, either from the face of the protocol nor from any certificate attached to or accompanying it, that either Mrs. Stanley or Mrs. Brandin appeared before an officer authorized to take acknowledgments of deeds affecting lands situated in this state and acknowledged the execution of the instrument in the manner required by the act of April 30, 1846 (Laws 1846, p. 156), in order to make a deed of a married woman, conveying her separate property, effective. Paschal's Dig. arts. 1003, 1004. On the contrary, it affirmatively appears that no such acknowledgment was taken of either of these women, nor of Mrs. Brandin, to the power of attorney by virtue of which C. A. Stanley, as her agent, sought to convey by such instrument in the property.

The trial court held, as a matter of law, as follows: "The so-called deed or act between Sarah E. Irvin, M. A. (or M. M.) Stanley, and Theresa B. Brandin, on the one part, and A. J. Norwood, on the other part, was admissible in evidence as an ancient instrument, but was not sufficient to convey the title of the married women, M. A. Stanley and T. B. Brandin, and they are therefore entitled to recover a one-fourth interest in the lands in controversy." The assignment of error attacks this conclusion upon the ground that the act of April 23, 1907 (Laws 1907, p. 308, c. 165), amending article 2312 of Revised Civil Statutes of 1895, operated upon the deed so as to convey the title of these married women. The act referred to was not intended to have any such effect, nor could it, if such were the legislative intent, be given any such force by the courts. The instrument, as to these married women, was, from its inception, absolutely void (*Berry v. Donley*, 26 Tex. 737; *Zimbleman v. Portwood* [Tex. Civ. App.] 107 S. W. 584), and no act that could be passed by the Legislature would give it any validity at all. When the instrument was executed, title remained in Mrs. Stanley and Mrs. Brandin just as it was before and could not be taken from them by the Legislature if it wanted to; but no such assault was intended or contemplated by the Legislature upon the rights of individuals. It was simply intended by the act to render, in certain cases, instruments and copies of them, which had been recorded a designated period of time, admissible in evidence which could not be introduced in evidence before under the article amended, but would otherwise have to be proved as at common law. The effect of such evidence was not changed, nor intended to be. If the instrument was invalid before, it remained so, and would so remain forever, unless validated by the parties themselves.

The judgment is affirmed.

McDONALD et al. v. HANKS et al.†

(Court of Civil Appeals of Texas. Oct. 30, 1908. Rehearing Denied Nov. 19, 1908.)

1. EVIDENCE (§ 181*)—BEST AND SECONDARY EVIDENCE—LETTERS—CARBON COPIES.

Where a carbon copy of a letter is taken and filed by the sender, the original being signed and mailed to the addressee, the carbon was not an original, but a copy, and inadmissible without accounting for the nonproduction of the original.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 600; Dec. Dig. § 181.*]

2. EVIDENCE (§ 186*)—BEST AND SECONDARY EVIDENCE—ORIGINAL—COPY.

If a writer, desiring to preserve a copy of a letter, writes two copies at the same time exactly alike, one of which he proposes to send and the other to keep, it is immaterial which copy he sends, as the one sent becomes the original and the other the copy, regardless of the force of the evidence showing it to be an absolutely accurate copy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 667; Dec. Dig. § 186.*]

3. EVIDENCE (§ 378*)—BEST AND SECONDARY EVIDENCE—LOST DEED—EFFORTS TO DISCOVER—LETTERS.

On an issue as to the execution and delivery of a lost deed which it was to plaintiff's interest to produce, letters to and from persons expected to have knowledge of the deed and its whereabouts were admissible to show plaintiff's efforts to discover it, without proof of the signatures of the persons by whom the letters on their face purported to have been written.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1648; Dec. Dig. § 378.*]

4. EVIDENCE (§ 372*)—LOST DEEDS—COUNTY CLERK'S CERTIFICATE—ANCIENT DOCUMENTS.

Where an alleged lost deed, if executed at all, was executed prior to 1847, supposed to have been in 1840, and plaintiffs had every motive to search for and produce the deed, the court did not err in admitting a county clerk's certificate dated October 17, 1847, reciting that there was a record in the clerk's office of a deed conforming to that alleged to have been lost, the records having been destroyed by fire in 1871 and the deed never having been re-recorded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1614; Dec. Dig. § 372.*]

5. EVIDENCE (§ 187*)—BEST AND SECONDARY EVIDENCE—PREDICATE—SUFFICIENCY.

The sufficiency of the proof offered as a predicate for the admission of an alleged lost deed is within the judicial discretion of the trial court under all the circumstances of the particular case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 675; Dec. Dig. § 187.*]

6. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASERS—NOTICE—RECORDS.

Deeds from H. to C. described the land as one-half of the tract sold jointly to R. H. and W. H. by H., Sr., attorney in fact of S., duly recorded, etc. The latter deed described the land as 640 acres out of the north half of the F. headright, being the east end of 1,700 acres sold by F. to S. All the deeds were of record in the county when defendants purchased the land in controversy, the deed from F. being a necessary part of defendants' title. *Held*, that a judgment under which defendants deraigned title, describing the land as 320 acres conveyed to C. by H., together with such deeds, was suffi-

cient to charge defendants with notice of the existence of the F. deed to S.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 513; Dec. Dig. § 231.*]

7. PRINCIPAL AND AGENT (§ 10*)—POWER OF ATTORNEY—SUFFICIENCY OF DESCRIPTION OF LAND—CERTAINTY.

A power of attorney described the land as part of a larger tract situated in L. county and a part of the F. headright, the grantor's interest being about 2,000 acres, as would more fully appear by reference to the county records of L. county. It was shown by the record that such interest was 1,700 acres off the north side of the league. *Held*, that the description being sufficient with the aid of extrinsic evidence to identify the land, the power was not void for uncertainty.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 21; Dec. Dig. § 10.*]

8. EVIDENCE (§ 372*)—ANCIENT DOCUMENTS.

Where a deed more than 30 years old purported to have been executed under a power of attorney, and possession was shown under the deed, the execution of the power would be presumed without proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1613; Dec. Dig. § 372.*]

9. DEEDS (§ 38*)—DESCRIPTION—CERTAINTY.

A deed describing the land as 640 acres situated in Liberty county, east of the Trinity river, about 25 miles above Liberty and out of the north half of the Isaiah Fields headright league, being the east end of 1,700 acres sold by Fields to Smith and conveyed to the grantor by power of attorney, irrevocable by Smith as appeared from the records of Liberty county, described the land with sufficient certainty to be identified by the aid of extrinsic evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 65, 66; Dec. Dig. § 38.*]

10. LOST INSTRUMENTS (§ 23*)—DEEDS—FINDINGS—EVIDENCE.

In trespass to try title, evidence *held* to sustain a finding of the execution and delivery of a lost deed under which defendants claimed title.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 57; Dec. Dig. § 23.*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Suit by Wyatt Hanks and others against Roderick McDonald, Sr., and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

L. B. Moody, for appellants. Baldwin & Christian, for appellees.

REESE, J. This is a suit in trespass to try title by Wyatt Hanks et al. against Roderick McDonald, Sr., Roderick McDonald, Jr., and Arch McDonald for a tract of 640 acres of land, a part of the Isaiah Fields league, and a part of a tract of 1,700 acres on the north side of said league claimed to have been sold by said Fields to one W. D. Smith. The defendant Roderick McDonald, Jr., disclaimed. The other two defendants pleaded not guilty.

Plaintiffs are heirs of Wyatt Hanks, Jr., and Richard S. Hanks, to whom the land was conveyed by Wyatt Hanks, Sr., under an irrevocable power of attorney from W. D. Smith in 1857. On the trial plaintiffs under-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

took to establish by circumstantial evidence the execution, about 1840, of a deed from Isalah Fields, the original grantee, of the 1,700 acres. Defendants undertook to show, besides other defenses, by like evidence the execution by R. S. Hanks to J. K. Hanks, under whom they claim title, of a deed for his interest in the tract. They also defend on the ground that plaintiffs fail to show title out of the original grantee, and that they are innocent purchasers without notice. The case was tried without a jury, and resulted in a judgment for plaintiffs, from which defendants appeal.

The following conclusions of fact of the trial court, prepared and filed at the request of appellants, are adopted as a substantially correct finding of the facts as established by the evidence:

"(1) In December, 1874, all the records of Liberty county, Tex., affecting the title to lands were destroyed by fire, and the present public records of said county consist solely of such instruments as have been recorded subsequent to the date of said fire.

"(2) Some time prior to the 13th day of June, 1838, Isalah S. Fields and wife, Sarah Fields, settled in this government, and by reason of said settlement became entitled to a league of land, which was granted to them on the 13th day of June, 1838, and said headright league is located in Liberty county, Tex., and the land in controversy is carved out of said land.

"(3) Some time prior to the 23d day of March, 1847, Isalah S. Fields conveyed to Wm. D. Smith, 1,700 acres off of the north side of his headright league of land. This deed is not of record in Liberty county, Tex., neither was the original offered in evidence on the trial of this cause, but from the recitals in other conveyances read in evidence, as well as from other facts established on the trial of this cause, I conclude that said deed was executed, and was sufficient to pass to Wm. D. Smith the title to 1,700 acres off of the north side of the Isalah S. Fields league. This embraces a strip of land 1,025 varas wide, north and south, extending across the entire league from the east to the west.

"(4) On March 23, 1847, Wm. D. Smith executed an irrevocable power of attorney to Wyatt Hanks, Sr., authorizing said Hanks to sell, convey, and dispose of all his interest in the Isalah S. Fields league of land, and to appropriate the proceeds thereof, etc.

"(5) On September 25, 1857, Wyatt Hanks, Sr., as attorney in fact for Wm. D. Smith, executed a general warranty deed to Wyatt Hanks, Jr., and Richard S. Hanks, by which he conveyed to them 640 acres of land out of the north one-half of the Isalah S. Fields headright league, 'it being the east end of 1,700 acres sold by the aforesaid Fields to Wm. D. Smith, and conveyed to me, Wyatt Hanks, by the aforesaid Smith, as will appear by records of Liberty county, Tex.' This deed was sufficient also to pass to Wyatt

Hanks, Jr., and Richard S. Hanks, the title to 640 acres of land off of the east end of the 1,700-acre tract which is the 640 acres involved in this suit and described in plaintiffs' petition.

"(6) Wyatt Hanks, Jr., died in the year 1863, Richard S. Hanks died in the year 1873, and the plaintiffs in this case are their descendants and the legal heirs of said Wyatt Hanks, Jr., and Richard S. Hanks, except the plaintiff, Laura Cox, who is the surviving wife of Wyatt Hanks, Jr.

"(7) Isalah S. Fields and his wife, Sarah Fields, settled upon their league of land in a very early day, and they were living upon their league as early as 1854. He continued to live upon the same up to the time of his death, which occurred some time in the 60's. His wife, Sarah Fields, continued to live upon the same up to the time of her death, which occurred after the year 1890. They neither lived upon nor claimed the 1,700 acres off of the north side of the league, and they never at any time, asserted any title, or claim to this tract of land. They knew it was being claimed by Wyatt Hanks, Sr., and those deraigning title through him. They recognized and acquiesced in the claim made by Wyatt Hanks, Sr., to this tract of land.

"(8) Isalah S. Fields and wife had born unto them six children, their names being Sophronia Fields, Serena Fields, Selina Fields, Randolph R. Fields, Vernal Fields, Harrison Fields. Harrison Fields was never married, and died without issue. Sophronia Fields married John W. Stevens, and had two children, J. R. Stevens and O. H. Stevens. Serena Fields married H. V. Akins. Selina Fields married Pipkin. The family history of these people is set out fully in the agreement of the attorneys filed herein, but I only deem it necessary to point out the above facts with reference to this family history in disposing of this case. Sarah Fields, the surviving wife of Isalah S. Fields, and two of her children, Serena Akins and Randolph R. Fields, and a grandchild, J. R. Stevens, were parties to the suit of Sarah Fields et al. v. S. B. Cooper et al., hereinafter mentioned. The other legal heirs of Isalah S. Fields were not parties to that suit. However, Selina Pipkin executed a deed to A. B. Green to the 1,700 acres described in that judgment, and A. B. Green conveyed the 640 acres involved in this suit to one of the plaintiffs, John F. Hanks, but in disposing of this case I do not consider these conveyances, as will appear from my other findings that the plaintiffs were the legal owners of the 640 acres of land at the time of this conveyance.

"(9) In the year 1854, Wyatt Hanks, Sr., who was then claiming to be the legal owner of the 1,700 acres of land that had been conveyed by Isalah S. Fields to Wm. D. Smith, went into actual possession of said tract of land. He built a house thereon and made other improvements thereon, putting a part thereof in cultivation. He claimed to be the

legal owner thereof, and used and cultivated the ground up to the time of his death, which occurred in about the year 1863. During all of this time Isalah S. Fields and his wife, Sarah Fields, lived upon the same league of land within about a mile or a mlie and a half of the home of Wyatt Hanks, Sr. They knew he was living upon the land, and was claiming the same. They recognized his title thereto.

"I find in paragraph 5 hereof that on September 25, 1857, Wyatt Hanks, Sr., conveyed to his two sons, Wyatt Hanks, Jr., and Richard S. Hanks 640 acres of said 1,700-acre tract off of the east end thereof; and afterwards, to wit, on August 25, 1859, Wyatt Hanks, Sr., conveyed to another one of his sons, George T. Hanks, 703 acres off of the west end of the 1,700-acre tract, described it by metes and bounds, and this deed recites that it is a part of the tract of land conveyed by Isalah S. Fields to Wm. D. Smith by deed bearing date the 9th day of September, 1840, and recorded in Liberty county, Tex., in Book E, p. 88, more fully described by metes and bounds as follows, to wit: [Then follows description by metes and bounds.] This description, together with the description given of the 1,700 acres in the judgment rendered in the case of Sarah Fields et al. v. S. B. Cooper et al., and other facts in evidence, is sufficient to fully identify the 1,700 acres of land conveyed by Fields to Smith. George T. Hanks took actual possession of this tract, continued to live upon the same, use and cultivate the same from that time down to the time of his death, and his son, George T. Hanks, Jr., who was his sole and only heir, was in possession of a part thereof at the time of this trial.

"Wyatt Hanks, Jr., and Richard S. Hanks never took actual possession of their 640 acres, and the same has never been actually occupied since it was severed from the 1,700-acre tract by the conveyance from Wyatt Hanks, Sr., to them, but they paid taxes upon the same during their lifetime. Wyatt Hanks, Jr., having died in 1863, and the plaintiff in this case, Laura Cox, who was the surviving wife of Wyatt Hanks, Jr., paid the taxes upon this land for a long number of years after her husband's death. Richard S. Hanks died in 1873. They and their heirs have always asserted title to this 640-acre tract, and their title was always recognized by George T. Hanks.

"(10) On the 14th day of August, 1890, there was rendered in the district court of Liberty county, Tex., a judgment in the cause of Sarah Fields et al. v. S. B. Cooper et al. by which the plaintiffs in that cause, Randolph R. Fields, J. R. Stevens, Sarah Fields, and Serena Akins, recovered a judgment against George T. Hanks, W. B. Denson, and S. B. Cooper for all of the Isalah S. Fields league, except 1,700 acres off of the north side of said league, which was decreed to the defendants and is described by metes

and bounds as follows, to wit: 'Beginning on the E. bank of the Trinity river, at the N. W. corner of the Isalah Fields league, a mound and a post, from which a sweet gum 20 in. dia. brs. S. 10 deg. E. 7 ⁵/₁₀ vrs. dist. and a white oak 20 in. dia. brs. N. 31 deg. W. 7 vrs.; thence down said river, with its meanderings to the N. R. cor. of a survey of a tract of land deeded by Isalah Fields to his wife and children, a post from which a white oak 16" in dia. brs. S. 33 deg. a white oak E. 1 vr. mkd. thus L. S. F. and a white oak 12" in dia. brs. S. 20 deg. W. 2 vrs. dist.; thence N. 89 deg. E. with said sur. a part of the distance to the E. B. line of said league; thence north 1 deg. W. with said E. line 1025 vrs. to the N. E. cor. of said league; thence with the N. line of said league and part of the distance with Pierre Blanchette league. to the beginning, containing 1700 acres, more or less and of the 1700 acres there is allotted to the defendant, W. B. Denson 250 acres, being the same heretofore conveyed to him by G. T. Hanks; and of the said 1700 acres, there is allotted to the defendant S. B. Cooper 320 acres, being the same conveyed to him by J. K. Hanks on the 16th day of August, 1881 and the balance of said 1700 acres is allotted to the defendant, George T. Hanks.'

"(11) On August 16, 1881, John K. Hanks executed a deed to S. B. Cooper, which is the one mentioned and recited in the judgment described in paragraph 10 hereof, by which he conveyed to Cooper 320 acres of land, part of the Isalah S. Fields league. He described the land in that deed as follows, to wit: 'Being one-half of the tract of land sold jointly to R. S. Hanks and Wyatt Hanks, Jr., by Wyatt Hanks, Sr., attorney in fact for Wm. D. Smith, by deed bearing date the 17th day of September, 1857, and duly recorded in the office of the county clerk of Liberty county, Texas, on the 20th day of August, 1858, the same land herein conveyed being the one-half of said 640 acres conveyed as aforesaid, and being the same conveyed to me by R. S. Hanks by deed bearing date, the 19th day of December, 1860.'

"I find that the deed recited in this conveyance from Richard S. Hanks to John K. Hanks was never executed, as recited therein, but that the deed recited from Wyatt Hanks, Sr., to Richard S. Hanks and Wyatt Hanks, Jr., was duly executed, as therein recited, all of which is fully shown from the deed which was read in evidence on the trial of this cause. In conveyance from Wyatt Hanks, Sr., to Wyatt Hanks, Jr., and Richard S. Hanks, there is a recital to the effect that the 1,700 acres had been sold by Isalah S. Fields to Wm. D. Smith, and conveyed by Wm. D. Smith to Wyatt Hanks, Sr. I find that the deed recited in this conveyance from Isalah S. Fields to Wm. D. Smith was executed, as therein recited. I further find that in view of the fact of the destruction of the deed records of Liberty county, Tex., by fire in

1874, the recital made in the judgment rendered in the case of Sarah Fields et al. v. S. B. Cooper et al., to the effect that the land decreed to S. B. Cooper was 320 acres, which was conveyed to him by J. K. Hanks on the 16th day of August, 1881, and the recital made in the deed from J. K. Hanks to S. B. Cooper, which is dated the 16th day of August, 1881, to the effect that it was the same land conveyed to Richard S. Hanks and Wyatt Hanks, Jr., by Wyatt Hanks, Sr., attorney in fact for Wm. D. Smith, by deed bearing date the 17th day of September, 1857; and the recital made in the deed from Wyatt Hanks, Sr., to Wyatt Hanks, Jr., and Richard S. Hanks, which is dated the 17th day of September, 1857, to the effect that the 1,700 acres had been conveyed by Isaiah S. Fields to Wm. D. Smith and by Wm. D. Smith to Wyatt Hanks, Sr., were sufficient to put all persons deraigning title through Cooper, and through any party to this judgment, upon notice of the existence of the deed from Fields to Smith; at least, these recitals were sufficient to put them upon inquiry as to whether or not such a deed had ever existed, and, if this inquiry had been properly pursued, it would have led to the discovery of the facts that the plaintiffs were legal owners of the land in controversy; and inasmuch as the defendants deraign their title through S. B. Cooper and through this judgment, they cannot claim to be innocent purchasers for value without notice.

"(12) There is a regular chain of transfers from S. B. Cooper down to and into the defendants.

"(13) There is a regular chain of transfers from G. T. Hanks, one of the defendants in the case of Sarah Fields et al. v. S. B. Cooper et al., down to and into the defendants; but, there being no title in either Cooper or Hanks, I find that no title passed to the defendants.

"(14) I find that, at the time the defendants in this case, and those through whom they deraign title, acquired title to the land in controversy they then had notice of the deed from Isaiah S. Fields to Wm. D. Smith, and had notice of the plaintiffs' claim to the land in controversy, and had notice of facts sufficient to put them upon inquiry with reference to the plaintiffs' right to said land, and that by reason of these facts they cannot be purchasers for value without notice, and are not entitled to be protected as such."

Plaintiffs, in proving their title, undertook to establish the execution of a deed, alleged to have been executed in 1840, from Isaiah Fields, the original grantee, to W. D. Smith, under whom they show title. In laying the predicate for the introduction of secondary evidence to establish the execution and contents of this deed, plaintiffs offered in evidence carbon copies of certain typewritten letters written by their attorneys to surviving members of the family and relatives of W. D. Smith making inquiry as to

said deed. It was shown by the attorney who wrote the letters that it was his custom in preserving copies of business letters to prepare carbon copies of the originals, which were filed away. The carbon copies in question were not signed, but it was shown that the copies offered were such carbon copies of letters signed and mailed to the addressees. No effort was made to procure from such addressees—all of whom lived in this state but in distant counties—the originals of the letters sent, and no evidence was offered tending to show that such originals could not have been procured. Objection was made to the introduction of each of the copies on this ground, which was overruled and defendants excepted, and make the ruling the basis of their first four assignments of error.

We are of the opinion that the assignments should be sustained. The copies of the letters signed and forwarded and those kept by the addressers cannot be considered duplicate originals. There can be no logical difference between such copies and the letterpress copies, which have always been held to be copies which are not admissible in evidence without accounting for the nonproduction of the originals. 2 Wigmore, Ev. § 1234; Hubbard v. Russell, 24 Barb. (N. Y.) 404; 3 Enc. of Ev. p. 540. If a writer, desiring to preserve a copy of a letter, writes at the same time two copies exactly alike, one of which he proposes to send and the other to keep, it is a matter of indifference which copy he sends, but the one sent becomes the original and the other a copy, no matter by what force of evidence it is shown to be an absolutely accurate copy. The court was in error in overruling the objection and admitting the copies, but in the view we take of the case such error does not require a reversal of the judgment, for the reasons hereafter shown.

The letters above referred to were addressed to Sidney A. Smith, Gonzales, Tex., grandson of W. D. Smith; Dr. Elisha H. Smith, Victoria, Tex., son of said Smith; Mrs. Matilda Jobe, Gatesville, Tex., a daughter; and J. C. Burns, Goliad, Tex., who seems at one time to have had some connection as an attorney with an investigation by plaintiffs of their title. Plaintiffs offered in evidence original letters which Baldwin testified had been received by him from Sidney A. Smith. Objection was made to the introduction in evidence of these letters, on the ground that they were ex parte unsworn statements of the parties, and also that it was not shown that they had been signed by the parties respectively by whom they were written. No evidence was offered as to the signatures. The objections were overruled, and the evidence admitted, to which defendants excepted, and the point is made the basis of the fifth and sixth assignments of error.

Baldwin, witness for plaintiffs, testified that his firm made an effort to locate the deed from Isaiah Fields to Wm. D. Smith,

and, as a part of that effort, on December 31, 1906, wrote Sidney A. Smith, who was a grandson of Wm. D. Smith, deceased, with reference to this deed, and who, they thought at that time, might give them some information with reference to it, and that they received in reply the letter offered in evidence. The letter is as follows:

"Gonzales, Texas, January 7, 1907. Baldwin & Christian, Attys. at Law, Houston, Texas: Gentlemen: Yours of recent date in regard to papers belonging to my grandfather, W. D. Smith, was received several days ago, and in reply will say that if the deed about which you inquire is in existence, it is probably in the possession of my uncle, Dr. Elisha H. Smith, of Victoria, Texas. He is the only one of the administrators now living, and I think has nearly all papers. Sorry I am unable to give you more information. Very truly yours, Sidney A. Smith."

The witness further testified that they then wrote to Elisha H. Smith, and received from him a reply which is as follows:

"Victoria Co., Tex. Jan. 16th, 1907. R. F. D. Route No. 7. Mr. J. C. Baldwin, Houston, Texas: Dear Sir: A letter of inquiry concerning title to part of Isalah Fields survey in Liberty Co. Tex. came to me some days since when I was quite busy and lost or mislaid the answer, so I write this to say W. D. Smith was my father, he owned several tracts of land in Liberty and in other East Tex. Counties though I do not recollect ever hearing him speak of the Isalah Fields and am sure he would have given over to purchaser all papers concerning any land which he ever sold. Father after moving to Gonzales Co. lived with my oldest brother, J. R. S. until after the war, then with the youngest, F. G. Smith at San Anton, several years and finally with Mrs. Jobe my youngest sister at Gonzales where he died, his papers were with F. G. Smith, father of Sid A. Smith of Gonzales, some with Mrs. Jobe's husband and some with J. E. Smith at Corsicana and it was not until after the death of those three, Dr. John R. Smith, Dr. John Jobe and Felix G. Smith that I came into the possession of papers which W. D. Smith left and there was nothing to show that he ever owned any part of survey mentioned in your letter. Please tell me on postal enclosed if you get this, etc. Yours, Dr. E. H. Smith. P. S. Mrs. Matilda Jobe now of Gatesville, Tex. would tell you if she knows of such a paper, she was with W. D. Smith nearly all the latter part of his life. Address to her at Gatesville, care of Mr. Royalty. Yours etc., E. H. S."

Plaintiffs were laying the predicate for the introduction of secondary evidence to establish the execution and contents of the deed from Fields to W. D. Smith, afterwards shown to have been executed in 1840 or about that time. In doing so it was required that they show that they had used reasonable diligence in searching for the original deed and

were unable to produce it on the trial. It was material and competent in showing such diligence to prove, in connection with the testimony that letters of inquiry had been written to persons who might be supposed to be able to give some information with regard to the missing deed, that replies had been received purporting to be from the persons addressed containing the information shown in the letters quoted.

Plaintiffs (or their attorney) had a right to assume that the letters so received and purporting to be signed by the persons to whom his own letters had been addressed came from those persons. The exercise of reasonable diligence on their part in searching for the deed did not require further exploration of this source of information after receiving the answers to their letters, and this would be true regardless of whether the letters were, in fact, written and signed by the persons referred to, and whether the information given was true or not. The question is not whether these parties knew anything about the whereabouts of this deed, but whether plaintiffs had used reasonable diligence in exploring this source of information. He had every reason to believe that the letters received were in reply to the letters sent, and he had no reason to suspect that the contents were not true. He was not required to go further as to this source of information. The fact that he got the information in letters purporting to be in reply to his own letters asking it was the material thing in determining whether reasonable diligence had been used to get the missing deed. *White v. Burney*, 27 Tex. 50; *Walker v. Pittman*, 18 Tex. Civ. App. 519, 46 S. W. 117; *Johnson v. Arnwine*, 42 N. J. Law, 454, 36 Am. Rep. 527; 2 Wigmore, Ev. § 1194.

The trial court did not err in overruling the objections and admitting the evidence. The assignments are overruled.

In proof of the missing deed, plaintiffs offered in evidence a certificate of the county clerk of Liberty county dated October 17, 1847, under his official seal, to the effect, in substance, that there was of record in his office a deed from Isalah Fields to Wm. D. Smith for 1,700 acres of land, a part of the headright of said Fields, also that he has in his office (filed for record) a power of attorney (with power to sell) from said Smith to Wyatt Hanks, of said lands. The deed records of Liberty county were destroyed by fire in 1874, and this deed was never re-recorded. Objection was made to the introduction of this certificate upon the ground: "That it is irrelevant and immaterial, and, if offered for the purpose of proving the existence of a lost deed, no predicate had been laid for its introduction." The objection was overruled, and the document admitted, to which defendants excepted, and the point is made the basis of the seventh assignment of error.

In addition to writing to Sidney Smith, the grandson, and Elisha Smith, the son, of W.

D. Smith, plaintiffs' attorney wrote to Mrs. Jobe, a daughter, to which he received no reply, and to J. C. Burns, an attorney who had at one time investigated the title for Wyatt Hanks, who replied that he had never seen this deed. Baldwin afterwards saw Ellisha Smith, who was a son of W. D. Smith, and was told by him that he was administrator of his father's estate, and that he did not have the deed and did not know where it could be found. He stated that he had made a search for the paper and could not find it. The deed, if executed at all, was executed at some date prior to 1847, supposed to have been in 1840. The grantor had been dead many years. Wyatt Hanks, Sr., had also been dead about 40 years, as well as Wyatt Hanks, Jr., and Richard S. Hanks. Plaintiffs had every motive to search for and find and produce the deed. "A material inquiry in such cases is whether or not there was a probable motive for withholding this highest and best evidence." *Jernigen v. State*, 81 Ala. 60, 1 South. 72. The whole matter of the sufficiency of the proof offered as a predicate is left to the sound (though not uncontrolled) discretion of the trial court under all the facts and circumstances of the particular case. *Cheatham v. Riddle*, 8 Tex. 167; *Mays v. Moore*, 13 Tex. 88; 2 Wlgmore, Ev. § 1194. The evidence introduced, to our minds, conclusively established the execution and contents of this deed. The trial court did not err in overruling the objection and admitting the evidence. The assignment is overruled.

The eighth and ninth assignments are without merit. The evidence abundantly sustains the finding by the court, in the eleventh and fourteenth paragraphs of the conclusions of fact, that the recitals in the judgment in the case of Sarah Fields et al. v. S. B. Cooper et al., under which defendants deraign title, and in the deeds in the chain of title, were sufficient to affect defendants with notice of the deed from Fields to Wm. D. Smith. The judgment in *Fields et al. v. Cooper et al.*, describes the land allotted to Cooper as 320 acres conveyed to him by J. K. Hanks. The deeds from J. K. Hanks to Cooper describes it as one-half of the tract of land sold jointly to R. S. Hanks and Wyatt Hanks, Jr., by Wyatt Hanks, Sr., attorney in fact of Wm. D. Smith, duly recorded, etc. This latter deed describes the land as 640 acres out of the north half of the Isaiah Fields headright, being the east end of 1,700 acres sold by the aforesaid Fields to Wm. D. Smith. All of these deeds were of record in Liberty county when defendants purchased. One of defendants testified that he had no notice concerning the title except such as appears from the records of Liberty county. At least one of the deeds in his chain of title on record recited the execution of the deed from Fields to Smith as the basis of the title, and other deeds in his chain of title referred to the former deed. This Fields deed was in fact a necessary part of their own title, as shown

by the judgment and by the various deeds under which defendants claim. We think this evidence was sufficient to affect them with notice, not only as to the 320 acres they got from Cooper, but of the entire 640 acres which came through this deed. It is incorrect to say that these recitals in their chain of title were sufficient to put defendants upon inquiry. They gave them positive and unequivocal notice of the existence of the Fields deed. The assignments and the various propositions thereunder are overruled. *Willis v. Gay*, 48 Tex. 469, 26 Am. Rep. 328; *Wimberly v. Pabst*, 55 Tex. 592.

There was no error in admitting in evidence the power of attorney from W. D. Smith to Wyatt Hanks, over the objection urged that it does not describe the land in controversy. The power of attorney dealt with the larger tract of which the tract in controversy is a part. It is described as a certain tract situated in Liberty county, a part of the Isaiah Fields headright, "my interest in said survey being about 2,000 acres as will more fully appear by reference to the county records of Liberty county." It sufficiently appears that the land conveyed was Smith's interest of about 2,000 acres in the survey as shown by the county records, which showed at that time the deed from Isaiah Fields to Smith, identifying the land as 1,700 acres off the north side of the league. The deed was not void for uncertainty of description. Extrinsic evidence might have been resorted to to show what land was owned by Smith in the Fields league. *Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282. It would not, however, have affected plaintiffs' case if this power of attorney had been excluded. The deed of Wyatt Hanks, Sr., to Wyatt Hanks, Jr., and R. S. Hanks, conveying the 640 acres of land, was more than 30 years old. Possession was shown under the deed, and it purported to be made under a power of attorney from W. D. Smith. The execution of the power of attorney would be presumed without other proof.

The deed from Wyatt Hanks, Sr., to Wyatt Hanks, Jr., and R. S. Hanks was also objected to for uncertainty of description. The land is described in this deed as "640 acres situated in Liberty county east of the Trinity river about 25 miles above Liberty, and out of the north $\frac{1}{2}$ of the Isaiah Fields' headright league, it being the E. end of 1700 acres sold by the aforesaid Fields to W. D. Smith and conveyed to me, Wyatt Hanks, by power of attorney irrevocable by the said Smith, as will appear from the records of Liberty county." This described the land with sufficient certainty to be identified by the aid of extrinsic evidence, which is sufficient. *Camley v. Stanfield*, 10 Tex. 550, 60 Am. Dec. 219; *Hermann v. Likens*, supra. Assignments of error 10 and 11 presenting the questions are overruled.

The finding of the court that Fields had executed to W. D. Smith the deed referred to

was, we think, conclusively established by the evidence. This evidence consisted of recitals in deeds conveying the land, all more than 40 years old, claim of title and actual possession, cultivation and improvement, payment of taxes, etc., under this deed, with the knowledge and acquiescence of Isalah Fields in his lifetime and of his heirs after him, proof of the actual record of such a deed in Liberty county as early as 1847, and the testimony of one witness that Fields told him that he had "given the land to Smith," which could only have meant that he had conveyed it to him. The assignments of error that the court erred in its findings on this point because they are unsupported by the evidence as set out in the thirteenth and fourteenth assignments are without merit. *Brewer v. Cochran* (Tex. Civ. App.) 99 S. W. 1033, and cases cited.

In view of the fact that the trial was before the court, the admission of the letters referred to in the twelfth assignment cannot be held to be reversible error, if error at all.

The court did not err in the 3rd, 5th, 7th, 9th, and 11th conclusions of fact, as set out in the 13th, 14th, 15th, 16th and 17th assignments of error. We will not discuss or repeat here the evidence in support of these conclusions. It is amply sufficient to support the court's findings.

What has been said sufficiently disposes of the remaining assignments of error, which attack the conclusions of law that the plaintiffs were entitled to recover, and the judgment in their favor. The facts found can result in no other legal conclusion than that the plaintiffs are entitled to the land.

Finding no reversible error, the judgment is affirmed.

Affirmed.

HEILBRON et al. v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.†

(Court of Civil Appeals of Texas. Nov. 5, 1908.
Rehearing Denied Nov. 19, 1908.)

1. RAILROADS (§ 114*)—CONSTRUCTION—INJURY FROM CONSTRUCTION—EVIDENCE—SUFFICIENCY.

In an action against a railroad for damage to adjacent property, caused by excavating in a road which the company claimed was a part of its right of way, evidence *held* to show that the property had been actually damaged by the excavation.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 114.*]

2. HIGHWAYS (§ 87*)—RIGHTS OF ABUTTING OWNERS—REMEDIES FOR OBSTRUCTIONS.

Owners of property abutting upon a highway have a vested right in the easement created by the existence of the highway; and, if it is injured or obstructed so as to cause special injury to the owner beyond that to the public generally, he may recover therefor.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 297; Dec. Dig. § 87.*]

3. DEDICATION (§ 5*)—HIGHWAYS—ESSENTIALS.

A public highway may be established by the owner of the fee by setting it apart for public use.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 2; Dec. Dig. § 5.*]

4. HIGHWAYS (§ 1*)—ESTABLISHMENT—PRESCRIPTION—ESSENTIALS.

A highway may be established by user by the public in such manner, and for such a length of time, as to give the public a right therein by prescription or limitation.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

5. TENANCY IN COMMON (§ 3*)—EXISTENCE OF RELATION.

Where one of two co-tenants conveyed her undivided one-half interest to a railroad, the latter became a tenant in common with the other.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 8; Dec. Dig. § 3.*]

6. TENANCY IN COMMON (§ 39*)—RIGHTS OF CO-TENANT.

No one could complain of the exclusive use of the joint property by one tenant in common, except his co-tenant.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 119; Dec. Dig. § 39.*]

7. TENANCY IN COMMON (§ 40*)—RIGHTS OF CO-TENANTS—DEDICATION TO PUBLIC.

A railroad being co-tenant of a part of land, the other co-tenant could not dedicate any part thereof as a highway without the railroad's consent.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 120; Dec. Dig. § 40.*]

8. DEDICATION (§ 15*)—REQUISITES—ABANDONMENT TO PUBLIC USE.

To constitute a dedication of private property for a public use, the owner must have intended to absolutely and irrevocably set it apart for that purpose.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 13; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1908-1917; vol. 8, pp. 7629, 7630.

9. DEDICATION (§ 44*)—EVIDENCE—SUFFICIENCY.

The evidence *held* insufficient to show that a road was ever dedicated to public use by the owner.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.*]

10. HIGHWAYS (§ 7*)—ESTABLISHMENT—PRESCRIPTION—ADVERSE CHARACTER OF USE—PERMISSIVE USE.

Permissive use of a way for any length of time will not ripen into a right, and the use by the public, without objection, of an uninclosed portion of a railway's right of way, in a manner that did not interfere with its use by the railroad, did not constitute the way so used a public highway by prescription.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 10-16; Dec. Dig. § 7.*]

11. RAILROADS (§ 4*)—RAILROAD COMPANIES—NATURE—"PUBLIC HIGHWAY."

A railroad is a "public highway," conducted and operated for the public's benefit.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3291-3306; vol. 8, p. 7673.]

12. EMINENT DOMAIN (§ 85*)—USE OF PROPERTY.

If a road located on a railroad's right of way was not a public highway, the railroad

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For opinion on rehearing, see 113 S. W. 979.

could destroy it for its own purposes, if it did so in a lawful manner, without being liable to adjacent owners.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 85.*]

13. EMINENT DOMAIN (§ 69*)—COMPENSATION—NECESSITY OF COMPENSATION.

Private property cannot be taken or damaged for public use without compensation.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 171; Dec. Dig. § 69.*]

14. EMINENT DOMAIN (§ 90*)—COMPENSATION—INJURING PROPERTY—INJURY TO PROPERTY NOT TAKEN.

The rule that private property cannot be taken or damaged for public use without compensation has been extended to give the owner of land adjacent to a railroad damages incident to the proximity of the railroad to his premises, though they are not actually invaded.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 239-244; Dec. Dig. § 90.*]

15. EMINENT DOMAIN (§ 70*)—COMPENSATION—INJURING PROPERTY—PURPOSE OF LAW.

The purpose of the constitutional provisions prohibiting the damaging or destroying of private property for public use without compensation was to place public, or quasi public, corporations upon the same basis with private persons as to liability for such injuries.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 174; Dec. Dig. § 70.*]

16. EMINENT DOMAIN (§ 90*)—COMPENSATION—INJURING PROPERTY—NATURE OF DAMAGE—“DAMAGING OF PRIVATE PROPERTY.”

To constitute a “damaging of private property,” within the constitutional provision prohibiting the damaging of private property for public use without compensation, there must be an interference with its free use and enjoyment, resulting in some physical inconvenience, discomfort, or detriment.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 239-244; Dec. Dig. § 90.*]

17. EMINENT DOMAIN (§ 90*)—USE OF LAND—RENDERING LAND UNATTRACTIVE.

A property owner is not bound to keep his premises attractive, or to refrain from making them unattractive and offensive to the æsthetic sense of his neighbors, so long as his use thereof does not interfere with their use of their own property.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 90.*]

18. EMINENT DOMAIN (§ 90*)—COMPENSATION—INJURY TO PROPERTY—NATURE OF INJURY—RENDERING PROPERTY UNATTRACTIVE.

The construction by a railroad of a deep cut on its right of way would not entitle adjacent property owners to compensation for damage to their property, even though it had depreciated in value by reason of the proximity of the cut, if its construction did not render unsafe the street on which the property was situated; any injury because of the unsightliness of the cut not being actionable.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 239; Dec. Dig. § 90.*]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Action by Louis Heilbron and another against the St. Louis Southwestern Railway Company of Texas. From a judgment for defendant, plaintiffs appeal. Affirmed.

Hart, Mahaffey & Thomas, for appellants. Glass, Estes & King, for appellee.

HODGES, J. On the 12th day of June, 1907, the appellants, Louis Heilbron and M. C. Wade, began this suit in the district court of Bowie county, seeking to recover of the appellee damages in the sum of \$10,000, which, it is alleged, resulted from the deepening and widening of a cut in the appellee's right of way adjacent to their property. The J. W. Johnson survey is a tract of land near the city of Texarkana, and was originally patented to Mrs. Ball and Mrs. Estes, both of whom were married women at the time. Some time thereafter, and during the year 1881, Mrs. Ball, joined by her husband, conveyed to the Texas & St. Louis Railway Company, for a recited consideration, a right of way 100 feet in width, running practically east and west through the Johnson survey. For some reason Mrs. Estes did not join in this deed, nor does it appear that she ever, at any time thereafter, conveyed any of her interest in the right of way. We think, however, the record will justify the conclusion that she acquiesced in the conveyance made by Mrs. Ball, and never at any time thereafter made any claim to any part of the railway right of way. The remainder of this survey was held in common by Mrs. Ball and Mrs. Estes till about the year 1891, when they made a partition of this property between themselves. In making the division the joint owners seem to have recognized the conveyance theretofore made by Mrs. Ball to the railway company, and the boundaries of the property which they divided among themselves were made without any conflict with the railway right of way. The deed made by Mrs. Ball conveying the right of way was duly recorded, and thereafter all of the taxes were regularly paid upon the property by the grantee and its successors. The Texas & St. Louis Railway Company constructed a narrow gage line upon the right of way soon after, and about the time it was conveyed, and that line has been continuously operated up to the present time. Some time after its construction the gage was broadened, so that it is now what is called a “standard gage road”; and the appellee, the St. Louis Southwestern Railway Company of Texas, has succeeded to all of the rights and franchises of the railway company to which the land was originally conveyed by Mrs. Ball. In 1904 the appellants for a valuable consideration acquired title to a portion of the Johnson survey, through Mrs. Estes, to whom that portion had been allotted in the partition before mentioned. The tract which they so acquired was located a few miles west of the city of Texarkana, on the north side of the appellee's right of way, at a point called Red Cut; this being on an elevation sloping from the north to the south, and where the railway entered a cut. This cut was variously estimated as being at that time from 4 to 6 feet

deep at the deepest point. At the time of this purchase there was an old road that ran along on the north side of the appellee's right of way at Red Cut. Some of the witnesses testified that it was partly or wholly on the right of way of the railway company at that point. After the purchase of this tract of land by the appellants, they laid it off into blocks and town lots, providing for streets and alleys in the usual way, and designated it the "Red Cut Addition to the City of Texarkana." In platting the land the appellants laid off and dedicated, as one of its streets or highways, a strip 20 feet in width on the south side of their tract and adjacent to the north line of the railway right of way and parallel therewith. This was called Britton avenue. In June, 1905, the appellee railway company determined to lower the grade of its roadbed at that point, and for the purpose of carrying that into execution made considerable excavations on its right of way, both in the depth and the width of the cut. The testimony shows that after the work was completed the cut was about 15 feet deep at the deepest place, and that it had been widened on the north side until it was approximately from 36 to 42 feet from the center of the track, and was within from 8 to 12 feet of the north boundary line of its right of way. The wall on the north side, after the excavation, was left in a perpendicular condition. It is also shown that practically all of the old road which formerly ran along on the appellee's right of way had been destroyed by the excavation. It is also shown by the evidence that this excavation was reasonable and necessary; that the grade of the railroad at that point was too high, and that the company determined to lower it; that it became necessary to widen the cut in order to lay a temporary track while the roadbed was being lowered, in order to prevent interference with travel. The appellants claim that the old road which ran along on the south side of their property, and which, together with the strip 20 feet wide, constituted Britton avenue, was a public highway; and their recovery is based upon the depreciation in the value of their property occasioned by the destruction or serious interference with this highway. It is alleged by the appellants that the old road had long been dedicated to public use; that in making the excavations before mentioned the railway company had destroyed that road, and rendered the use of Britton avenue, or that portion which remained, dangerous, and that the cut, as it then existed, was a nuisance. At the conclusion of the testimony the court instructed a verdict for the railway company, and from the judgment so entered this appeal is prosecuted.

The only assignment of error presented in the record complains of the peremptory instruction directing the verdict for the defendant. The owners of the property testified up-

on the trial that, since the excavations made by the railway company at Red Cut, the market value of their property has greatly depreciated, estimated at about one-third of its original value. In order, therefore, to sustain the judgment of the trial court, it is essential that the facts show this to be a case of *damnum absque injuria*. As a basis for their right of recovery, the appellants urge that the old road on the north side of the railway right of way was a public highway, in which they, together with the general public, had an easement, and that its destruction seriously interfered with the travel to and from the addition which they had platted. They also claim that Britton avenue, the strip which they had dedicated, was menaced and rendered unsafe by the proximity of the cut and the process of caving of the banks since the cut was made. It is contended by them that the evidence adduced upon the trial which tended to establish those facts was of such weight that the issue made should have been submitted to the jury. If the old road before mentioned had been dedicated to the public, as claimed by the appellants, and was a public highway in the sense that the public generally had an absolute right to have it kept open and free from obstructions, the testimony showing as it does that it had been practically destroyed by the railway, then it must be admitted that the appellants had a cause of action, because we think the testimony would support a finding that the property had been damaged by reason of that fact. The issue, therefore, is whether or not the railway company had the right to destroy the old road. Owners of property abutting upon a public highway have a vested right in the easement created by the existence of the highway; and, when this highway is obstructed or destroyed, and the obstruction or destruction causes a special injury to the property owner beyond that which results to the public generally, such owner has a cause of action against the aggressor. *Dooley Block et al. v. S. L. Rapid Transit Co.*, 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610; *Elliott on Roads and Streets*, § 403. There are various methods by which a public highway may be created or established. It may be by dedication by the owners of the fee, or it may be acquired by long use by the public, carried on in such a manner, and persisted in for such a length of time, as to give a right by prescription or limitation, or by being laid out and established by the municipal authorities, in accordance with statutory provision. In this action the appellants have specifically alleged that the road had been "dedicated" to the public use, but in their arguments they also insist that it became such by prescription. These two methods of acquiring an easement over the land of another are essentially different. Dedication is a setting apart by the owner for public use, while prescription is based upon a hostile use. *Ramthun v. Half-*

man, 58 Tex. 551; Elliott on Roads and Streets, § 175. We have failed to find in the record any evidence of a dedication of this old road to public use.

Assuming that the deed from Mrs. Ball to the railway company had the effect of conveying only her undivided one-half interest in the strip of land designated, still it had the effect of vesting that interest in the railway company, and of making it a tenant in common with Mrs. Estes as to that portion of the land. No one could complain of the railway company's entering upon and making exclusive use of this land, except Mrs. Estes. After that conveyance no valid dedication could have been made, even by Mrs. Estes, of any part of the land upon which this right of way was located, without the consent of the railway company. It does not appear that any such attempt upon her part was ever made. There was offered in evidence by the appellants a map or plat of the Johnson survey, made at the time of the partition between Mrs. Ball and Mrs. Estes, showing the various subdivisions into which the tract had been divided. This plat shows two parallel lines marked across it, which, though not designating what it is intended to represent, may be regarded as indicating the railway right of way. On each side of these marked lines is written "narrow gage street," showing that the owners intended that there should be a space for streets on each side of the railroad. There is nothing to indicate what width they intended those streets to be, nor is there anything to show that they intended to locate them upon the railroad right of way. In the absence of proof to the contrary, we think it may be safely assumed that, if they intended to dedicate a strip of land on each side of the railway for public use, it was such land as they could lawfully dedicate, and hence was not upon the right of way. In order to constitute a dedication of private property for a public use it must clearly appear that the owner of the property intended to absolutely and irrevocably set apart the land for public use. *Ramthun v. Halfman*, 58 Tex. 551; *Worthington v. Wade*, 82 Tex. 28, 17 S. W. 520, and cases cited. The record fails to disclose any such evidence in this case, and we have therefore concluded that there was no evidence of the old road's having been dedicated to public use.

Neither do we think there was sufficient evidence to warrant a finding that a right of way had been acquired by the public by prescription, as is insisted by appellants' counsel. The testimony tended to show that this old road was merely a neighborhood road; that it had never been worked as a public road, and no authority was exercised over it by the municipal government; that it had been there since about 1881; that it was traveled by any one who wanted to do so; and that no objection was ever made to its use. It is further shown that the rail-

way property was not fenced at that point, but that on the north side of the railway right of way embankments of dirt had been thrown up, variously estimated at from four to six feet in height, when the original cut was excavated. How much travel passed over this old road is not shown. There is nothing to indicate that it was more than a neighborhood passway, and used as a matter of convenience merely by the inhabitants of that particular locality. In this situation the record presents the case of a portion of the uninclosed right of way of the railway company being used, without objection, by the public in a manner that did not interfere with its use by the railway company itself. The question then is, Is this sufficient to sustain a finding that the public had acquired a road by prescription? We think not. It is a well-established principle of law in this state that the permissive use of a road or way for any length of time does not ripen into a right. *Ramthun v. Halfman*, 58 Tex. 551; *Worthington v. Wade*, 82 Tex. 28, 17 S. W. 520; *Gilder v. City*, 67 Tex. 346, 3 S. W. 309; *Stewart v. Frink*, 94 N. C. 487, 55 Am. Rep. 618; *Jones on Easements*, § 282; *Elliott on Roads and Streets*, § 130. In this instance we feel that the testimony was sufficient to show only that the roadway had been used by the acquiescence and permission of the railroad company. To hold that the mere use by the public, without objection, of a portion of a railway right of way, and continued during the statutory period of limitation, or for 20 years, would cause the railway company to lose the use of its property, which it may need for legitimate purposes connected with its operation, would cause unutterable confusion, and bring about in this state a condition of affairs which would seriously interfere with railway traffic. A railroad is itself a public highway, constructed and operated for the public benefit; and some courts have gone so far as to hold that a right by prescription or limitation cannot be acquired against a railroad to any portion of its right of way. *S. P. Ry. Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522; *N.-P. Ry. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157; *Jones on Easements*, § 281, and authorities cited in note. There are many portions of railway tracks and rights of way, especially around and near depots in cities and large towns, where the public use the right of way for passing to and fro continuously, and where such use has been kept up, in some cases, far beyond the period of time necessary to create an absolute easement, yet no court in this state has ever treated such persons, when injured while using the railway right of way, as more than licensees. To hold that they had the same rights there which they would have if they had acquired a right by prescription to the use of the right of way would be to enlarge the liability of railway companies beyond that which any court in this state—

or in any other state, so far as we have been able to ascertain—has ever gone. If, then, the old road located upon the appellee's right of way was not a public highway which the railway company was precluded from disturbing, the company had a right to destroy it, especially if in doing so it was using its property in a lawful manner.

If we are correct in holding that the old road was not a public highway, in the sense that the public had an absolute right to its continued use, then there is but one other issue involved, and that is, Were the excavations made by the railway company of such a character as to interfere with the free use and safety of Britton avenue? We are not unmindful of the rule that private property cannot for a public purpose be taken, damaged, or destroyed without compensation, and that this has been extended so as to protect the rights of an adjacent owner, whose land is not actually invaded by railway companies, from certain damages incident to the proximity of the railroad to his premises. *Gainsville, H. & W. R. Co. v. Hall*, 78 Tex. 172, 14 S. W. 259, 9 L. R. A. 298, 22 Am. St. Rep. 42. It has been held that, in the absence of some legislative or constitutional provision similar to that which is incorporated in ours, corporations, organized and acting for a public purpose, having legal authority to construct lines of railway, might be immune from liability for consequential damages inflicted upon private property. 4 *Sutherland on Damages* (3d Ed.) § 1061. To place railways and other corporations exercising public, or quasi public, functions, upon the same plane, as to liability for such damages, with private persons was the purpose of our constitutional provisions prohibiting the taking, damaging, or destroying private property for a public purpose without compensation. Since the adoption of that provision railways and other such corporations stand in the same attitude as to liability with private persons. *Gainsville, etc., v. Hall*, supra; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859. We understand the rule to be that in order to constitute a damaging of private property, within the meaning of our constitutional provision, there need not be actual invasion, but there must be an interference with its free use and enjoyment, the production of some physical inconvenience, discomfort, or detriment. *Aldrich v. Met. West Side Ry.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237; 15 Cyc. 656, and cases cited in note 16. One of the appellants, testifying in answer to the question as to how his property had been injured by the deepening and widening of the cut, stated that it was unsightly and dangerous. We do not think it will be seriously contended that the unsightly appearance of adjacent premises can give a property owner any right of recovery.

Whatever the appellants' property may have derived in point of value by reason of the beauty of the scenery or the attractiveness of the surroundings occasioned by the condition of the appellee's property was not derived legitimately from the use of their own, but, to that extent, from the use of the adjacent property. One property owner is not bound to keep his premises attractive for the delectation of his neighbor, nor is he compelled to refrain from making them unattractive lest he might offend his neighbor's æsthetic sense. So long as his use of the premises does not interfere with the use by his neighbor of the latter's own premises, then there can be no actionable damage. In his testimony the above-mentioned witness did not state in what respect the excavation was dangerous. He did not say it rendered travel along Britton avenue dangerous; and it may be that he considered it dangerous to one only who went upon the appellee's premises. There were quite a number of witnesses who testified for the appellants upon the trial, and none of them gave it as their opinion, or stated facts which would justify us in reaching the conclusion, that Britton avenue was dangerous for those who traveled it. It is true one or two of the witnesses stated that the road was not now being traveled, but they gave as a reason that the water had been turned into a ditch running across the avenue, and this ditch had been so washed out that vehicles could not pass over it. In the absence of testimony showing that Britton avenue had been rendered unsafe for travel, and in that way ingress and egress to and from the property of the appellants had been interfered with, we do not think there is any well-grounded basis for damages, even though the property had depreciated in value by reason of the proximity of the cut. If the evidence had been sufficient to sustain a finding upon the trial that these excavations had substantially interfered with travel upon Britton avenue, or had rendered it dangerous, and in that way had affected injuriously the value of appellants' property, it would have been error to instruct a verdict for the appellee.

We have concluded, therefore, that the judgment should be in all things affirmed.

ANDREAS v. CITY OF BEAUMONT et al.
(Court of Civil Appeals of Texas. Oct. 17, 1908.)

1. INTOXICATING LIQUORS (§ 11*)—MUNICIPAL REGULATIONS—SALOON LIMITS—VALIDITY.

Beaumont City Charter (Acts 29th Leg., Sp. Laws 1905, p. 435, c. 49, § 104), conferring on the city council the right to prescribe by ordinance in what part of the city saloons shall not be conducted, but providing that the city may not prohibit the business in the whole city, and an ordinance in pursuance thereof, specifying territory in which saloons shall not be al-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lowed, and providing that the ordinance shall not affect liquor licenses from the federal, state, county, or municipal authorities then in force within the city limits, are not in conflict with the Baskin-McGregor Act (Acts 30th Leg., Laws 1907, p. 260, c. 138, § 10), a general state law providing that one desiring a retail liquor dealer's license may petition therefor, stating the place where the business is to be conducted, and, if the place be in any block of any city where there are more bona fide residences than business houses, the petition shall be accompanied with the written consent of the majority of bona fide householders in the block, etc.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 13; Dec. Dig. § 11.*]

2. CONSTITUTIONAL LAW (§ 63*)—DELEGATION OF LEGISLATIVE POWER—MUNICIPAL REGULATION—POWER TO CONTROL TRAFFIC—SPECIAL CHARTER.

The Legislature can by special charter authorize a city council to prescribe saloon limits, and such an act is not unconstitutional as a delegation of its power to suspend a general law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63.*]

3. INTOXICATING LIQUORS (§ 15*)—MUNICIPAL REGULATIONS—PRESCRIBING SALOON LIMITS—VALIDITY OF ORDINANCE—DISCRIMINATION.

A city ordinance, fixing saloon limits, and providing that licensees conducting saloons outside the limits might continue until the expiration of their licenses, was not invalid as unreasonably and unjustly discriminating among different liquor dealers outside the limits, because one whose license expired before those of other dealers was prevented from conducting his saloon for the same length of time as the others.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 15.*]

4. INTOXICATING LIQUORS (§ 15*)—MUNICIPAL REGULATION PRESCRIBING SALOON LIMITS—VALIDITY OF ORDINANCE—AMENDMENT—INEQUALITY OF TAXATION.

An ordinance, fixing saloon limits, and permitting dealers outside the limits to continue in business until the expiration of their licenses, was not invalid because a subsequent amendment to an occupation tax ordinance operated to exact a higher tax from saloon keepers inside the saloon limits than that paid by those outside, since, if there was an inequality of taxation, it alone affected the legality of the amended occupation tax ordinance.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 15.*]

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Mandamus by J. H. Andreas to compel the city of Beaumont, through its tax collector, T. C. King, to issue relator a retail liquor license. From a judgment refusing the writ, relator appeals. Affirmed.

Teagle & Conley, for appellant. Marvin L. Curlock and Smith, Crawford & Lonfield, for appellees.

McMEANS, J. Appellant, J. H. Andreas, applied for a writ of mandamus to compel the appellee, city of Beaumont, through its tax collector, T. C. King, to issue to him a license to engage in the occupation of retail liquor dealer at a place without the limits prescribed by the city council of the city of

Beaumont wherein saloons and grogshops could be conducted, which said limits were prescribed by ordinance under and by virtue of express power conferred upon the city council of the city of Beaumont by special charter granted by the Twenty-Ninth Legislature (Sp. Laws 1905, p. 435, c. 49, § 104). Appellant alleged compliance by him with all the requirements of what is popularly known as the "Baskin-McGregor Act," passed by the Thirtieth Legislature (Laws 1907, p. 260, c. 138, § 10), regulating the sale of intoxicating liquors, the procurement by him of state and county license to carry on the business of retail liquor dealer without said limits, the refusal of T. C. King, the city tax collector, to issue him a license to conduct retail liquor business without said limits, upon tender of the amount of occupation tax assessed by the city council, and attacked the ordinance in question as being void because in conflict with the Baskin-McGregor act. He further alleged, in effect: That the city council of the city of Beaumont, by an ordinance adopted May 7, 1907, levied an annual occupation tax of \$150 on the occupation of retailing spirituous and vinous liquors in said city, which ordinance was amended July 19, 1907, wherein, in conformity to the Baskin-McGregor act, the levy was increased to \$187.50; that the saloon districting ordinance specially excepted from its provisions the increase of occupation taxes upon all persons engaged in such business without the district; there being several persons thus engaged, and as to them the annual occupation tax of \$150.00 remained; and that the ordinance is therefore unconstitutional and void because the force and effect of same results in unequal and nonuniform taxation on persons engaged in the same occupation. He further alleged, in substance: That under the terms of said ordinance all licenses held by persons engaged in the saloon business without the district, which were in force when the ordinance went into effect, were not affected thereby and were specially excepted therefrom; that there were two such licenses other than his in force when the ordinance was adopted, one of which would not expire until January, 1908, and the other not until May, 1908 (appellant's license expired August 6, 1907); and that by the terms of said ordinance the anomaly is presented of permitting two retail liquor dealers to conduct and operate saloons without the saloon limits for six years and ten months, respectively, after his license had expired, and his right to conduct his business without the district had been denied him, and for this reason the ordinance discriminates against him, is arbitrary, unreasonable, and void. The facts alleged in the application were substantially proved. The court, after hearing the evidence, entered judgment refusing to grant

the mandamus prayed for, and from that judgment appellant has presented this appeal.

The charter of the city of Beaumont, granted by the Twenty-Ninth Legislature (Sp. Laws 1905, p. 435), provides that: "The city council shall have the right by ordinance, to prescribe in what portion of the city of Beaumont saloons, grogshops or other places for retailing intoxicating liquors shall not be conducted and provide penalties for violation of such ordinance; provided the city shall not have the right to prohibit such business in the whole city." In pursuance of the authority thus conferred by the charter, the city council of the city of Beaumont passed an ordinance prescribing certain territory within the city in which the business of selling intoxicating liquors should not be conducted, providing penalties for the violations thereof, and providing, further, that the ordinance "should not be so construed as to affect, violate or vitiate any valid liquor or beer license issued by any federal, state, county or municipal authorities now in force within the limits of the city." Appellant, at the time of the adoption of the ordinance, was engaged in the business of retail liquor dealer within the territory in which such traffic was prohibited, as were two other persons, and their business was not interfered with during the life of the licenses held by them, nor attempted to be interfered with; and appellant continued in the business of selling liquors until his license expired on the 6th day of August, 1907, when, as before stated, he complied with all the requirements of the Baskin-McGregor act, tendered to the city the amount levied by the city as an annual occupation tax on such business, demanded of the tax collector a license to further carry on his business within the district in which it was prohibited, and the license was refused him. The Baskin-McGregor act provides that the place of business of a person desiring a license as a retail liquor dealer or malt liquor dealer shall be described in his application with reasonable certainty, and, "if the place of business be in any block or square in any city or town where there are more bona fide residences than there are business houses in said block or square, or in any block where there is a church or a school, then the petition shall be accompanied with the written consent of a majority of bona fide householders of the residences in said block or square."

Appellant contends that the charter provisions above quoted and the ordinance referred to are in conflict with and repugnant to the Baskin-McGregor act, and especially to the section quoted. We cannot so hold. *Williams v. State* (Tex. Cr. App.) 107 S. W. 1123, was an appeal from a fine imposed for retailing liquors without the limits of territory prescribed by the charter of the city of Dallas in which the sale of liquors was

prohibited. In that case, as in this, it was claimed that the charter and ordinance were contrary to the Baskin-McGregor act, and therefore void. Judge Brooks, speaking for the Court of Criminal Appeals, says: "We hold not. It is a well-known rule of statutory construction that, where two statutes can be given a construction to uphold both, it must be done, and we take it that the language clearly imports that, before one can get a license for the retail sale of whisky in any block where there are more bona fide residences than business houses, he must secure the consent of the majority of the bona fide householders. This in no sense conflicts with the saloon limit law embodied in the charter of the city of Dallas. * * * And further: " * * * It has been one unbroken policy of this state, where a local option does not prevail, to license the retail sale of whisky as well as the wholesale of intoxicating liquors; that the Baskin-McGregor bill is simply a continuation of the policy existing in this state almost since its earliest history; that there was no attempt on the part of the Legislature, in adopting said bill or law, to interfere with the pre-existing condition in cities and towns in this state with reference to saloon limit laws, and the Baskin-McGregor bill, being a general law, would not repeal by implication the pre-existing special law, to wit, the city charter of the city of Dallas, under a provision of which special law saloon limits are established." It is true that the saloon limits were fixed by the charter granted by the Legislature to the city of Dallas, while only the power to fix by ordinance such limits were conferred upon the city council of the city of Beaumont; but we cannot see that this difference affects in any way the question now under discussion.

Ex parte King (Tex. Cr. App.) 107 S. W. 549, was a case in which the relator was arrested by virtue of a warrant issued on a complaint charging him with a violation of the city ordinance of the city of Ft. Worth, which prohibited the conducting of saloons without the limits prescribed by the board of commissioners of the city of Ft. Worth, acting under a special charter which in terms authorized the commissioners, and made it their duty, to fix saloon limits within said city. In that case it was contended, as in this, that the power conferred by the charter upon the commissioners to fix saloon limits was repealed and superseded by the subsequent act known as the "Baskin-McGregor Liquor Law." Judge Ramsey, rendering the opinion of the Court of Criminal Appeals, in overruling this contention, says: "The contention and claim of relator that the provisions of the special charter of Ft. Worth, authorizing the fixing of saloon limits, were repealed and superseded by what is known as the Baskin-McGregor bill, was passed on, in effect, in the case of *Williams v. State*, this day decided, in which this question was

carefully considered and elaborately treated in the opinion of the court in that case. The opinion * * * is believed to be both well reasoned and well sustained by authority."

Paul v. State (Tex. Civ. App.) 106 S. W. 448, quoted with approval in State v. Williams, supra, was an appeal from a judgment enjoining the defendant from selling liquors without the territory prescribed by the charter of the city of Dallas in which the saloon business might be conducted. In that case it was also contended that the provisions of the charter were inconsistent with the general or Baskin-McGregor law, and therefore the charter provisions must yield to the general act. Justice Talbot, of the Court of Civil Appeals of the Fifth District, speaking for the court, says: "We cannot agree with this construction of the law. It is well settled that special legislation or local laws are not repealed by a later general act, unless specially mentioned in the general law, or such purpose is made manifest from the plain provisions of the general law. Ex parte Neal, 47 Tex. Cr. R. 441, 83 S. W. 831; State v. Connor, 86 Tex. 133, 23 S. W. 1103; Ellis v. Batts, 26 Tex. 703; 26 Am. & Eng. Enc. of Law (2d Ed.) p. 739, and note 3. In the authority last cited, after stating the rule substantially as we have above, though more elaborately, it is said: 'The reason which has been given for this rule is that in passing a special act the Legislature has its attention directed to the special case which the act was made to meet, and considers and provides for all the circumstances of that special case, and, having done so, it is not to be considered that the Legislature by a subsequent general enactment intended to derogate from the special provisions previously made, when it was not mentioned in such enactment.' Fitzgerald v. Champneys, 2 Johns. & H. 54. There is no mention made in the Baskin-McGregor law of the act granting the Dallas charter, nor to any of its provisions. If therefore the Baskin-McGregor act effects a repeal of any of the provisions of said charter, it is by implication, and not by expression. In his work on Statutory Construction (section 157), Mr. Sutherland says: 'It is a principle that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one which is special or local, unless there is something in the general law or in the course of legislation upon its subject-matter that makes it manifest that the Legislature contemplated and intended a repeal.' Mr. Black, on this subject, says: 'When the provisions of a general law applicable to the entire state are repugnant to the provisions of a previously enacted special law applicable in a particular locality only, the passage of such general law does not operate to modify or repeal the special law, either wholly or in part, unless such modification or repeal is provided for in express words or arises by necessary im-

plication. A local statute enacted for a particular municipality for reasons satisfactory to the Legislature is intended to be exceptional and for the benefit of such municipality. It has been said that it is against reason to suppose that the Legislature, in framing a general system for the state, intended to repeal a special act which the local circumstances made necessary.' Black, Interp. Laws, 116. It is also a well-established rule that when a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention shall be considered as an exception to the general one. In such cases full effect may be given to the general law beyond the scope of the local or special law, and by allowing the latter to operate according to its special purposes and aims the two acts can stand together. The application of these principles seems clear. If it be admitted, which is not done, that the provisions of the Baskin-McGregor act and the provisions of the charter of the city of Dallas relating to the subject-matter of this controversy are repugnant to each other, yet we see nothing in the former act or in the course of legislation touching such provisions that renders it manifest that the Legislature contemplated and intended a repeal. The Baskin-McGregor law is intended as a general system for the state in dealing with the whisky traffic; whereas, the provisions of the act constituting the charter of the city of Dallas and relating to the same subject are local laws in their operation and enactment for the benefit of said city, which local conditions and experience dictated were necessary. * * * No such conflict in our opinion exists, and the provisions of the charter conferring upon the city of Dallas authority to license, tax, and regulate saloons and places where intoxicating liquors are sold, etc., and prohibiting the sale of such liquors and the establishment of such places outside of certain defined limits, must be considered as having been excepted by the Legislature out of the operation of the general statutes commonly known as the 'Baskin-McGregor Law.'" See, also, Garonzik v. State, 50 Tex. Cr. R. 533, 100 S. W. 374.

Appellant further contends that the grant of power in the charter of the city of Beaumont to enact the saloon limit ordinance was an attempt on the part of the Legislature to delegate its power to suspend a general law, which, under the Constitution, it could not do; that therefore that provision of the charter and the ordinance passed under its authority were unconstitutional and void. This question was fairly presented for the consideration of the Court of Criminal Appeals in Ex parte King, supra, and in passing upon the point Judge Ramsey says: "The Legislature of this state is authorized to empower city councils by special charter to prescribe the boundaries and limits within which the sale of liquor shall be prohibited

by law, and such local authorities may define and limit the area within which alone such sale may be lawful. This was distinctly ruled in the case of *Cohen v. Rice*, 101 S. W. 1052, by the Court of Civil Appeals of the Fifth Supreme Judicial District, in which case writ of error was refused by our Supreme Court. This is in accord with and is well sustained by authorities. 1 *Abbott on Municipal Corporations*, § 130; *People v. Cregler*, 138 Ill. 401, 28 N. E. 812; *Mayor of Val Verde v. Shattuck*, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208." This decision is by a court having jurisdiction over cases arising out of a violation of the ordinance under consideration, and not only meets our approval, but is by a court of final jurisdiction in such cases, and binding on us. The assignments of error raising the question are overruled.

Appellant attacks the ordinance on the further ground that, inasmuch as, by its terms, it did not interfere with two other persons who were also engaged in the saloon business without saloon limits, for the period of six and ten months, respectively, after the adoption of the ordinance, while he was denied the right to continue the business after a little less than three months after the ordinance was passed, at which time his license expired, was such unjust and unreasonable discrimination against him as to render the ordinance void. The facts disclose that, at the time of the adoption of the ordinance, appellant and two others were conducting saloons in the territory without the prescribed limits under licenses theretofore procured. The ordinance expressly undertook to protect alike all persons who, in good faith, had paid for and obtained license to conduct saloons without the limits, in order to avoid a forfeiture. No license has been issued to any person to sell without the limits since the ordinance went into effect. The ordinance applied to and affected all those not in the saloon limits alike, in that it permitted each to carry on his business as long as the license permitted him to do so. When appellant's license expired, he was bound to quit. When the licenses held by the two others expire, they are bound to quit; and the fact that the ordinance, instead of working a forfeiture of the license, as it probably could have done, permits each licensee to continue his business until his license expired by its own limitation, does not unreasonably discriminate against appellant because his happened to expire first. *Commonwealth v. Petri*, 90 S. W. 987, 28 Ky. Law Rep. 940. The assignment presenting the point is overruled.

It is complained, in the fourth assignment of error, that the provision of the ordinance that permitted dealers without the prescribed limits to continue their business until the expiration of their respective licenses results

in unequal and nonuniform taxation, because such dealer had paid \$150 occupation tax while dealers within the saloon limits, under an amendment passed after the districting ordinance was adopted, were required to pay an occupation tax of \$187.50, so that those who were without the district were operating under a license which required the payment of a less amount than those operating within the limits; that therefore the ordinance was unconstitutional and void. The contention is without merit. Even if, under the facts stated, inequality of taxation resulted, it in no wise affected the validity of the saloon districting ordinance, but of the amended occupation tax ordinance only. The districting ordinance does not levy an occupation tax and is entirely separate and distinct from the amended ordinance levying the tax. The assignment is overruled.

The record discloses no reversible error, and the judgment of the court below is affirmed.

Affirmed.

HESS v. WEBB et al.

(Court of Civil Appeals of Texas. Oct. 26, 1908. On Rehearing, Nov. 19, 1908.)

1. PARTITION (§ 46*)—PARTIES—NECESSARY PARTIES.

Where it becomes apparent that there are part owners of the property sought to be partitioned, who are not parties to the suit, the trial must be suspended until they are brought before the court, or a decree for partition will be reversed.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 114, 115, 118-125; Dec. Dig. § 46.*]

2. PARTITION (§ 70*)—PARTIES—NECESSARY PARTIES.

Whether or not the persons named in a petition for partition as the only heirs of the deceased ancestor were the only heirs *held* for the jury.

[Ed. Note.—For other cases, see *Partition*, Dec. Dig. § 70.*]

3. DEATH (§ 4*)—PROOF OF DEATH—EVIDENCE—SUFFICIENCY.

Proof that according to family history a daughter and her husband and her children perished at sea, and that none of the family had heard of them since their embarkment on such voyage, though 50 years had elapsed, was sufficient, in the absence of contradictory proof, to show that they perished during the voyage.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 5, 6; Dec. Dig. § 4.*]

4. DEATH (§ 4*)—PROOF OF DEATH—EVIDENCE—SUFFICIENCY.

A member of a family proved that another member had three children, two daughters and a son, that the son lived in another state, that the daughters married, that they had not been heard from for 12 years, and that it was not known whether they or their families were living or not. *Held*, insufficient to establish the death of the families of the two daughters.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 5; Dec. Dig. § 4.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. PARTITION (§ 63*)—PARTIES—RECOVERY.

To entitle plaintiffs suing in partition for the entire interest remaining in the heirs of the deceased ancestor, they must show that they are the only heirs of the deceased ancestor, which is not done where the evidence discloses the existence at one time of other heirs not shown to be dead without other heirs than plaintiffs.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 63.*]

6. TENANCY IN COMMON (§ 3*)—RIGHTS OF CO-TENANTS.

One holding the title of one of the heirs of a deceased ancestor is a tenant in common with the other heirs and is not a mere trespasser so as to authorize some of the heirs to recover from him.

[Ed. Note.—For other cases, see Tenancy in Common, Dec. Dig. § 3.*]

7. APPEAL AND ERROR (§ 1029*)—PREJUDICIAL ERROR.

The error in allowing one to recover along with other plaintiffs in partition against a defendant claiming title by adverse possession does not affect the rights of defendant who was found not to have acquired title by adverse possession.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1029.*]

8. PARTITION (§ 75*)—NECESSARY PARTIES.

Where in partition it did not appear that plaintiffs were the only heirs of the deceased ancestor, it was error to permit them to recover any more than their respective interests in the premises.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 75.*]

9. ATTORNEY AND CLIENT (§ 71*)—AUTHORITY—OBJECTIONS.

A defendant in partition, relying on title by adverse possession, cannot defeat a recovery by plaintiffs by showing that the suit was brought by an attorney without authority.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 100; Dec. Dig. § 71.*]

10. ATTORNEY AND CLIENT (§ 71*)—AUTHORITY OF ATTORNEY—STATUTES.

The authority of an attorney to bring a suit can be attacked by defendant only in the manner prescribed by Rev. St. 1895, arts. 272, 273, authorizing a defendant by motion to require the attorney to show his authority, etc.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 71.*]

11. ADVERSE POSSESSION (§ 116*)—INSTRUCTIONS—ACTUAL POSSESSION.

A charge so worded as to make a party's right to recover on his plea of limitation in partition depend on his "cultivation, use, and enjoyment" in connection with his possession, is affirmatively erroneous and prejudicial; the law only requiring cultivation, use, or enjoyment.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 116.*]

12. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF DISPUTED FACT.

In partition in which the question whether plaintiffs were the only heirs of the deceased ancestor was in issue, an instruction that unless defendant, relying on a plea of limitation, had held actual and hostile possession for a specified time, the verdict must be for plaintiffs, was erroneous as assuming that plaintiffs were the only heirs of the ancestor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-435; Dec. Dig. § 191.*]

13. ADVERSE POSSESSION (§ 13*)—ACTS CONSTITUTING POSSESSION—INSTRUCTIONS.

In order to constitute adverse possession there must be actual, visible, notorious, distinct, and hostile possession of the premises, cultivating, using, or enjoying the same for the statutory period.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 65; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 1, pp. 227-235; vol. 8, p. 7568.]

14. TENANCY IN COMMON (§ 15*)—RIGHTS OF CO-TENANTS—ADVERSE POSSESSION.

A purchaser of the interest of an heir in a tract of land of the deceased ancestor becomes a tenant in common with the other heirs, and after his purchase his possession is not adverse to them, unless notice is clearly brought to them that he claims the entire tract as exclusive owner, and unless his previous actual possession and cultivation of a small part of the tract was such as to support the statute of limitations as to the entire tract.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

15. ADVERSE POSSESSION (§ 114*) — HOSTILE CHARACTER OF POSSESSION—EVIDENCE.

The evidence did not show 10 years' possession of a tract by a purchaser of the interest of an heir therein prior to his purchase, nor did it show that his possession and cultivation of a part of the tract was accompanied with a claim of ownership of the entire tract. The evidence was not clear as to any inclosure accompanied with use, enjoyment, or cultivation of any part of the tract by one acquiring title from such purchaser. *Held* not to establish adverse possession as against the other heirs of the ancestor.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 114.*]

16. PLEADING (§ 36*) — CONCLUSIVENESS OF ADMISSIONS.

The allegation, in a trial amendment filed by plaintiffs in partition setting up their claim for rents, that defendant had been in exclusive possession since a specified time, was not evidence of the fact of exclusive possession on the issue of limitation pleaded by defendant and denied by a supplemental petition.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 36.*]

17. APPEAL AND ERROR (§ 742*)—ASSIGNMENT OF ERROR—PROPOSITIONS—REVIEW.

An assignment of error, which presents several distinct propositions of law, and which does not in itself present a proposition, cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

18. APPEAL AND ERROR (§ 548*)—REFUSAL TO GIVE INSTRUCTIONS — STATEMENT OF EVIDENCE—REVIEW.

In the absence of a statement showing that the evidence authorized the giving of an instruction, the error complaining of the refusal to give the instruction cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2440; Dec. Dig. § 548.*]

19. APPEAL AND ERROR (§ 750*)—ASSIGNMENTS OF ERROR—QUESTIONS RAISED.

A party complaining of the refusal of the court to give a charge, which erroneously assumed the existence of a fact contradicted by the testimony of witnesses, cannot complain of the refusal of the court to give a correct charge, on the ground that the requested charge sufficiently called the court's attention to the point, and the failure of the court to give a correct charge, after its attention had been called to a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

point by an erroneous requested charge, must be specifically assigned.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 750.*]

20. PARTITION (§ 51*)—PARTIES—SERVICE OF SUMMONS.

Where in partition the names and residences of all the heirs of the deceased ancestor cannot be given, resort may be had to the statute authorizing service by publication on unknown heirs.

[Ed. Note.—For other cases, see Partition, Dec. Dig. § 51.*]

On Rehearing.

21. PARTITION (§ 75*)—JUDGMENT—ERRORS—EFFECT.

Where, in partition, the evidence showed that the premises descended in equal shares to the nine children of the deceased ancestor, and that one of the children and her husband and children were dead, and the proof established beyond dispute that designated persons before the court were heirs and entitled to designated shares in the premises, the judgment should give to such persons their proper shares, and the judgment against defendant relying solely on title by adverse possession should stand, though the court erred in proceeding to decree a partition without having all of the parties in interest before it.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 210; Dec. Dig. § 75.*]

22. DESCENT AND DISTRIBUTION (§ 84*)—CONVEYANCES BY HEIRS—CONSTRUCTION.

Where an heir conveyed his own interest as heir of the deceased ancestor and his interest as heir of a deceased heir without other heirs than the heirs of the deceased ancestor, the grantee acquired the entire interest of such heir.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 325; Dec. Dig. § 84.*]

Appeal from District Court, Fayette County; L. W. Moore, Judge.

Action by R. C. Webb and others against Mrs. E. C. Hess and others. From a judgment for plaintiffs, defendant Mrs. E. C. Hess appeals. Reformed and affirmed in part. Reversed and remanded in part.

Brown & Lane, for appellant. John T. Duncan and Will A. Morriss, for appellees.

REESE, J. In the original petition filed in this suit, R. C. Webb and 25 others sought to have partitioned between themselves and Mrs. E. C. Hess and husband, Ida Smith and husband, F. E. Young, W. R. Young, Ernest Young, Jennie Young, and Mary Young (the last three minors), named as defendants, a tract of 100 acres of land, described as the Polly Webb tract in a partition of a larger tract among the children of John Sorrell. It is alleged in the petition that the plaintiffs are descendants and heirs of the said Polly Webb, long since dead, and as such own eight-ninths of said tract, being the shares of eight of her said children, and including the whole tract, less one-ninth interest belonging to defendants, being the interest of one of the children of said Polly Webb acquired by purchase by Wm. Young, the former husband of Mrs. Hess, and the father

and grandfather of the other defendants. The suit was instituted in 1897. In 1905, the original petition having been lost, plaintiffs had leave to substitute, under which they filed a new pleading in lieu of the last petition, and also making several new plaintiffs whose rights had not therefore been asserted. The defendants F. E. Young and W. R. Young disclaimed any interest in the land. Defendants Ida Smith and husband and Ernest, Mary, and Jennie Young, minors, disclaimed as to all of the land except 17.4 acres, described by metes and bounds, as to which they pleaded not guilty and limitation of three, five, and ten years. Defendants Mrs. Hess and husband disclaimed as to all of the 100 acres, except 73.8 acres, which they describe by metes and bounds, as to which they pleaded not guilty, denied that plaintiffs had any title to any part thereof, and pleaded also the three, five, and ten years' statute of limitations. The case was tried with a jury May 3, 1907, who returned a verdict in favor of all of the defendants except Mrs. Hess and her husband, and as to them found in favor of plaintiffs for the "amount of 73 acres of land held by Mrs. E. C. Hess, less her one-ninth interest." Upon this verdict judgment was rendered quieting the title of Mrs. Smith and her husband and Ernest, Jennie, and Mary Young to the 17.4 acres claimed by them. F. E. and W. R. Young were dismissed on their disclaimer, and judgment for plaintiffs against Mrs. E. C. Hess and husband for eight-ninths of the 73.8 acres, with decree of partition, and appointing commissioners to set off eight-ninths to plaintiffs and one-ninth to Mrs. Hess. Her motion for a new trial having been overruled, Mrs. Hess and husband prosecute this appeal from the judgment.

As proper for a clear comprehension of the points at issue in the controversy, the following facts, substantially established by the undisputed testimony, are stated: Polly Webb was one of the nine children of John Sorrell, who died prior to 1850, owning a tract of land on the Colorado river embracing the Thomas Alley quarter league, and 122½ acres of another survey, in all 1,229½ acres. In 1850 this tract was partitioned among his children; Polly Webb receiving as her share the 100 acres in controversy, being a long narrow tract abutting, at the north end, on the Colorado river, and running back from the river south about 2,500 varas. Polly Webb died in 1851, and this tract of land descended to her nine children, to wit, Minerva Hughes, Sarah Rebecca Butler, Ellisha Webb, Matilda Clemens, Mary Brown, Emily Terry, Caroline Risher, John Webb, and Robert Webb. William Young, the husband of Mrs. Hess, the father of F. E. and W. R. Young, and the grandfather of the other defendants, children of Robert Young, a son of William Young, acquired title to all of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lands divided among the heirs of John Sorrell in the partition aforesaid, except the 100 acres allotted to Polly Webb, and by purchase acquired also the title of Elisha Webb, one of her children, to his one-ninth interest in the Polly Webb tract. William Young died in 1873 leaving surviving as his heirs his widow, Mrs. Hess, and three children, to wit, F. E., W. R., and Robert (or R. W.) Young. Robert died leaving his widow, Mrs. Ida Smith, and children the minors, Ernest, Jennie, and Mary Young. Adjoining the Polly Webb tract on the east along its entire length is another tract of 100 acres, which, in the partition among the heirs of John Sorrell, was allotted to the heirs of Kitty Barnes, one of the children of John Sorrell. The title to this tract was acquired by William Young, and it formed a part of the body of land owned by him at his death, which included the entire John Sorrell tract of 1,229 $\frac{3}{4}$ acres, except eight-ninths undivided of the Polly Webb tract. In 1874 the widow and children of William Young by reciprocal deeds partitioned among themselves this body of land, in which partition 188 acres was allotted to each of the children, and 564 acres to Mrs. Hess; the land being community of William Young and wife. The sum of the different tracts was 1,128 acres, but in the several deeds it is stated that the land so partitioned was: "1,129 acres of land out of the Thomas Alley one-fourth league and the N. Woods tract, being the home tract of the community property of William Young, dec'd." The different tracts are described by metes and bounds, from which it appears that no part of the Kitty Barnes 100 acres was included in the partition deed, except 15 acres off of the south end, but that the entire Polly Webb 100 acres was embraced in the partition; 73.8 acres thereof being given to Mrs. Hess, and included in the field notes of the land conveyed to her, 17.4 to Robert Young, and 8.8 to F. E. Young. This 8.8 acres was sold by F. E. Young before suit, and his vendee was not a party, and that portion is not affected by the judgment. The heirs of Robert Young had judgment for the 17.4 acres, and that portion is not affected by this appeal. These two tracts were off the south end of the tract. The partition deeds were not filed for record until October 7, 1885.

Unless Mrs. Hess has title by limitation, the undisputed evidence shows title in the heirs of Polly Webb to an undivided eight-ninths of the 73.8 acres in controversy upon this appeal. It is contended by appellants that the uncontroverted evidence established Mrs. Hess' title by limitation of both five and ten years. On the other hand, it is strenuously insisted by appellees that the evidence was not sufficient to raise this issue. The court instructed the jury that "plaintiffs have shown a legal title, and should recover in this suit, unless the same be defeated by the pleas of limitation of the defendants."

The first assignment of error is based upon the action of the court in proceeding to judgment and decreeing partition of the land between Mrs. Hess, as the owner of one-ninth, and the plaintiffs, as the owners of the balance, after it was shown that certain persons, naming them, not parties to the suit, were part owners. Under this assignment, the following proposition is stated: "Whenever in the trial of a partition suit it becomes apparent that there are part owners of the property sought to be partitioned, who are not parties to the suit, the trial should be suspended until such part owners are brought before the court, and, unless this be done, no valid partition decree can be made, and one entered without such parties will be reversed." This proposition is undoubtedly correct and sustained by the unbroken current of authorities in this state and elsewhere. *Holloway v. McIlhenny*, 77 Tex. 637, 14 S. W. 240; *Black v. Black*, 95 Tex. 627, 69 S. W. 65; *Maverick v. Burney*, 88 Tex. 560, 32 S. W. 512; *De la Vega v. League*, 64 Tex. 212. It remains only to make application of this principle to the facts as shown by the record. The title of Polly Webb descended at her death to her nine children, and the plaintiffs named in the petition are clearly shown to be descendants of those nine children. The issue presented is whether the evidence disclosed the existence of other heirs of Polly Webb, not parties, or presented an issue on that point which should have been submitted to the jury.

The persons named in the assignment, not parties to the suit, who, it is claimed, were shown to be part owners of the land, are Catherine, Cynthia, Owen, John, Gibb, Sophronia, S. A., and J. Pat Butler, children of Sarah Rebecca Butler, one of the children of Polly Webb, Mary Brown, daughter of Polly Webb, Ella Tabor and her husband, and the two daughters of Emily Terry, a daughter of Polly Webb, also the seven children of Elisha Webb, a son of Polly Webb. Mrs. Butler was one of the nine children of Polly Webb, and was shown to have been long since dead. As to her heirs, A. T. Hughes, one of the plaintiffs and a witness in their behalf, testified that certain persons named in the petition as plaintiffs were the children of Mrs. Butler, and that they were all of said children that he knew of that were living; that there were some other children, but he thinks they died in infancy. R. C. Webb, a grandson of Polly Webb, whose deposition was read in evidence by defendants, when asked to give the names, ages, and places of residence of each of the children of Mrs. Butler, answered: John, W. P., Robert, Gibb, Sophronia, Catherine, Cynthia, Josephine, and Owens. The persons named by the witness Hughes as children of Mrs. Butler, and who are parties to the suit, are S. A., J. A., R. J., and Caldenia Butler, S. V. Brooks, S. H. Defee, and J. H.

Tabor; the three latter married women. Where only the initials are given, some of the persons named by R. C. Webb might be the same as some of those named by Hughes, as, for instance, Sophronia might be the same as S. A., or John or Josephine might be the same person as J. A. or R. J. Going as far as we can, however, in reconciling these two statements of the two grandsons of Polly Webb, it is clear that some of the persons named by R. C. Webb as the children of Mrs. Butler are not parties to the suit. The only inference to be drawn from his statement is that he is referring to the children of Mrs. Butler then living. No attempt is made to reconcile these two statements, and they raise an issue of facts as to who are the heirs of Mrs. Butler, and whether those named in the petition are her only heirs and entitled in this suit to recover her one-ninth interest. We think the court was not warranted in assuming upon this evidence that the persons named in the petition were the only heirs of Mrs. Butler. The issue should have been submitted to the jury.

As to Mary Webb, who married Brown and had two children, the evidence of the witness Hughes that, according to family history, she, with her husband and two children, perished at sea in 1855 or 1856, and that none of them had been heard of since their embarkation upon such voyage, was sufficient, when not in any way controverted, to establish not only that they were all dead, but that they perished at the time and under the circumstances stated. *Johnson v. Merithew*, 80 Me. 111, 13 Atl. 132, 6 Am. St. Rep. 162; *Estate of Williams*, 128 Cal. 552, 61 Pac. 670, 79 Am. St. Rep. 69.

This also disposes of the objection that the heirs of Elisha Webb were not parties to the suit. He sold his interest in 1858, and, if Mrs. Brown and her children were then dead, there was left in him no interest, as an heir of Mrs. Brown, to descend to his children. The death of Mrs. Brown and her children is established not solely as an inference from the fact that they had not been heard of in 50 years, but by the general reputation in the family that she perished in the particular manner and at the time referred to.

One of the plaintiffs named in the petition is Ella Taylor, one of the descendants of John Webb. The record shows that Hughes testified that Ella Tabor was one of the children of John Webb. He makes no reference in his testimony, as shown by the stenographer's notes, to Ella Taylor. We think that it may be assumed that this is a mistake of the stenographer in copying his notes, and that Ella Taylor was meant, which, however, should have been detected and corrected by appellees' counsel.

As to the two daughters of Emily Terry, who, it is objected, were shown to be entitled to an interest in the land, and who are not parties to the suit, the evidence

shows that Emily Webb was a daughter of Polly Webb, that she married a man named Terry, that they are both long since dead, leaving as their only heirs a son, Robert Terry, and two daughters, both of whom married. Robert Terry is made a party, but neither of the daughters, nor any one representing their interest, except Robert. Appellees contend that the evidence was sufficient to show that they were both dead without issue or descendants, in which event Robert Terry would be entitled to their interest. The only evidence upon this point is the testimony of A. T. Hughes, who stated, speaking of Mrs. Terry: "She left three children. I only know one of them that is now living. She had a son, Robert Terry. He was living the last I heard of him a year ago. I think the balance of them are dead. Could not say positively, but I tried to find them, and I could not. Lived in Union Parish, La. They married and went away somewhere, I heard, but am not positive about that. Do not know where they are now. Have not heard of them in 12 years." Testifying by deposition, he said: "Emily Webb Terry had three children, two girls and one boy. The son, Robert Terry, lives near Farmersville. Union Parish, La. The two daughters both married. We have not heard from them for 12 or more years, and do not know whether they or their families are living or not." It seems that this branch of the family lived at the time of Mrs. Terry's death, in Union Parish, La. This evidence seems to have been taken as establishing the entire extinction of the families of these two married women, not only that they were both dead, but either that they had no issue, or, if they had, they were all dead. The evidence is entirely insufficient for such purpose. It amounts to nothing more than that Hughes, and possibly those of the family with whom he had communicated, had not heard of them in 12 years. No attempt was made to get the testimony of Robert Webb on this point. *Turner v. Sealock*, 21 Tex. Civ. App. 594, 54 S. W. 358; *Johnson v. Johnson*, 170 Mo. 34, 70 S. W. 247, 59 L. R. A. 748; *Francis v. Francis*, 180 Pa. 644, 37 Atl. 120, 57 Am. St. Rep. 668; *Latham v. Tombs*, 32 Tex. Civ. App. 270, 73 S. W. 1060; *Martin v. Royse*, 52 S. W. 1062, 21 Ky. Law Rep. 775.

Appellees contend that this failure of parties should affect only the decree for partition, and not the judgment establishing their title to the land; but this contention cannot be sustained. Plaintiffs sue for the entire interest remaining in the heirs of Polly Webb to the land, and the court instructed the jury that they had the legal title to this entire interest, which they recovered. To entitle them to recover in this measure, it was incumbent upon them to show affirmatively, not only that they were heirs of Polly Webb, but the only heirs. This could not be where the evidence disclosed the existence at one time of other heirs who were not shown

to be dead without other heirs than plaintiffs. Mrs. Hess, holding the title of one of Polly Webb's heirs, was a tenant in common with the others, and not a mere trespasser in such sense as to authorize some of the heirs to recover from her the entire estate. She has as much right, as such tenant in common, to the possession of that part belonging to the other joint owners, not parties to the suit, as have the plaintiffs. *Boone v. Knox*, 80 Tex. 642, 16 S. W. 448, 26 Am. St. Rep. 767.

The first assignment must be sustained, and what has been said necessarily disposes of other assignments hereafter referred to.

The error, if any, in allowing John Sherman to recover, along with the other plaintiffs, it not having been shown that he was one of the heirs of Polly Webb, did not affect any right of appellant, and the same may be said as to Ella Taylor, if, in fact, the failure to show her heirship is not due to a mere clerical error on the part of the stenographer as heretofore referred to. The second assignment, presenting these questions, is overruled.

We have said it was error to permit the plaintiffs to recover anything more than their respective interests in the land. If any of the parties to the suit were barred of their right by the statutes of limitation, such right did not inure to the benefit of the other plaintiffs; but appellant should have recovered such interest upon her plea. In so far as these principles were violated, as set out in the fourth and fifth assignments, they are sustained. It is not clear that they were violated. As to other matters complained of by the assignments and the various propositions thereunder, they are overruled.

The sixth, seventh, eighth, ninth, and tenth assignments present the same general question and cannot be sustained. During the trial appellant attempted to show that certain of the plaintiffs had not authorized the bringing of the suit in their names. The court excluded the evidence upon objection of appellees. This and the action of the court in allowing a recovery for these plaintiffs are assigned as error. In this connection it is proper to state that on the day of the trial, and before it began, appellant filed a motion to abate the suit as to these parties, which was overruled, and the ruling is made the basis of the twelfth assignment of error. We do not think that defendant should be allowed to defeat a recovery by plaintiffs by showing upon the trial that the suit was brought by the attorney without authority, nor can such authority be attacked except in the manner prescribed by the statute. Articles 272, 273, Rev. St. 1895. The motion referred to came too late, and was properly overruled.

The court charged the jury as follows: "You are charged that the plaintiffs have shown a legal title and should recover in this suit, unless the same is defeated by the

pleas of limitation of defendants." This charge is objected to on various grounds, as set out in the fourteenth assignment of error. All of these objections have been disposed of and held good by what has been said in disposing of the first assignment, except that the charge eliminated the right of recovery by appellant on the issue of a presumed deed from Polly Webb or her heirs to William Young. We do not think that the evidence was sufficient to raise this issue, and the court did not err in failing to submit it.

The seventeenth and eighteenth assignments do not present affirmative error. If the charge objected to had been so worded as to make appellant's right to recover on her pleas of limitation depend upon her "cultivation, use, and enjoyment" in connection with her possession, it would have been affirmative and prejudicial error. The law only requires cultivation, use, or enjoyment. *Railway Co. v. Hill*, 95 Tex. 629, 69 S. W. 136. The error was, no doubt, inadvertent, and will not occur on another trial.

The following portion of charge No. 2, given to the jury at the request of appellees, as set out in the nineteenth assignment, is objectionable: "Unless you further believe from the evidence that the defendant Mrs. E. C. Hess for five years or more before the institution of this suit, and after the 7th of October, 1885, had and held actual, visible, notorious, distinct, and hostile possession of the particular portion of the land included in her said deed of partition embraced within the Polly Webb tract, cultivating, using, or enjoying the same, why then, in that event, you are instructed to return a verdict in favor of plaintiffs and against the defendant Mrs. Hess for that portion of the land in controversy now claimed by her." This charge contains one prejudicial error, not cured by other portions of the court's charge, in that it assumes that the plaintiffs named in the petition were the only heirs of Polly Webb. The first part of the charge, which seeks to apply to the case the principles announced in *Turner v. Moore*, 81 Tex. 206, 16 S. W. 929, is correct. See, also, *Faison v. Primm* (Tex. Civ. App.) 34 S. W. 834; *Polk v. Beaumont Pasture Co.*, 26 Tex. Civ. App. 242, 64 S. W. 58, 2 Tex. Ot. Rep. 786. In this connection, however, in view of another trial, we will state that, if we are limited to a consideration of the evidence on the statute of limitation to which we are referred in appellant's brief, it is not clear that it raises the issue of the statute of limitations of either five or ten years.

By the purchase by William Young of the interest of Elisha Webb, he became a tenant in common with appellees of the land, and after that date his possession was not adverse to them, unless notice was clearly brought to them that he claimed the entire tract as exclusive owner, and also unless his previous actual possession and cultivation of

the small portion at the south end was such as to support the statute as to the entire tract. This status continued until the record of the deed to Mrs. Hess conveying to her the 73.8 acres in controversy, unless notice was sooner, in some way, brought home to appellees that the possession, hitherto of a tenant in common, had become that of a claimant of the entire title. As we understand the evidence, it fails to show ten full years' possession by William Young of any part of the Polly Webb tract prior to the acquisition by him of the Elisha Webb interest in 1862. Nor does it show that his possession and cultivation of the few acres on the extreme south end was accompanied with a claim of ownership of the entire 100 acres. The evidence is not clear as to any inclosure accompanied with use, enjoyment, or cultivation of any part of the 73.8 acres by appellant after she acquired the title in 1874. The allegation in the so-called trial amendment filed by appellees, setting up their claim for rents, that appellant had been in exclusive possession since 1895, was not evidence of that fact upon the issue of limitation. The allegations of the answer setting up the defense of limitation was denied by a supplemental petition, and the statement in the trial amendment of appellees in connection with their claim for rents cannot be taken as an admission of exclusive possession on this issue, in the face of the express denial of that fact in the supplemental petition. *Railway Co. v. DeWalt*, 96 Tex. 121, 70 S. W. 531, 97 Am. St. Rep. 877, 5 Tex. Ct. Rep. 1006; *Duncan v. Magette*, 25 Tex. 246.

The twenty-second assignment is not so presented in the brief that it can properly be considered. It presents several distinct propositions of law, and cannot be considered in itself as a proposition. It does not, however, present reversible error.

What has been said sufficiently disposes of the twenty-third assignment. The facts did not raise the issue of presumption of a deed.

We think it hardly necessary, in view of what has been said, to discuss the twenty-fourth and twenty-fifth assignments. The charge of the court on the issue of limitation of ten years was hardly as full, clear, and distinct as it should have been, in view of the different aspects in which the issue was presented.

The twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth assignments of error, complaining of the action of the court in refusing certain charges, cannot be considered. There is no statement properly showing that the evidence authorized the giving of these charges. In view of the disability of certain of the plaintiffs set up in the supplemental petition, if the evidence raised the issue of possession during the lifetime of their ancestors, or before the coverture of the plaintiffs pleading coverture, the jury should have been instructed as to the legal effects of such facts.

The charge requested and refused and made the basis of the thirtieth assignment assumes that Robert Terry was dead, but the evidence referred to in the statement shows that two witnesses testified that he was living, and one that he was dead. The charge was properly refused. Appellant cannot object, under this assignment, that, if erroneous, it was sufficient to call the court's attention to the point and require a correct charge. Such error should have been specifically assigned. *El Paso El. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735.

It was error to permit the witness Reeves to testify, as set out in the thirty-second assignment. The statement was too general and indefinite to be entitled to consideration.

The third, thirteenth, fifteenth, sixteenth, twentieth, twenty-first, and thirty-first assignments, with their various propositions, are overruled without discussion.

It may be difficult in this case to show the names and residences of all of the heirs of Polly Webb so as to have a partition of the land. In case this cannot be done, resort may be had to the statute authorizing service by publication upon unknown heirs. All such heirs must be made parties in some way before partition can be had, but without this plaintiffs would be entitled to recover the title and right of possession to such part of the land as they may respectively show themselves entitled to, but no more.

For the errors indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

On Rehearing.

As will appear from the opinion in this case, the judgment of the trial court was reversed, and the cause remanded, for errors in proceeding to decree a partition of the property without having all of the parties in interest before the court.

On motion for rehearing, it is urged that the judgment in favor of some of the parties before the court for their respective interests in the land should be allowed to stand, and the judgment should be reformed to that extent and affirmed. Upon a careful consideration again of the whole case, we are of the opinion that this should be done, as none of the errors assigned are sufficient to require a reversal of the judgment in so far as it establishes the title of some of plaintiffs against the defendant Mrs. Hess for their respective interests. The verdict of the jury, which in this regard should not be disturbed, was against Mrs. Hess on her plea of limitation, and she has no other title.

Polly Webb's estate descended to and vested in equal shares in her nine children. Minerva Hughes, Sarah Rebecca Butler, Elisha Webb, Matilda Clemens, Mary Brown, Emily Terry, Caroline Risher, John Webb, and Robert Webb. By the death of Mrs. Brown, her husband, and children in 1835 or 1856, there were left only eight children

to inherit the Polly Webb tract. The evidence was conflicting as to whether the persons so named as plaintiffs were sole heirs of Sarah Rebecca Butler, and Mrs. Emily Terry, and as to whether Robert Terry, named as her sole surviving heir, was alive. The evidence establishes beyond dispute that A. T. Hughes and J. D. Hughes are the sole heirs of Minerva Hughes; that Mary Brantley is the sole heir of Matilda Clemens; that Cora Durbridge, Carrie Rossiter, and Howard Risher are sole heirs of Caroline Risher; that William Webb, John Webb, Robert Webb, Ora West, Ella Taylor, and Minnie Woodward are sole heirs of John Webb; and that R. C. Webb, Rufus Webb, and Hattie Everett are sole heirs of Robert Webb. We are of the opinion that the judgment should be reformed so as to adjudge to said parties the one-eighth interest, respectively, of their ancestors, and, as so reformed, should be affirmed. In so far as the judgment disposes of the interests of those claiming to be heirs of the other children of Polly Webb and decrees a partition, it should be reversed, and the cause remanded.

Upon the death of Mrs. Brown, one-eighth of her one-ninth interest was inherited by Ellisha Webb, and, when he conveyed to Sorrell, he, had in addition to his one-ninth interest, as one of the nine children of Polly Webb, this one-eighth as one of the heirs of Mrs. Brown, making his entire interest one-eighth. If his deed to Sorrell conveyed only his one-ninth interest, this left the balance of his interest, or one-eighth of one-ninth, to descend to his heirs, who are not parties. If his deed conveyed his entire interest, then Mrs. Hess owns one-eighth, instead of one-ninth. At all events, this one-eighth of one-ninth does not belong to the other plaintiffs.

Let the judgment be reformed and affirmed in part and reversed and remanded in part, accordingly. Costs of the appeal will be adjudged against appellees.

Reformed and affirmed in part. Reversed and remanded in part.

WESTERN UNION TELEGRAPH CO. v. MORAN.†

(Court of Civil Appeals of Texas. Oct. 28, 1908. Rehearing Denied Nov. 25, 1908.)

1. TELEGRAPHS AND TELEPHONES (§ 74*) — DEATH MESSAGES — DELAY — IDENTITY OF SENDER — MATERIALITY.

In an action for delay in delivering a death message to a wife which prevented her from attending the funeral, she alleged decedent's employer's agent had sent the message in the employer's name, that if defendant had delivered it without delay plaintiff would have answered it and had decedent's remains sent home for burial, or would have telegraphed the employer to delay the burial until her arrival. *Held* that, in the absence of special exceptions, the allegations authorized submission of an issue whether, if plaintiff had sent a message, the "person or persons"

having charge of the body would have postponed the burial.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 74.*]

2. TELEGRAPHS AND TELEPHONES (§ 66*) — DEATH MESSAGES—EVIDENCE—SUFFICIENCY.

Evidence *held* to show that, if a death message had been received without delay, the addressee would have telegraphed the sender to delay burial.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.*]

3. TELEGRAPHS AND TELEPHONES (§ 66*) — DEATH MESSAGES — DELAY IN DELIVERY — EVIDENCE.

In an action for delay in delivering a death message, thereby preventing addressee from delaying, by a reply telegram, the burial until her arrival, she could show that the message was sent in the name of the person whose name was signed to the message by his employe, and that his employes were authorized to and did receive messages directed to him.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 66.*]

4. TELEGRAPHS AND TELEPHONES (§ 38*) — DEATH MESSAGES—DUTY OF COMPANY.

That a telegraph company accepted and transmitted a death message implied an obligation to make prompt delivery.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.*]

5. TELEGRAPHS AND TELEPHONES (§ 38*) — DEATH MESSAGES — IDENTITY OF SENDER — MATERIALITY.

That the employer whose name was signed to a death message by his agent was in another state does not prevent the addressee from recovering for delay in its delivery on the theory that, if it had been delivered promptly, by sending a reply she could have had the burial postponed, where the agent who sent the message would have received any messages directed to the employer and would probably have postponed the burial.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 38.*]

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by C. Moran against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Webb & Goeth, for appellant. C. S. Robinson, for appellee.

FLY, J. This is a suit for damages instituted by appellee, alleged to have accrued by failure to deliver within a reasonable time a certain message delivered to appellant, in which was contained information as to the death of her husband in Louisiana, and requesting instructions as to the disposition of the body. The cause was tried by jury, and resulted in a verdict and judgment in favor of appellee for \$1,400.

On the evening of September 7, 1906, the following telegram was delivered to appellant at Grosse Tete, La.: "Mrs. C. Moran, North Olive St., San Antonio, Texas: Mr. Moran dead. Advise disposition of remains. details by letter. W. O. Robertson. 10:35

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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† Writ of error denied by Supreme Court.

p. m." That message was delivered to Mrs. Moran between 11 and 12 o'clock on the morning of September 9, 1906. The body of Mr. Moran was buried at 6 o'clock p. m. on September 8, 1906. The deceased, husband of appellee, was working for W. O. Robertson at the time of his death, near Grosse Tete, La., which could be reached by railroad in 24 hours from San Antonio. The message was sent by Kendall, who was working for Robertson. Appellee immediately sent a telegram to W. O. Robertson on September 9th, asking as to what disposition had been made of the remains, and next day received a message that they had been buried at Rosedale, La. A reasonable time for the delivery of the message to appellee would have been 2 hours, and it was delivered in about 40 hours. Robertson was not in Louisiana at the time of the death of appellee's husband, and knew nothing about the message which was sent in his name to appellee. Mrs. Moran would have telegraphed for a postponement of the funeral had she received the message promptly, and the funeral would have been postponed.

The following allegations appear in the petition:

"And plaintiff further says if defendant had delivered the message to her at any time during September 7th, or on the morning of September 8th, she would have at once answered the same by telegram and had her husband's remains at once shipped to San Antonio, plaintiff's home, and the same could and would have reached San Antonio in time for plaintiff to have viewed and looked upon the face of her husband, and to attend and be present at his funeral, and the children of plaintiff and deceased to have viewed and looked upon the face of their father once more; or that plaintiff would have promptly telegraphed to W. O. Robertson to hold the body of her husband, that she would come to the burial, and she would have at once gone to Grosse Tete, La., with the children, and been present at the funeral and burial of her husband, and the remains would have been withheld from burial until she, together with the children, could be present at the burial of her husband in Louisiana. Or plaintiff would have gone to Grosse Tete, La., and directed the disposition of her husband's remains, or wired advice and made proper arrangements for his burial. But not receiving any answer from plaintiff to the aforesaid telegram, plaintiff's husband was buried by strangers at Grosse Tete, La., at about 6 o'clock p. m., September 8, 1906.

"That plaintiff desired to see her husband's face once more and to be present at his funeral, and desired that the children should once more look upon the face of their father and be present at the funeral. But when plaintiff received said message it was impossible for her to have gone to the burial of her husband or have his remains shipped to San Antonio; the said message having been

received too late. Plaintiff further says that had a message been telegraphed by her to W. O. Robertson in answer to the one sent to her under his name and received, stating that plaintiff desired the remains of C. Moran, her husband, shipped to San Antonio, that the same would have been promptly shipped as directed by plaintiff, and she would have had the funeral of her husband take place in San Antonio from her home, and she, together with the children, could have attended the same, and they would have done so, or the body of her husband would have been kept out of the grave till she arrived in Louisiana and was present at the burial."

It is the contention of appellant that it was fundamental error for the court to instruct the jury as to their verdict if they found "that if she had sent such message the person or persons having charge of said body would have been advised of the contents of said message, if any, and would have postponed said burial." What appellant deems to be a fundamental error in the charge copied does not clearly appear, but we conclude from the statement that "the charge with reference to all other persons, except W. O. Robertson, submits an independent, material, and indispensable question of fact not found in the petition," that it is the ground upon which claim of fundamental error is based. The claim is untenable. The allegations of the petition, while general, justify the charge.

The message to appellee was sent by one Kendall, the timekeeper of W. O. Robertson. In the name of the latter, who was at the time in San Antonio, Tex., and could not have received any reply to the message sent to him at Grosse Tete, La., and through the first assignment of error the claim is made that appellee should not recover because she could not, as alleged, have sent a message to Robertson in Louisiana. The assignment is without merit. If the message sent to appellee in the name of Robertson had been promptly delivered, and if a message sent to him in reply would have been the means of keeping the remains of the deceased husband out of the ground until appellee could have reached them, it is utterly immaterial whether Robertson sent or authorized the sending of the message or not, or whether he would ever have seen a message in reply or not. The only question in this connection was whether, if a message sent in the name of W. O. Robertson had been promptly delivered, appellee would have wired a reply which would have had the result of causing the body of her husband to be held until she could have seen it. It would not matter if W. O. Robertson was the veriest myth that the imagination could create, still, if some one under that name was sending and receiving messages bearing on the death and burial of Christopher Moran, the allegations of the petition were answered by proof of such facts. When appellee did telegraph to W. O. Robertson, a prompt answer was returned.

We cannot sustain the contention, embodied in the second assignment of error, that there is no evidence that the plaintiff would have telegraphed to W. O. Robertson to hold the body of her husband as alleged in the petition. Mrs. Moran swore: "I would have sent them a telegram that I was coming at once, notified them, for the purpose of seeing his remains, to be at his funeral," and "I would have wired them to hold the remains; that I wanted to be present at the funeral. I would have gone immediately. I had the means to go, and I would have gone." It is clear that appellee meant by "them" the person who had sent her the message, and the jury was fully justified in so finding.

The court did not err in charging the jury as to whether, if the message had been promptly delivered, appellee would have promptly notified W. O. Robertson by telegram to hold the body of her husband until she could reach the place where the body was held and be present at the funeral. She so alleged, and she sustained the allegation by proof, which was not militated against by the fact that the real W. O. Robertson was in San Antonio. The man using his name was in Louisiana, and he, to all the intents and purposes of this case, was W. O. Robertson.

The allegations of the petition were sufficient, in the absence of special exceptions, to justify the charge complained of in the fourth assignment of error. It was entirely proper, under the allegations and evidence, for the court to submit the issue as to whether the "person or persons having charge of said body would have been advised of the contents of said message." It was developed by the evidence that other persons than Robertson had charge of the body, and the issue was as to whether a message to W. O. Robertson would have reached the person or persons, and whether he or they would have heeded the message. The petition was full and explicit enough to withstand a general demurrer and to justify the evidence upon which the charge was based. The authorities cited by appellant do not militate against the propriety of the action of the court below.

Appellee alleged that one W. H. Kendall had sent the message on which the suit is based, and had signed it "W. O. Robertson," and had paid the toll, and that appellant had contracted to deliver it promptly and had not done so, and that had she received that message promptly, she would have telegraphed W. O. Robertson and the remains would have been held. It will be seen that appellee put appellant upon notice that Robertson had not sent the message, but that another in his name had sent it, and that a message to Robertson would accomplish what she desired. If appellant desired a more definite allegation as to who would have received a message directed to W. O. Robertson, it should have invoked it through the

medium of special exceptions. It is useless to argue that it would have been the duty of appellant to have delivered the message to W. O. Robertson in person and to no one else, in view of the fact that when the message was sent to Robertson it was delivered to some one else, and, when the service message was sent, it went to Kendall. It seems that it was customary to deliver messages directed to Robertson to his employés. Appellant was fully informed by the petition as to what evidence it would have to meet. Appellant seeks by assignments in this court to reach supposed defects in the petition which could only be reached, in the usual and orderly course of practice, through special demurrers. There is nothing in the petition that would lead to the conclusion that the holding of the body would depend upon W. O. Robertson; but, on the other hand, it clearly appeared that he did not send the message, and would not receive it in any other way than through the person sending the message. There is no allegation that W. O. Robertson would have held the remains, as is contended by appellant.

The objection to the testimony of H. C. Lewis is based on the predicate that the petition alleged that W. O. Robertson would in answer to the message have delayed the funeral, and, there being no such allegation in the petition, there is a necessary collapse of the objection. It was not definitely alleged that any certain person would have held the body, but the allegation was broad and general, and sufficient to justify proof that Lewis would have held the body.

It was proper to prove that the message was sent by Kendall, and that the employés in Robertson's camp were authorized to, and did, receive messages directed to him. Appellant is in no position to claim any surprise on these points, when it is shown that, in connection with the very message on which this claim for damages is based, it delivered two messages, addressed to Robertson, to his employés. It shows that it was following an established custom, and, if not, that it would have delivered any reply to the message from appellee to any employé of Robertson who applied for it, and Lewis did apply for the reply.

The circumstances tend to show that Kendall sent the message, and it appears from the telegram itself and from the fact of its delivery that appellant had accepted it and was cognizant of its importance. The facts were sufficient to show a contract to deliver with promptness. The very fact that the message was accepted and transmitted by appellant carried with it an obligation of prompt delivery.

The issue was not raised by allegation or proof as to appellee's ability to reach Grosse Tete in time for the funeral, but the issue was, would appellee have been able to have postponed the funeral until she could have gotten there, if the message had been prompt-

ly delivered? The evidence tended to show that she could have postponed the interment until she reached Grosse Tete. The whole of appellant's argument is based on the fallacious premise that appellee's case is destroyed by proof that Robertson was not in Louisiana and could not have received any messages. As the case was developed, it did not matter where he was, nor that he would not have received any message sent to him in Louisiana. The man who sent the message was there, and would have received any messages directed to Robertson, and would probably have postponed the burial.

The judgment is affirmed.

TEXAS & N. O. R. CO. v. JACKSON.†

(Court of Civil Appeals of Texas. Oct. 21, 1908.
Rehearing Denied Nov. 25, 1908.)

1. MASTER AND SERVANT (§ 217*)—ASSUMPTION OF RISKS.

A railroad employé assumes the risks ordinarily incident to the service he engages to perform, and such others, including negligence of the company's servants chargeable to it, as he knows of or must necessarily have known of in the ordinary discharge of his duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

2. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—ASSUMED RISK.

In a personal injury action by a servant against the master, where it was not shown that the servant knew or should have known that the appliance which caused the injury was defective, there was no evidence to sustain the defense of assumed risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

3. MASTER AND SERVANT (§ 243*)—INJURIES TO SERVANT—FAILURE TO OBEY RULES.

The violation of a railroad company's rule forbidding a servant from going between moving cars to couple them, etc., would not of itself preclude the servant's recovery for resultant injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 767; Dec. Dig. § 243.*]

4. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR—REFUSAL OF REQUESTS FOR INSTRUCTIONS.

Where a party has procured the giving of a special charge, it cannot complain of the court's refusal to give others on the same subject in conflict therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. § 882.*]

5. TRIAL (§ 260*)—REFUSAL OF REQUESTS—REQUESTS COVERED BY COURT'S CHARGE.

It is not error to refuse a special charge, covered by the court's general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from District Court, Harris County; C. E. Ashe, Judge.

Personal injury action by Everett C. Jackson against the Texas & New Orleans Rail-

road Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a personal injury suit, which resulted in a verdict and judgment for the plaintiff for \$6,000, and the defendant has appealed. The case was submitted to the jury upon the following instructions given by the trial judge.

"(1) Negligence, as a law term, means the want of ordinary care; that is, the want of such care as an ordinarily prudent person would have exercised under the same or similar circumstances.

"(2) Contributory negligence, as a law phrase, means such act or omission on the part of a plaintiff as an ordinarily prudent person would not do or suffer to be done under the same or similar circumstances, which, concurring with the negligent act or omission of a defendant, becomes a proximate cause of an injury.

"(3) By proximate cause is meant an efficient cause without which the injury would not have happened, and from which danger of injury might reasonably have been anticipated as a natural and probable consequence.

"(4) A railroad corporation operating a railroad, the line of which is situated in whole or in part in this state, is made liable by a statute for all damages sustained by an employé thereof while engaged in the work of operating the cars or trains of such corporation by reason of the negligence of any other servant or employé of such corporation; and the fact that such servants or employes were fellow servants with each other would not impair or destroy such liability.

"(5) An employer, such as a railroad company, is not required to furnish absolutely safe appliances, but owes to an employé the duty of exercising ordinary care to maintain the appliances with which he is called upon to work in a reasonably safe condition for the use of which they are designated; and negligence of any employé or servant charged with the performance of that duty, no matter what his rank or grade, is deemed in law the negligence of the employer.

"(6) An employé of a railroad company is held in law to assume such risks as are ordinarily incident to the service he engages to perform, and such others as he knows of or must necessarily have known of in the ordinary discharge of the duties of his service; but risks arising from negligence of the company's servants or employes that is chargeable to it are not assumed by an employé, unless he knows of them or must necessarily have known of them in the ordinary discharge of the duties of his service, and until then he has a right to assume that risks arising from such negligence do not exist.

"(7) An employé, in law, is bound to exercise ordinary care for his own safety in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

discharge of the duties of his service, and if by negligence on his own part he contributes to the injury of which he complains, he cannot recover therefor.

"(8) If you believe from the evidence (a) that plaintiff, on the occasion in question, was in the employment of defendant as switchman, and as such engaged in the work of operating its trains or cars at Echo, and that, while so employed and engaged, he undertook to adjust the drawbars between two cars, and that he was, in so undertaking, acting in the ordinary discharge of the duties of his service, and (b) that, while so engaged and undertaking, he was injured by the bounding back of one of the cars, substantially as alleged, and that such bounding back was on account of the car striking another in which the knuckle of its coupling appliance was closed, and (c) that defendant had failed to exercise ordinary care to maintain the coupling appliance of which said knuckle was a part in a reasonably safe condition, and that on account thereof such coupling appliance was in a condition that kept the knuckle from being open, or (d) that said knuckle was not in such condition, but that some employé or servant of defendant, in the course of his service for it, left the knuckle closed, instead of open, and that he, in so doing, failed to exercise ordinary care, as before defined, and (e) that in either event such want of ordinary care was a proximate cause, as above explained, of plaintiff's alleged injuries—then let the verdict be for plaintiff, unless you find for defendant on the issue of contributory negligence or on the issue of assumed risk as submitted by the court.

"(9) The burden is upon the plaintiff to prove by a preponderance of the evidence, to be considered in its entirety, no matter by which side adduced, the facts necessary to make out a case for his recovery, as submitted by the court in the next preceding paragraph, and unless such facts are so established, the plaintiff cannot recover.

"(10) Therefore, if you do not believe from the evidence that the car in question bounded back and injured plaintiff substantially in the manner alleged, or if you do not believe that the bounding back of the car, if it did so, was on account of the knuckle of the car it is alleged to have struck being closed instead of open, or if you do not believe that such knuckle being closed, if it was, was due to negligence of the defendant or of one of its servants or employés in that behalf, as before explained, or should believe that the company had used ordinary care to see that same was in a reasonably safe condition, or if you do not believe that such negligence, if shown, was a proximate cause of plaintiff's alleged injuries—that is, an efficient cause without which they would not have happened, and from which danger of injury might reasonably have been anticipat-

ed as a natural and probable consequence—then let the verdict be for the defendant.

"(11) Although you may find that defendant was negligent in the particular submitted, and that such negligence was a proximate cause of plaintiff's alleged injuries, yet if you believe from the evidence that plaintiff on the occasion in question, in shoving or attempting to shove the drawhead or drawbar to the car attached to the engine, if he did so, he placed his hand in a dangerous position, and that in either or both particulars such conduct, on account of its being contrary to the rule of defendant in evidence, if it was, or independent of such rule, was a failure on his part to exercise such care for his own safety as an ordinarily prudent person would have exercised under the same or similar circumstances, then let the verdict be for defendant on account of plaintiff's contributory negligence.

"(12) If you believe from the evidence that plaintiff's alleged injury was the result of a risk ordinarily incident to the service in which he was engaged as an employé of defendant, or that it resulted to him from a risk that was known to him or must necessarily have been known to him in the ordinary discharge of the duties of his service, then let the verdict be for the defendant on account of plaintiff's having assumed the risk.

"(13) In determining the issue submitted in the next preceding paragraph, you are instructed that if plaintiff's alleged injury was the result of defendant's negligence, or that of one of its servants or employés, chargeable to it as submitted by the court, then if plaintiff had no knowledge of the danger or risk thence to him arising until he was injured, and if he would not necessarily have known thereof in the ordinary discharge of the duties of his service until injured, the defense of assumed risk is not sustained.

"(14) The only alleged ground of negligence upon which plaintiff relies is that the knuckle on the east end of the stationary car in question was closed instead of being open, and to that ground alone must your inquiry be confined.

"(15) If your verdict is in favor of the plaintiff, then assess his damages at such sum as you believe from the evidence will fairly and adequately compensate him for the alleged injuries which you may find he sustained, taking into consideration as elements of damage, so far as shown by the evidence to result, naturally and probably, from such injuries, the following: First, mental anguish and physical suffering to him therefrom, if any, including such, if any, as you may believe from the evidence will in reasonable probability ensue to him therefrom in the future; second, the reasonable value of his lost time therefrom, if any, until now; and, third, the reasonable value, if paid now.

of his diminished earning power from such injuries in the future, if any.

"(16) You will, on the issues submitted, consider the court's instructions to you in their entirety, and not in isolated or detached parts alone, and be bound by the law as given you herein; but you are the exclusive judges of the weight of the evidence and credibility of the witnesses, and by your conclusions thereon, under the law as given you in charge by the court, let the verdict be determined."

Special charges given at request of defendant:

"(1) You are instructed that if you believe from the evidence that the plaintiff, E. C. Jackson, while engaged in coupling and uncoupling the different cars in the yards at Echo on the evening of the accident complained of, at and prior to the time of said accident knew, or by the exercise of ordinary care in the discharge of his duties would have known, of the defective condition of the coupling apparatus on the east end of the stationary car against which the car he was attempting to couple bumped (if you believe such apparatus was defective), and that plaintiff knew, or by the exercise of ordinary care would have known, of the location of said car, and that an ordinarily prudent person under the same or similar circumstances would not have attempted to make the coupling of the cars in the manner plaintiff did, and that such want of ordinary care on his part was the direct and proximate cause of his injuries, then he is not entitled to recover in this case, and if you so find you will return a verdict for defendant."

"(6) You are charged that if you believe from the evidence in this case that the plaintiff, in going between the cars in the manner and under the circumstances disclosed by the evidence, violated one of the rules of the company in that regard, but that such rule was habitually violated by the employes of such company; but that, notwithstanding such habitual violation of said rule, such act on the part of plaintiff was one which a person of ordinary prudence would not have performed under the same or similar circumstances, and was a want of ordinary care on his part, and that such want of ordinary care was the direct and proximate cause of his injuries then he would not be entitled to recover in this case, and, if you so find, you will return a verdict for defendant."

"(8) You are instructed that if you believe from the evidence that the knuckle on the drawhead on the east end of the car, against which the car which plaintiff was attempting to couple struck and rebounded, was closed, and if you further believe from the evidence that if said knuckle had been open there is a probability that said cars would not have coupled, and that said car which struck the stationary car would have rebounded so as to have caught plaintiff's

hand, and that plaintiff in the ordinary discharge of his duties as a switchman knew, or by the exercise of ordinary care would have known, that such rebound might occur whether said knuckle was open or closed, and that plaintiff's attempt to couple said cars under such circumstances was a lack of ordinary care on his part, and that such want of ordinary care contributed to his injuries, then you will find for defendant, although you may believe that the company was guilty of negligence in leaving the knuckle on the stationary car closed."

Baker, Botts, Parker & Garwood and Lane, Jackson, Kelley & Wolters, for appellant.
Ewing & Ring, for appellee.

KEY, J. (after stating the facts as above). Appellant's first assignment of error challenges the correctness of the sixth paragraph of the court's charge, and the proposition asserted thereunder is that an employe assumes such risks as arise from the negligence of his master as he has knowledge of, or might know and avoid by the exercise of ordinary care. The proposition asserted is too broad, and the charge of the court stated the law correctly. *Ry. Co. v. Hannig*, 91 Tex. 347, 43 S. W. 508; *Ry. Co. v. Davidson*, 107 S. W. 949, 20 Tex. Ct. Rep. 643; *Ry. Co. v. Vizard* (Tex. Civ. App.) 88 S. W. 461; *Ry. Co. v. Stoy* (Tex. Civ. App.) 99 S. W. 135; *Ry. v. Englehorn*, 24 Tex. Civ. App. 324, 62 S. W. 561; *Ry. v. McClane*, 24 Tex. Civ. App. 321, 62 S. W. 566. Furthermore, it was not shown that the plaintiff knew or should have known that the appliance which caused his injury was not in proper condition. This being the case, it may be doubted if the question of assumed risk should have been submitted to the jury. At any rate, there was no evidence which would sustain that defense.

Under the eighth assignment the appellant criticises the court's charge upon the contention that it submitted an issue not raised by the testimony and too remote to be considered in deciding the case. We overrule that assignment, and hold that all the issues presented in the paragraph of the charge referred to were presented by the testimony and proper to be considered by the jury.

The third assignment is addressed to the action of the court in refusing a special instruction requested by appellant, stating to the jury that there was no evidence to sustain the second count in the plaintiff's petition, and therefore to find for the defendant upon that issue. In view of instructions given in the charge of the court, and especially the fourteenth paragraph thereof, it must be held that no error was committed in refusing the requested instruction. We must assume that the jury was composed of men of average intelligence and fairness, and, in view of the court's charge, there can be no reason to suppose that the jury was misled and decided the case upon any ground of

negligence charged against the defendant, except the one specifically submitted in the court's charge, and to which the charge in express terms limited the jury's consideration. The plaintiff admitted that before the accident in question he was served with a copy of the rule issued by the defendant, which among other things, warned employees not to attempt to go between cars while in motion to couple them, to open, close, or arrange the knuckles or coupling, and that persons guilty of the violation of that rule would be discharged and not reinstated. There was some testimony tending to show that at the time the plaintiff was injured he was between two cars, one of which was in motion. There was testimony to the effect that the rule in question was, with the knowledge of the defendant, habitually disregarded, and that the plaintiff, in going where he did and doing as he did on the occasion in question, did that which was usual and customary on the defendant's road. Appellant requested three special instructions in regard to the rule in question, one of which the court gave and the other two were not given. The two that were refused were to the effect that a violation of the rule referred to by the plaintiff would constitute a defense, while the one that was given did not have that effect, unless such violation was such an act as a person of ordinary prudence would not have committed under the same or similar circumstances, and was a want of ordinary care on the plaintiff's part.

The fourth and sixth assignments of error complain of the action of the court in not giving the two special charges that were refused. For three reasons, those assignments will be overruled: In the first place, the refused instructions did not state the law correctly (*Ry. Co. v. Adams*, 94 Tex. 100, 58 S. W. 831; *Ry. Co. v. Connell*, 27 Tex. Civ. App. 533, 66 S. W. 246; *Ry. Co. v. Still* [Tex. Civ. App.] 100 S. W. 176); in the next place, they would have conflicted with the special charge given at the instance of the defendant upon that subject; and, third, appellant having asked more than one charge upon the same subject, and the court having given one, it cannot be heard to complain of the refusal of the others (*Cane Belt Ry. v. Crosson*, 39 Tex. Civ. App. 369, 87 S. W. 867).

The fifth assignment complains because the court refused the following requested instruction: "You are further charged that a railroad company is required to use ordinary care to provide its employees with safe appliances with which to perform their work, but it is not required to furnish appliances absolutely safe. Reasonable or ordinary care is all that is required. If, therefore, you find from the evidence that the defendant company and its servants had in this case used ordinary care to see and know that the

drawhead in question was in a reasonably safe condition, then you must find for the defendant." This instruction would have added nothing not covered by the court's charge, and for that reason, if for no other, its refusal constituted no error.

The seventh and last assignment assails the verdict of the jury on five separate grounds. We overrule that assignment, and hold that in the particulars referred to, and in all other material respects, the verdict of the jury is sustained by testimony.

In concluding this opinion, we desire to express our approval of the trial court's charge to the jury. It states the rules of law and submits the issues to the jury with a degree of terseness, perspicuity, and accuracy which we have seldom, if ever, seen excelled in such a document.

No error has been shown, and the judgment is affirmed.

FORDTRAN v. STOWERS.†

(Court of Civil Appeals of Texas. Nov. 4, 1908. Rehearing Denied Nov. 23, 1908.)

1. BROKERS (§ 40*)—SALE OF REAL PROPERTY—RIGHT TO COMPENSATION—VOLUNTARY SERVICES.

A broker cannot recover for services in the sale of real property rendered voluntarily and without authority or promise from the owner.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 38; Dec. Dig. § 40.*]

2. CONTRACTS (§ 15*)—REQUISITES AND VALIDITY—NATURE AND ESSENTIALS—MUTUALITY—OFFER AND ASSENT.

One of the essential elements of a contract, either express or implied, is an agreement or meeting of the minds of the parties by an offer on the one hand and an acceptance on the other.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 61; Dec. Dig. § 15.*]

3. CONTRACTS (§ 3*)—"EXPRESS CONTRACTS"—"IMPLIED CONTRACTS."

The terms "express contracts" and "contracts implied in fact" are used to indicate, not a distinction in the principles of contract, but a difference in the character of the evidence by which the contract is proved, and the same elements are essential in each case.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 3; Dec. Dig. § 3.*]

For other definitions, see *Words and Phrases*, vol. 3, p. 2606; vol. 4, pp. 3428-3431.]

4. BROKERS (§ 85*)—SALE OF REAL PROPERTY—ACTIONS FOR COMMISSIONS—EVIDENCE.

In an action by a broker for commissions for the sale of defendant's land, evidence of a conversation between plaintiff and the prospective purchaser regarding the sale, defendant not being present, was admissible only to show what efforts, if any, plaintiff made to sell the land.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 85.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY—LIMITING EFFECT OF EVIDENCE.

Where testimony is evidence only on one issue, and it is apprehended that it may be considered by the jury in determining other questions, the party desiring to limit the jury in its

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

consideration to such issue should ask a special charge to that end.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 632; Dec. Dig. § 256.*]

6. BROKERS (§ 88*)—SALE OF REAL PROPERTY—COMMISSIONS—ACTIONS—INSTRUCTIONS.

Where, in an action by a broker for commissions for the sale of land, the petition declared on a verbal contract made on a certain day, and specifically set forth the terms of the agreement and its performance by plaintiff, an instruction that, unless the jury believed that defendant expressly employed plaintiff on the day named as his agent to sell the land, they should find for defendant was proper.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 88.*]

7. CONTRACTS (§ 346*)—ACTIONS—PLEADING—ISSUES, PROOF AND VARIANCE.

One cannot declare on an express contract and recover on an implied agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1748; Dec. Dig. § 346.*]

8. BROKERS (§ 40*)—AUTHORITY—FORM—EVIDENCE.

A broker has authority to act for his principal only by virtue of an appointment express or implied, though no particular form is necessary for such appointment, and ordinarily all that is necessary is to show that the broker acted with the consent of his principal, whether given by a written instrument, orally, or by implication from the conduct of the parties.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 38-40; Dec. Dig. § 40.*]

9. TRIAL (§ 251*)—INSTRUCTIONS—CONFORMITY TO PLEADINGS.

Instructions, based on a theory not deducible from the petition, are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

10. TRIAL (§ 260*)—INSTRUCTIONS COVERED BY MAIN CHARGE.

An instruction, the substance of which is embraced in the main charge, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

11. CONTRACTS (§ 353*)—BREACH—ACTIONS—INSTRUCTIONS.

Since, to authorize a recovery for a breach of contract, the proof must show that the very contract declared on was breached, the court's charge should be so drawn as to identify the contract sued on, and confine the jury to the issues whether such contract was made, whether it was broken, and the damage from its breach.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 353.*]

12. TRIAL (§ 131*)—REMARKS OF COUNSEL—EXCEPTIONS.

In a broker's action for commissions, a remark of defendant's counsel in his argument that he believed the testimony showed that plaintiff's claim was a concocted scheme to defraud defendant, etc., should have been excepted to when made or at least during the trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 313; Dec. Dig. § 131.*]

13. BROKERS (§ 82*)—COMMISSIONS—ACTIONS—EVIDENCE—QUANTUM MERUIT.

In a broker's action for commissions, under an express contract fixing the compensation plaintiff was to receive, evidence of the value of his services was inadmissible.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 82.*]

Appeal from District Court, Bexar County; Arthur W. Seeligson, Judge.

Action by W. B. Fordtran against G. W. Stowers. Judgment for defendant, and plaintiff appeals. Affirmed.

Masterson, Atkinson & Masterson, Cobbs & Cobbs, John H. Cunningham, E. T. Chew, and Geo. W. Graves, for appellant. Nat. B. Jones, for appellee.

NEILL, J. The appellant sued appellee to recover \$5,000 as commissions alleged due him as a real estate broker, for services rendered in effecting a sale of certain real property of the latter. Plaintiff's petition, after alleging that on September 16, 1906, he was pursuing the business of a real estate broker in the city of Houston, Harris county, Tex., avers substantially that on the day aforesaid he entered into a verbal contract with defendant, whereby he agreed and undertook to sell, for a commission hereinafter stated, certain designated real estate for the defendant, which the latter represented to plaintiff that he owned and would sell and convey a good title thereto to any purchaser plaintiff could procure for him; that plaintiff, being engaged in such business, and learning that defendant was desirous of selling the property, after making inquiries and ascertaining that he had a client in the market for such property, endeavored to make arrangements with defendant whereby he could sell such property; that he had various negotiations, beginning in the early part of September, 1906, with defendant, and that, finally, on or about October 4, 1906, he went to San Antonio to see the defendant, when and where it was agreed between plaintiff and defendant that, in case the former should procure a purchaser for the latter able to purchase it, the property could be sold for a sum not less than \$200,000, part cash, and the balance to be paid for by the purchaser assuming an outstanding obligation against it of \$75,000, and that plaintiff was to receive, in compensation for his services in effecting the sale, a commission of 2½ per cent. on the sum of \$200,000; that in the conversation culminating in the agreement plaintiff represented to defendant that H. Masterson was a customer of his (plaintiff's), whom he had induced to make an offer to purchase the property for the sum of \$210,000, to be paid by his assuming the \$75,000 debt against the same, by paying defendant \$85,000 cash, and conveying him Houston real estate to the value of \$50,000; that defendant was not willing to accept the trade as an entirety which would compel him to take any real estate as a part of the consideration, but agreed with plaintiff that he might continue his agency to make the sale if he could convert any of the property Masterson proposed to convey into money, so

the trade could be carried out, and to that end defendant allowed plaintiff 30 days to consummate the trade and convert the property, proposed by Masterson as a part of the consideration, into money; that notwithstanding the agreement that plaintiff was to have more time to consummate such trade with Masterson, defendant himself, before the time had elapsed, closed the trade with him; that defendant fully understood the terms upon which the sale was to be made by plaintiff to Masterson and fully ratified such terms, and authorized plaintiff to make the same, whereby defendant agreed and obligated himself to pay plaintiff 2½ per cent. commission on \$200,000, the price for which the property was sold; that the refusal of defendant to accept said proposition upon the terms and conditions, as alleged, made for Masterson was for the purpose of depriving plaintiff of his justly earned commission, and defeat him by selling the property himself; that thereafter defendant went to H. Masterson and sold the property to him for \$200,000, which was the amount paid and assumed by the purchaser to defendant for the property, such being the sum defendant had agreed with plaintiff to accept upon his procuring a purchaser; that when defendant made the sale, he had full knowledge of the fact that H. Masterson was a customer of plaintiff, and had been by him interested in the property, induced to consider the purchase, and procured as a purchaser of the property, plaintiff being the real and moving cause of bringing defendant and Masterson together and effecting the sale; that plaintiff procured Masterson as a purchaser, who was ready and able to carry out, at any time, the contract in accordance with the terms and stipulations made to him by plaintiff, as before alleged, and that therefore plaintiff has become entitled to the sum of \$5,000 as his commission together with interest from date of sale. After making the averments, as above stated, the petition continues, verbatim, as follows: "Plaintiff further represents that, in pursuance of the said contract so entered into by and between him and the defendant, he used his utmost diligence, and worked faithfully to secure a purchaser for the property who was able to comply with the terms thereof, and that he did procure and bring to the said defendant the said H. Masterson, who agreed to take said property upon the terms and stipulations required, as hereinbefore set out, and could have, and would have, within the said 30 days sold said land received from said Masterson for not less than \$45,000, but said defendant, so your petitioner believes, for the purpose of preventing your petitioner from receiving the amount of his compensation for the services performed—to earn the commission upon said sale—rejected the said Masterson, and endeavored to cancel his contract with plaintiff, although he knew plaintiff had performed the services faithfully and well, and that

thereafter that said defendant himself, ignoring the rights of your petitioner, took up the sale with said Masterson, who would not have purchased from the defendant had it not been for plaintiff, and closed the trade for some less than he was willing to take for the property from plaintiff by closing the trade with said Masterson for the sum of \$200,000 aforesaid. Wherefore, for the reasons stated hereinbefore, the said defendant, by virtue of said contract, became indebted to the said plaintiff in the sum of \$5,000, as commission. The plaintiff further represents that said sum of \$5,000 commission is a reasonable value of said services performed, and that said services performed, as hereinbefore stated, are reasonably worth the sum of \$5,000, and that said sum was and is the usual and customary amount paid for such services on such contracts in the city of Houston, Harris county, Tex." It concludes with a prayer for \$5,000, with interest thereon at the rate of 6 per cent. per annum from date of sale. The defendant answered by general and special exceptions (none of which was presented to the court) to plaintiff's petition, a general denial, and specially that, if plaintiff was instrumental in making the sale, his conduct, acts, and services in effecting it were purely voluntary, without authority from defendant or promise of compensation therefor, and that if any compensation is due plaintiff, it is by the purchaser, H. Masterson, and not defendant; and that the sale was made by one Morse & Stowers, and not by plaintiff. The case was tried before a jury, who returned a verdict for defendant, upon which the judgment appealed from was entered.

Conclusion of Fact.

The evidence wholly fails to show that any such agreement or contract as is declared upon was ever made by the plaintiff and defendant.

Conclusions of Law.

1. Under our view of the case, which will be exposed in considering other assignments, it is immaterial whether plaintiff was the procuring cause of the alleged sale or not. For, if our view of it is correct, it may be conceded that the undisputed evidence shows he was the procuring cause, still, as there was an absolute failure of evidence to prove other facts essential to his recovery, a verdict in no event could have been rendered for him. Therefore the plaintiff could not have been prejudiced by the third paragraph of the court's charge, as is complained of in the second assignment, even should it be construed to have submitted as an issue a fact proved by the undisputed evidence.

2. There was no error affording plaintiff any just ground of complaint in the court's charging the jury that, if they believed from the evidence plaintiff's conduct, acts, and services concerning the sale of defendant's

property were voluntary, and without authority or promise from the defendant, their verdict must be for him. One of the essential elements of a contract is an agreement or meeting of the minds of the parties, by an offer on the one hand, and an acceptance on the other. This necessary element must be present in an implied, as well as in an express, contract. If it is absent in either, no obligation is created. The terms "express contracts" and "contracts implied in fact" are used to indicate, not a distinction in the principles of contract, but a difference in the character of the evidence by which a simple contract is proved. The same elements essential to constitute a contract of the one character are necessary to the existence of the other. If, then, the plaintiff's services in effecting the sale were voluntary, and without authority or promise from the defendant, as the jury found, and as we believe the evidence clearly shows, there was an absence of an essential element—"a meeting of the minds by an offer on the one hand, and acceptance on the other"—of a contract, either express or implied, and no obligation rested upon the defendant to pay plaintiff anything, though he may have rendered services in effecting the sale. It is for these reasons we have held the charge, complained of by the third assignment, not erroneous in so far as it affects plaintiff.

3. What was said in the conversation between plaintiff and H. Masterson in Houston on October 5th and 6th regarding the sale of the property, the defendant not being present, was not admissible as evidence for any purpose, save to show what efforts, if any, plaintiff made to sell the property to Masterson. Where testimony is evidence only upon one issue, and it is apprehended it may be considered by the jury in determining other questions, it is the duty of a party who desires to limit the jury in its consideration to such issue to ask a special charge to that end. Therefore the special charge, given at defendant's request, which is complained of in the fourth assignment of error on the ground that it so limits the effect of such testimony, was proper.

4. The court did not err in instructing the jury that, unless they believed from a preponderance of the evidence that the defendant expressly employed plaintiff on October 4, 1906, as his agent to sell the property, they should find for the defendant. For it will be observed that the petition declares upon a verbal contract made on the day referred to in the charge, and specifically sets forth the terms of the agreement entered into between the parties, and its performance by the plaintiff. It, in connection with defendant's answer, presented the issues: (1) Was such contract made? And (2) if it were, was it performed by the defendant? Unless the first was established in the affirmation, there was an end of the case; for no one can ever perform an agreement that never existed. If

there was an implied agreement constituting plaintiff defendant's agent to effect the sale. It should have been pleaded by specifically alleging the facts and circumstances from which the contract might be implied so as to enable the court to determine from the allegations whether they were such as, if proved, would constitute a contract. Certain it is that one cannot declare upon an express contract, and, failing to prove it, recover upon the same allegations by reason of such failure, on an implied agreement. If the language used by plaintiff and defendant in the conversation between them on October 4, 1906, which plaintiff introduced in evidence in support of his allegations as to an express contract did not show a verbal contract, it certainly cannot be taken as proof of an implied one.

5. The seventh assignment of error complains of the court's refusing this special charge: "The plaintiff would be entitled to recover if you believe from all the evidence that he was the moving and efficient cause of the sale even though the sale was made by the defendant at a price and upon terms different from those originally stipulated; and, if you find that the plaintiff was the moving and efficient cause of the sale, you will find in favor of him for the amount sued for"—requested by plaintiff. The effect of this charge is to assume as a fixed fact the affirmative of a controverted issue; i. e., that plaintiff was authorized by the defendant to effect the sale. Unless, as we have before held, there was a contract, express or implied (in this case, it must have been express as it was so alleged), between the parties creating plaintiff defendant's agent to effect the sale, the former, though he may have been the efficient cause of its consummation was not entitled to recover anything for his services. As in all classes of agents a broker has authority to act for his principal only by virtue of an appointment express or implied, by the latter. True no particular form is necessary for such appointment. Ordinarily all that is necessary to show is that the broker acted with the consent of his principal, whether given by a written instrument, by words or by implication from the conduct of the parties. This consent is the sine qua non to the broker's right to recover commissions for making a sale. For if the broker renders services as a mere volunteer, without authority, express or implied, the owner of the property is not bound to pay him anything for such services. *Pipkin v. Horne* (Tex. Civ. App.) 68 S. W. 1000; *Ehrenworth v. Putnam* (Tex. Civ. App.) 55 S. W. 190; *Dunn v. Price*, 87 Tex. 319, 28 S. W. 681; *Cook v. Welch*, 91 Mass. 350; *Hinds v. Henry*, 36 N. J. Law, 328; *McVickar v. Roche*, 74 App. Div. 397, 77 N. Y. Supp. 501; *Villey v. Pettit*, 96 Ky. 576, 29 S. W. 438; *Walton v. Clark*, 54 Minn. 341, 56 N. W. 40; *Barton v. Powers*, 182 Mass. 467, 65 N. E. 826.

6. The same vice is apparent in special

charges Nos. 3 and 6, the refusal of which is the subject, respectively, of the eighth and eleventh assignments of error.

7. The ninth, tenth, fourteenth, and fifteenth assignments of error complain of the court's refusal to give certain special instructions, requested by plaintiff, submitting the case to the jury upon the theory of an implied contract. The requests were properly denied, because the theory upon which they were based was not deducible from plaintiff's petition, as is apparent from what we have said in disposing of other assignments.

8. The substance of special charge No. 8, which the thirteenth assignment complains of being refused, is embraced in the second paragraph of the main charge, which fully, clearly, and accurately states the law upon the phase of the case the special charge was intended to cover. Besides, the requested charge does not confine the jury in its deliberations to the contract pleaded by the plaintiff, but would have authorized a verdict for him upon the proof of any contract defendant might have made with plaintiff to find a purchaser for the property described in the pleading, in which it was agreed to pay the latter 2½ per cent. commission on the amount the property was to be sold for, provided he procured a purchaser ready, willing, and able to buy upon the terms specified in such contract. To authorize a recovery for a breach of contract the proof must show that the very contract declared upon was breached. Consequently the charge should be so drawn as to identify the contract sued upon, and confine the jury to it in its deliberations as to the issues of whether or not such contract was made, whether it was broken, and the damage ensuing from its breach. As there is no statement annexed to appellant's propositions under this assignment, as is required by rule 36 (67 S. W. xvi), we are not able to say, without reading the entire statement of facts, that there was not evidence of other contracts between the parties to which the requested charge would be as applicable as it is to the one declared upon.

9. The sixteenth assignment complains that the court erred in permitting counsel for defendant in his argument to state to the jury: "That he believed the testimony showed the claim of plaintiff was a concocted scheme to defraud defendant of \$5,000, and an unholy alliance between a real estate man and a lawyer." The bill of exception upon which this assignment is based shows upon its face that the language was not excepted to when used, nor until the bill of exception was drawn, which may have been, for aught it appears from the record, after the court adjourned. For the record shows that plaintiff was allowed 20 days from adjournment of court to prepare and file bills

of exceptions, that the court adjourned on February 1, 1908, and that the bill of exception was not filed until the 19th of that month. It is hardly necessary to say that a remark of the nature of the one in question should be excepted to when made, or at least during the trial. However, as the objection shown by the bill of exception was that there was no evidence of any such conspiracy between the land agent and the lawyer, and there is no statement subjoined to the proposition under the assignment in appellant's brief showing the lack of such evidence, we are not able to say as a matter of law that, notwithstanding the exalted character of their professions, an unholy alliance may not possibly exist between a real estate man and a lawyer. If, however, such an alliance is once shown to exist between them, it might be regarded by a lawyer, whose client is the victim of the conspiracy, as fraudulent per se.

10. The seventeenth and eighteenth assignments of error complain of the court's excluding certain testimony offered by plaintiff for the purpose of showing the value of his services. If the contract sued upon was ever made by the parties, it fixed the compensation he was to receive for his services. If it was not made, he was entitled to nothing on a quantum meruit. Therefore the testimony was properly excluded.

There is no error in the judgment, and it is affirmed.

FARENTHOLD v. TELL, et al.

(Court of Civil Appeals of Texas. Oct. 28, 1908. Rehearing Denied Nov. 25, 1908.)

1. APPEAL AND ERROR (§ 747*) — CROSS-ASSIGNMENTS—FILING—NECESSITY.

Whether a petition states a cause of action may be questioned on plaintiff's appeal, notwithstanding the cross-assignments directed to the overruling of a demurrer may not have been filed in the trial court as required by rule 101 for district and county courts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3053; Dec. Dig. § 747.*]

2. INTOXICATING LIQUORS (§ 283*) — CIVIL DAMAGE LAWS — STATUTORY PROVISIONS — REPEAL.

The Baskin-McGregor law does not repeal the provision of the former liquor law permitting aggrieved persons to recover the penalties prescribed for infractions of liquor bonds, but repeals only those parts of the former law in conflict with its provisions.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 283.*]

3. TRIAL (§ 251*)—CIVIL DAMAGE LAWS—ACTIONS FOR PENALTIES—INSTRUCTIONS.

Where, in an action on a retail liquor dealer's bond, the defense was that plaintiff's husband was not an habitual drunkard and a denial of a sale of liquor to him, a charge that if defendant sold liquor to plaintiff's husband, but in good faith under the belief that he was not an habitual drunkard, and there was no good ground for such belief, then plaintiff could not

recover, was erroneous, as it presented a defense not made by the answer.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

4. TRIAL (§ 251*) — INSTRUCTIONS — MATTERS NOT WITHIN ISSUES.

Where, in an action on a retail liquor dealer's bond, the charge presented a defense not made by the answer and upon which the verdict for the defense might have been founded, a reversal is required.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

5. APPEAL AND ERROR (§ 292*) — RESERVATION AND PRESENTATION OF ERROR — MOTION FOR NEW TRIAL — NECESSITY.

A motion for new trial is not required to render available error in instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1697; Dec. Dig. § 292.*]

6. TRIAL (§ 251*) — INSTRUCTIONS — CONFORMITY TO ISSUES.

Where, in an action on a retail liquor dealer's bond, the answer did not present the defense of good faith in a sale of liquor to plaintiff's husband, a charge on good faith cannot be sustained, even if there was evidence of a sale in good faith, admitted without objection from plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

7. INTOXICATING LIQUORS (§ 309*) — CIVIL DAMAGE LAWS — EVIDENCE — ADMISSIBILITY.

In an action on a retail liquor dealer's bond, what the liquor dealer thought about the efficacy of the revocation of notice not to sell to plaintiff's husband, or what induced plaintiff to make the revocation, was immaterial, and evidence on those points should not have been permitted.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 309.*]

8. INTOXICATING LIQUORS (§ 287*) — CIVIL DAMAGE LAWS — NOTICE NOT TO SELL — REVOCATION.

A notice not to sell intoxicating liquor to a person not an habitual drunkard may be withdrawn.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 287.*]

9. INTOXICATING LIQUORS (§ 309*) — CIVIL DAMAGE LAWS — DEFENSES — EVIDENCE.

In an action on a retail liquor dealer's bond it is no defense that notices to other liquor dealers than defendant not to sell to plaintiff's husband were revoked, and evidence thereof could not be used except possibly to corroborate evidence that defendant's notice had been revoked.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 309.*]

10. INTOXICATING LIQUORS (§ 293*) — CIVIL DAMAGE LAWS — DEFENSES.

To render revocation of a notice not to sell liquor to plaintiff's husband available as a defense to an action for breach of a retail liquor dealer's bond, it must be shown that the revocation was by plaintiff.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 293.*]

11. INTOXICATING LIQUORS (§ 309*) — CIVIL DAMAGE LAWS — EVIDENCE — ADMISSIBILITY.

In an action on a retail liquor dealer's bond for selling liquor to plaintiff's husband, an habitual drunkard, and after notice not to sell, evidence as to how plaintiff's husband acted to-

ward her and their son when intoxicated was not pertinent.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 447; Dec. Dig. § 309.*]

12. INTOXICATING LIQUORS (§ 306*) — CIVIL DAMAGE LAWS — DEFENSES.

In an action on a retail liquor dealer's bond for selling liquor to plaintiff's husband, an habitual drunkard, and after notice not to sell, her motive in instituting the action has no bearing on the case, and that part of the answer setting up that the action was fraudulently instituted for purposes of speculation should have been stricken.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 306.*]

13. INTOXICATING LIQUORS (§ 317*) — CIVIL DAMAGE LAWS — ACTIONS FOR PENALTIES — INSTRUCTIONS.

In an action on a retail liquor dealer's bond, wherein, under the pleadings, proof either that the husband was an habitual drunkard and liquor was sold to him, or that, after notice not to sell, liquor was sold him, would entitle plaintiff wife to recover, an instruction that the burden was on her to prove the material allegations of her petition was not calculated to mislead the jury to conclude that both phases of the case presented should be proved to justify a verdict for her.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 317.*]

Appeal from District Court, Colorado County; M. Kennon, Judge.

Action by Johanna Farenthold against William Tell, as principal, and others as sureties on his bond as a retail liquor dealer. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Brown, Carothers & Brown, for appellant. Adkins & Green, for appellees.

FLY, J. Appellant sued William Tell as principal, and W. C. Munn and T. A. Hill as sureties on his bond as a retail liquor dealer, for penalties arising from six several breaches of said bond in selling liquor to her husband, an habitual drunkard, and also after she had notified the liquor dealer not to sell liquor to her husband. The jury returned a verdict in favor of appellees, and from the judgment based thereon this appeal is prosecuted.

Before considering the assignments of error, we wish to dispose of the cross-assignments of appellees which seek a review of the action of the court in overruling their general demurrer. While the cross-assignments do not appear to have been filed in the trial court as required by rule 101, for district and county courts, still the question as to whether the petition is open to attack through a general demurrer—that is, fails to state a cause of action—is a fundamental one that may be raised without following the rules as to filing assignments.

The action in this cause arose under the law as to liquor dealers which was in force prior to the enactment of the present law, known as the "Baskin-McGregor Law," and the contention is that the latter law, being

intended to cover the whole subject of liquor dealing, repealed all former laws on the subject, and consequently all prosecutions under the former must fail. That question has been fully discussed by Courts of Civil Appeals in several of the districts, and has been decided each time contrary to the contention of appellee. We are of opinion that those decisions are correct in holding that the Baskin-McGregor law did not repeal the provision of the former law which permitted aggrieved persons to recover the penalties prescribed for infractions of liquor bonds, but repealed only those parts of the former law in conflict with its provisions. *Coughtry v. Haupt* (Tex. Civ. App.) 105 S. W. 516; *Jesse v. De Shong* (Tex. Civ. App.) 105 S. W. 1011; *Price v. Wakeham* (Tex. Civ. App.) 107 S. W. 132; *Markus v. Thompson* (Tex. Civ. App.) 111 S. W. 1074. The matter has been exhaustively treated in those decisions, and no good purpose would be subserved by a further discussion of it. The court very properly overruled the general demurrer.

All the defenses of appellees were contained in the following pleading:

"Further answering, these defendants emphatically deny that Herman Farenthold, the husband of plaintiff, is now or ever was an habitual drunkard; that he does not habitually indulge in the use of intoxicating liquors, but, on the contrary, is a sober and industrious man, and that the allegations to the contrary are untrue in fact.

"Defendants further represent to the court that if any legal notice not to sell intoxicating liquors to plaintiff's husband, Herman Farenthold, was ever served on the defendant William Tell, which is not admitted, but denied, then they say that the said defendant William Tell has never, since the service of said notice, sold or given, or permitted to be sold or given, at his place of business, or anywhere else, any intoxicating liquors to plaintiff's said husband, and they say that the allegation of plaintiff that he had so sold to her said husband is without foundation in fact and totally untrue.

"Defendants further represent that plaintiff alleges that on or about December 1, 1906, she notified defendant Tell in writing not to sell to plaintiff's husband any whisky, beer, vinous, spirituous, or malt liquors, or medicated bitters capable of producing intoxication.

"Now plaintiff avers that no such notice was served on him at the time alleged, and if plaintiff ever served him with legal notice not to sell such liquors to her said husband, which is not admitted, but denied, that same was done long previous to said date, the exact time plaintiff cannot state, but represents to the court that even previous to any such notice, and ever since the service of alleged notice, he has steadily refused to sell to Herman Farenthold any whiskies and liquors above mentioned; and these defendants here now respectfully represent, and state,

that if any legal notice was ever served upon the defendant Tell, that the plaintiff subsequent thereto and long before the time of any of the sales, etc., to plaintiff, gave her consent to the defendant Tell to sell her said husband intoxicating liquors, and did prior to the time of any of the alleged sales, etc., withdraw said notice, and therefore these defendants say that the said Tell was released from said notice not to sell, and these defendants therefore aver and charge that plaintiff has brought this suit in a fraudulent attempt to obtain money by mulcting these defendants, and for purposes of speculation, and cannot, and ought not, and should not, recover anything of these defendants."

It will be noted that there is no plea that the liquor was sold to the husband of appellant in good faith without knowledge that he was an habitual drunkard, but, on the other hand, the only defense bearing on the question of the husband being an habitual drunkard is that he did not habitually indulge in the use of intoxicating liquors, but was a sober, industrious man, and, further, denial of the sale of liquor to him. The question of selling to him in good faith with the belief that he was not an habitual drunkard does not arise even by inference or implication from the pleading. The court, however, instructed the jury:

"If you find from the evidence that at the time charged in the plaintiff's petition the said Herman Farenthold was an habitual drunkard, and that while he was such drunkard, and after the 13th day of September, 1905, and within the time charged in plaintiff's petition, the defendant William Tell did sell or give, or permit to be sold or given, to the said Herman Farenthold, at the defendant's said place of business, any spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, you will find for the plaintiff against all of the defendants five hundred dollars for each separate time that the said defendant so sold or permitted to be sold, or gave or permitted to be given, any of such intoxicants to the said Farenthold, substantially as charged by the plaintiff in her petition, unless you further find from the evidence that when the defendant Tell so sold or permitted to be sold, or gave or permitted to be given, such intoxicants to the said Farenthold, the sale or gift was made in good faith, with the belief that the said Herman Farenthold was not an habitual drunkard, and there was good ground for such belief, then, upon this branch of the case, you will find for the defendants."

The part of that charge on the question of good faith is attacked through the first assignment of error on the ground that it presented a defense not made by the answer, and is meritorious and must be sustained. The charge interpolated a vital issue into the case upon which the verdict of the jury may have turned. The verdict is a general one, and it cannot be said upon what issue the

jury based it. It is the rule that where a charge presents an issue outside of those made by the pleadings, and upon which the verdict might have been founded, the judgment based upon such verdict should be reversed. *Baldwin v. Peet*, 22 Tex. 708, 75 Am. Dec. 806; *Railway v. Terry*, 42 Tex. 491; *Loving v. Dixon*, 56 Tex. 75; *Railway v. French*, 86 Tex. 96, 23 S. W. 642; *Railway v. Vleno*, 7 Tex. Civ. App. 347, 26 S. W. 230.

Appellant did not file a motion for a new trial in the court below, and neither was it necessary for her to do so in order to raise errors committed by the court in its instructions to the jury, as is contended by appellee. Speaking on this subject, the Supreme Court held in *Clark v. Pearce*, 80 Tex. 151, 15 S. W. 787, that while appellate courts should not reverse upon the question of sufficiency of the evidence unless that question was presented to the trial court in a motion for new trial: "In regard to the rulings of the court upon exceptions to the pleadings, the admission of evidence, and in the giving or refusal of instructions, a different rule prevails. Having once acted, it is not to be presumed that the judge will change his ruling; and hence, in order to appeal from such action, it is not necessary that it be made ground for a new trial." That ruling has been cited and approved in other cases. *Telegraph Co. v. Mitchell*, 89 Tex. 441, 35 S. W. 4; *Railway v. Strycharski*, 92 Tex. 1, 37 S. W. 415.

The question of good faith was one purely defensive, and it devolved upon the defendant to allege and prove it. This is not an open question in Texas. In the case of *Lucas v. Johnson* (Tex. Civ. App.) 64 S. W. 823, it is said: "The good faith of appellants in making the sale to the minor was a defense to the suit which, to have been available, must have been pleaded and proven by the defendants. The plaintiff was not required to prove that the defendants did not act in good faith in selling liquor to the minor to make out his case, and, not being required to prove such fact, it was not necessary for him to allege it." To the same effect are *Haney v. Mann* (Tex. Civ. App.) 81 S. W. 66; *Farr v. Waterman* (Tex. Civ. App.) 95 S. W. 65. It would be intolerable to place upon those seeking redress in this class of cases not only the burdens of other plaintiffs, but also require them to anticipate, allege, and disprove any possible defenses that the defendants might desire to present.

The charge of the court on the good faith of Tell had no pleadings upon which to base it, and even if there had been evidence of a sale in good faith, admitted without objection on the part of appellant, the charge could not be sustained. *Cooper v. Loughlin*, 75 Tex. 527, 13 S. W. 37; *Telegraph Co. v. Smith*, 88 Tex. 9, 28 S. W. 931, 30 S. W. 540; *Moody v. Rowland*, 100 Tex. 363, 99 S. W. 1112.

If there was a revocation of the notice given by appellant to Tell not to sell liquor to her husband, the private opinion entertained by him as to the efficacy and legality of that notice could not affect its force and vitality, and neither could the motives actuating the making of the revocation affect its legality, and we cannot therefore sustain the second assignment of error, which complains of a charge on that subject. Tell swore that the revocation had no effect on his action in regard to the sale of liquor to appellant's husband, and that he did not sell him any liquor before or after the revocation. The jury, however, might have been convinced that Tell did sell the liquor after the revocation in spite of his denial, and yet, if they believed the revocation was made, it would be a defense to the sale. What Tell thought about the efficacy of the revocation, or what induced appellant to make the revocation, was immaterial, and evidence on those points should not have been permitted, and its elimination from another trial will remove any necessity or excuse for giving a charge similar to the one of which complaint is made. There should have been no issue in connection with the revocation, except as to whether or not it was given, which was a question purely of fact for the jury. The issue of revocation or no revocation was raised by the evidence. The illegality of the sale to the husband of appellant, in case he was not an habitual drunkard, depended on the notice given by her, and revocation or withdrawal of the notice at once removed him from the class of those to whom it was illegal to sell liquors. The wife, mother, daughter, or sister of any person has the power to place him in the class of those to whom the sale of liquor is prohibited, and has the power to withdraw him from that class by withdrawing or revoking the notice. The statute places the minor, the student of any institution of learning, and the habitual drunkard within the prohibited class, and no one has the authority to remove either of them from that class by consenting to a sale to him; but a different case is presented where the person is made a member of the prohibited class through and by virtue of a notice given by a person bearing a certain relation to him. She undoubtedly has the power to revoke her invocation of the statute. *Tipton v. Thompson*, 21 Tex. Civ. App. 143, 50 S. W. 641.

In connection with the revocation of the notice, it may be well to state that evidence of notices to other saloon keepers could not avail as a defense to Tell, for all other notices may have been revoked, yet, if the one served on Tell was not revoked, appellees would be liable to appellant on their bond. Testimony as to notices to other saloon keepers being revoked could not be used except possibly as a circumstance to corroborate the testimony that Tell's notice had

been revoked, and the evidence should be confined by the charge to that purpose. A revocation of the notice to Tell was pleaded, and in order to make it avail as a defense it must be proved that the notice to Tell was revoked by appellant.

We do not see the pertinency of the evidence as to the manner in which appellant's husband acted towards her and their son when he was intoxicated. It did not tend to prove that he was an habitual drunkard, and could have had no effect except perhaps to justify the action of appellant in serving notices on saloon keepers not to sell him liquor. She needed no justification for that action. It was her statutory right, and one she could exercise whether her husband ever became intoxicated or not. The exercise of her right under the statute was in no wise dependent upon the manner in which her husband treated her and her son while in a state of intoxication.

The question of whether the suit was fraudulently instituted by appellant for purposes of speculation had no place in the case, and that part of the answer setting up such a defense should have been stricken out on exception. Appellant's motives in instituting the suit could have no bearing on the case. *Johnson v. Rolls*, 97 Tex. 453, 79 S. W. 513. That opinion held that the law allowing suits of this character was not passed in order to compensate the aggrieved person, but to inflict punishment on violators of law. The motives of the aggrieved person could therefore cut no figure in the determination of the case.

Under the pleadings in the case, proof either that the husband was an habitual drunkard, and liquor was sold to him by Tell, or that, after notice was legally served on him by appellant, Tell sold him intoxicating liquors, would entitle appellant to a recovery, and the court, we think, clearly and succinctly, so instructed the jury. We do not think that a jury would be led, by an instruction that the burden was upon the plaintiff to prove the material allegations of her petition, to conclude that both phases of case presented by the allegations should be proved, to justify a verdict in favor of appellant.

For the errors indicated, the judgment is reversed and the cause remanded.

WELLS v. BENTLEY.

(Supreme Court of Arkansas. Oct. 19, 1908.)

1. APPEAL AND ERROR (§ 995*) — REVIEW — PRESUMPTIONS.

The Supreme Court is required to give the evidence its strongest probative force.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 995.*]

2. BOUNDARIES (§ 46*) — ESTABLISHMENT — AGREEMENT BETWEEN ADJOINING PROPRIETORS.

Where one adjoining owner at least, if not both, had regarded, before a survey, the middle of the lane which ran between their fences as the boundary between them, and after the survey the owner causing it to be made claimed all of the lane, and the owner first mentioned relinquished to him any right he might have in the lane, and thereupon he and the other owner agreed that the fence should be the line between them, there was such a dispute over the boundary line as to meet that requirement of the rule that boundary lines cannot be established by parol agreement, unless there be an uncertainty as to where the line is and a dispute as to it by the parties.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 216; Dec. Dig. § 46.*]

3. ADVERSE POSSESSION (§ 66*) — HOSTILE CHARACTER.

Where an adjoining owner held possession and asserted title to land extending to his line, intending to claim to the particular line, his possession was adverse so as to ripen into title after the requisite period.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 376; Dec. Dig. § 66.*]

Appeal from Circuit Court, Conway County; Hugh Basham, Judge.

Action by W. P. Wells against O. T. Bentley. Judgment for defendant, and plaintiff appeals. Affirmed.

Sellers & Sellers, for appellant. Chas. C. Reid, for appellee.

HILL, C. J. This case involves the fixation of a boundary by Bentley and Wells' predecessor in title, one Ward. It was tried before the circuit judge sitting as a jury. Appellant principally relies for reversal upon this statement of the law: "Boundary lines cannot be established by oral agreement so as to bind the parties, unless there be at the time of the agreement an uncertainty as to where the line is and a dispute over the line by the parties to the contract." This was asked as a declaration of law, but the court refused to so declare it in this form, and declared it with the omission of the latter clause, "and a dispute over the line by the parties to the contract."

Appellant has favored the court with an interesting review of the law upon this subject; the argument being predicated upon the necessity of a dispute in order to make valid an oral fixation of a boundary line. As the court views the testimony, the discussion is academic. Giving the testimony its strongest probative force, as the court must, it may be fairly deduced therefrom that Bentley and Ward were adjoining proprietors, and a lane ran between their fences, and Bentley at least, if not both, had theretofore regarded the middle of the lane as the boundary between them. Ward caused a survey to be made, and immediately thereafter claimed all of the land of the lane. Bentley relinquished to him any possible rights he might have in the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lane, as he said he cared nothing for it so long as the fence remained where it then was, and thereupon he and Ward agreed that the fence should be the line between them, and that the line now asserted by Bentley is the line of the fence thus agreed upon. Taking these as the facts of the case, then, under the law as contended for in the above-stated declaration, Bentley was entitled to recover.

It is unnecessary in this case to determine whether the statement in *Sherman v. King*, 71 Ark. 248, 72 S. W. 571, that, "when the boundary line between two estates is indefinite or unascertained, the owners may, by parol agreement, establish a division line," is correct as a general proposition or not, for, as above stated, the evidence here is sufficient to establish that there was such a dispute, which would render the agreement unquestionably valid. The contention of counsel is based upon the absence of that dispute; but, as the court finds that there is evidence to sustain its existence, it would be obiter dictum to proceed further with the discussion of the principles involved.

It is also insisted that a boundary line agreed on under mistake of fact is not binding by estoppel or otherwise. But this case cannot be distinguished in principle from *Goodwin v. Garibaldi*, 83 Ark. 74, 102 S. W. 706. Bentley held possession and asserted title to the land extending to this line, not intending to claim merely to the true boundary, wherever it might be, but intending to claim to this particular line, and, when so held for the requisite period of time, this confers title as therein shown.

Some other questions are presented, but the court fails to find error, and the judgment is affirmed.

FRANK et al. v. FRANK et al.

(Supreme Court of Arkansas. Oct. 26, 1908.)

1. WILLS (§ 698*)—ACTION TO CONSTRUCT—JURISDICTION.

A chancery court has no jurisdiction of an action solely for construction of a will, when the titles conferred, whatever they may be, are purely legal and capable of assertion in a court of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1676; Dec. Dig. § 698.*]

2. COURTS (§ 24*)—JURISDICTION—CONSENT.

The subject-matter not being within the jurisdiction of a court, it cannot by consent be given jurisdiction of the action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 76-78; Dec. Dig. § 24.*]

Appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor.

Suit by Charles F. Frank and others against Clara Bell Frank and others. Decree for plaintiffs. Defendants appeal. Reversed and remanded, with instructions to dismiss.

Jno. F. Frank was a resident of Memphis, Tenn., and died there on October 6, 1904, leaving a will containing six paragraphs. The first paragraph provides for the payment of his debts; the second is a devise of his residence to two of his daughters and one of his sons; the third provides a legacy of \$1,000 for a grandson. The fourth is as follows: "I hereby give, devise and bequeath to my seven children and legal heirs, to wit, Chas. F., Robt. B., John L., Walter A., Clara M., Elizabeth G. and Leonora F. Frank, now Mrs. S. A. Bowen, all my property, real, personal and mixed, wheresoever situated, not already disposed of, which I now own or may hereafter acquire and of which I may die seised and possessed, absolutely and in fee simple and in equal shares. The division shall be made by three commissioners to be appointed by my said children, and the lots and parcels of land so divided shall be drawn for by them and any difference in the valuation be settled among themselves. The property of my daughters, however, shall be held and owned by them for their sole and separate use and enjoyment, free from the debts and contracts of any husbands, for and during their natural lives with remainder in fee to their children, and in default of children surviving either of them, then to my children who shall then be living, their heirs and assigns forever; and should any of my sons die without issue, his or their shares shall also revert to my children then living, their heirs and assigns forever." The fifth paragraph is a provision that no lawyer's fees or court costs whatever be charged to his estate, and any heir desiring to employ an attorney should do so at his own individual expense. The sixth appointed three executors, and made provision for choosing their successors. Mr. Frank owned large tracts of land in Lee, Crittenden, and St. Francis counties, Ark. He left seven children surviving him. The children were all adults, and there were eight grandchildren, all of whom were minors. His children filed suit in the chancery court of St. Francis county against the grandchildren and the executors, seeking a construction of the will. They set forth the ownership of the land in said county, and other counties in Arkansas, by Mr. Frank at his death, the execution of his will and its due probate in Shelby county, Tenn., the names and residences of his children and grandchildren, and of the executors of the will, and that duly authenticated copies of the will had been filed with the clerk of each of said counties, and had been duly admitted to probate by the probate courts of Lee, Crittenden, and St. Francis counties, and set forth that the executors had duly qualified in the state of Tennessee, and are proceeding with the administration of said estate in the state of Tennessee, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have paid, or will pay, all of the debts and liabilities of every character, and have ample personal assets for that purpose, so that the said executors have not and will not qualify in the state of Arkansas, as there is no occasion for their doing so. And they further alleged that the legacy given by the said will to the grandson had been paid, or would be paid, by the executors in Tennessee, and there is no necessity or occasion for taking such legacy into account for the purposes of this suit. They further alleged that a suit had been brought and is now pending in the chancery court of Shelby county, Tenn., for a construction of the will of said John F. Frank, and that such court has jurisdiction of the subject-matter and the executors named in said will, and that the children of said Frank are the plaintiffs, and his grandchildren are the defendants, therein, and that said suit will be finally settled and determined with reference to the real estate located in the state of Tennessee, and all the personal property wheresoever situated, but that said court has no jurisdiction to establish the title to the lands in Arkansas; and for that reason this suit was brought for the purpose of obtaining a construction and interpretation of the titles derived by the parties to the suit to the lands devised by the fourth paragraph of the will. The plaintiffs alleged that by a proper construction and interpretation of the said fourth paragraph the testator had attempted to limit a remainder in the lands upon a previous gift or devise thereof to the plaintiffs, respectively, in fee simple and equally, and charged that under the laws of Arkansas it was not lawful to dispose of the fee in said lands, and then to create and limit a remainder upon such fee, and then to control and circumscribe the disposition of the fee, as was attempted in the will; and they allege that the plaintiffs take an absolute fee-simple title, and that the remainders and cross-remainders to the children of the testator, or his grandchildren or descendants, as therein provided, are void and without effect. But they allege that, in consequence of the probate of the will, and because it disposes of all the said lands and contains provisions as above stated, it is necessary, in order that the titles of the plaintiffs may not be incumbered and embarrassed, and that they may be able to hold, use, enjoy, and dispose of their lands according to their title and rights under the laws, that the court should put a construction and an interpretation upon the fourth paragraph of said will, and ascertain and declare and decree the legal effect thereof, so that the titles and rights of the parties may be fixed and established, and that it may be known just what they are, and just what can be relied upon by all persons having occasion to deal with the same. It was prayed that the defendants be brought in under proper process, and guardians ad litem

appointed for the minors, they having no regular guardians, and that the court put a proper construction and interpretation upon every part of the will, particularly the fourth paragraph; ascertain and fix the rights of the plaintiffs and defendants in the lands, which were described at length in the complaint, and their shares therein, and that the same be declared vested in the plaintiffs in fee equally, share and share alike, and not subject to the remainders and provisions of the said fourth clause of the will limiting their titles and rights, and restricting and circumscribing their powers of disposition, and that such provisions be declared and decreed to be of no force and effect. The minor defendants were all brought properly into court, and filed answer through their guardian ad litem, taking issue with the construction which the plaintiffs placed upon the will, and denying that the plaintiffs became seised in the fee simple of the real estate, and asserted that the proper construction of the fourth paragraph of the will was to devise the real estate to the plaintiffs for their natural lives, with a remainder in fee to the children of said plaintiffs; and they asked that the court place such construction upon the will. The defendants also filed a demurrer to the complaint, on the ground that it did not state a cause of action. This demurrer does not appear to have been acted upon by the court. Testimony was taken, which only went to prove the children and grandchildren left by Mr. Frank at the time of his death, and of the pendency of the suit in Tennessee, and other matters of fact alleged in the complaint. It was proved that all of the indebtedness of the estate had been discharged. The executors made no answer to the complaint, and accepted service of notice to take depositions. The case was heard on the complaint and its exhibits, and the answer of the infant defendants by their guardian ad litem, the evidence of service showing that the nonresident defendants were properly summoned, and the will and the depositions. The court construed the will as prayed in the complaint. The infant defendants by their guardian ad litem excepted to the same, and took an appeal.

John Gatling, for appellants. W. M. Randolph, George Randolph, and Wassell Randolph, for appellees.

HILL, C. J. (after stating the facts as above). As will be seen by reference to the statement of facts, this is a bill brought by the children of Jno. F. Frank to obtain a construction of the fourth paragraph of his will; the children maintaining that thereunder they obtained a fee-simple title to the lands devised in said paragraph, and the answer of the guardian ad litem of the grandchildren maintaining that the children obtained a life estate, with a vested remainder

in the grandchildren. There is no trust involved, no trust estate is created, and the executors are not seeking aid or instruction in the discharge of their duties. The indebtedness of the estate has been paid. The sole question sought to be determined is the title conveyed to the respective parties to this suit under the fourth clause of the will. No controversy has arisen over it, the object of the suit appears to be to prevent, rather than to settle, a controversy. There are no equitable titles or trusts created by the will. The titles conferred by the fourth paragraph—whatever they may be—are purely legal and capable of assertion in a court of law. Has a chancery court jurisdiction to entertain this suit? Mr. Pomeroy says: "Although there is not an entire uniformity in the decisions by courts of different states upon this particular subject, yet the doctrine which seems to be both in harmony with principle and sustained by the weight of authority is that the special equitable jurisdiction to construe wills is simply an incident of the general jurisdiction over trusts; that a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will, without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates or interests, and which makes no attempt to create any trust relations with respect to the property donated." 3 Pomeroy's Equity Jur. (3d Ed.) 1156. This statement was quoted and followed in *Head v. Phillips*, 70 Ark. 432, 68 S. W. 878, and an examination of the authorities proves it to be sound: The same principle is thus stated in the *Encyclopædia of Pleading & Practice*: "In fact, by the great preponderance of authority, the power of courts of equity to construe wills is simply an incident of their general jurisdiction over trusts; and, while such power will be exercised liberally on behalf of executors, trustees, or other persons interested in trusts created by wills, suits brought solely for the construction of wills, where no trust is involved, will not be entertained." 22 Enc. Pl. & Pr. 1191. The Court of Appeals of New York said: "It is by reason of the jurisdiction of the court of chancery over trusts that courts having equity powers as an incident of that jurisdiction take cognizance of, and pass upon, the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, or when only legal rights are in controversy." *Chipman v. Montgomery*, 63 N. Y. 221. In *Bailey v. Briggs*, 56 N. Y. 407, it is thus expressed: "It is when the court is moved in behalf of an executor, trustee, or cestui que trust, and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give a construction to a doubtful

or disputed clause in a will. The jurisdiction is incidental to that over trusts." The Illinois court said: "Where no trust is created, the law, as we understand it, is that neither the executor, nor the heir or the devisee who claims only a legal title in the estate, will be permitted to come into a court of equity for the purpose of obtaining a judicial construction of the provisions of the will." *Strubher v. Belsey*, 79 Ill. 307. This case was followed and reiterated in *Harrison v. Owsley*, 172 Ill. 629, 50 N. E. 227. *Mansfield v. Mansfield*, 203 Ill. 92, 67 N. E. 497, is strikingly similar to the case at bar. The lower court had given judgment on titles derived from a will at the instance of an heir, where no trust was involved, and the Supreme Court declined to pass upon the will, and dismissed the action for want of jurisdiction, although the jurisdiction had not been questioned. The following cases have also been examined, and found to contain the same principle, in many of which there are reviews of the authorities on the subject: *Woodlief v. Merritt*, 96 N. C. 226, 2 S. E. 350; *Dill v. Wisner*, 88 N. Y. 153; *Torrey v. Torrey*, 55 N. J. Eq. 410, 36 Atl. 1084; *Fahy v. Fahy*, 58 N. J. Eq. 210, 42 Atl. 726; *Kelly v. Kelly*, 80 Wis. 486, 50 N. W. 334; *Mansfield v. Mansfield*, 203 Ill. 92, 67 N. E. 497; *Miller v. Drane*, 100 Wis. 1, 75 N. W. 413. This court reached the same conclusion in *Head v. Phillips*, 70 Ark. 432, 68 S. W. 874. A demurrer was interposed in the chancery court, which does not seem to have been passed upon, but it raised the question of jurisdiction. *Kelly v. Kelly*, 80 Wis. 486, 50 N. W. 334. Even without the demurrer, however, the court should have declined to pass upon the issue tendered, as it is not the subject-matter of jurisdiction of the chancery court, and consent cannot give such jurisdiction. *Mansfield v. Mansfield*, 203 Ill. 92, 67 N. E. 497; *Richards v. Ry. Co.*, 124 Ill. 517, 16 N. E. 909.

In view of these authorities, and many more which may be found cited by the text-writers and reviewed in the cases mentioned, it was unquestionably the duty of the chancery court to refuse to entertain the bill; and, for the error in entertaining it and rendering a decree construing the will, the decree is reversed, and the cause remanded, with instructions to dismiss the bill without prejudice to any future litigation which may arise between the parties.

EVANS v. ST. LOUIS, I. M. & S. RY. CO.
(Supreme Court of Arkansas. Oct. 26, 1908.
On Rehearing, Nov. 16, 1908.)

RAILROADS (§ 400*)—INJURY TO TRESPASSER ON TRACK—EVIDENCE.

Whether the engineer of the train, the cow-catcher of which struck a trespasser, asleep on the side of the track, was negligent in not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sounding the whistle, the fact of the trespasser being a human being not being discovered till the train was within 75 feet of him, is a question for the jury, though the engineer gave as a reason for not whistling that the person was lying clear of the train, and that he feared the whistle would cause him to jump towards the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1373; Dec. Dig. § 400.*]

Appeal from Circuit Court, Pope County; Hugh Basham, Judge.

Action by J. W. Evans, administrator, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for defendant. Plaintiff appeals. Reversed and remanded for new trial.

U. L. Meade, for appellant. Lovick P. Miles, for appellee.

HART, J. Plaintiff brought this suit as administrator of the estate of David F. Evans, deceased, and also as next of kin of said deceased, against the defendant, to recover damages on account of the killing of said Evans. The complaint alleges, in substance, that Evans was struck and killed by a train of the defendant on the night of July 14, 1907; that it was a starlight night, and that the track was perfectly straight with the view unobstructed for two miles or more east of where Evans was struck and killed by the train; that he and his companion were lying asleep on the north side of the track; that, after discovering him, defendant's servants in charge of the locomotive negligently failed to give any danger signals or check the speed of the train, but recklessly ran into him, thereby causing his death. The railway company answered, making a general denial, and averred that the death of Evans was caused by his own negligence. After hearing the evidence on motion of the defendant, the court directed the jury to return a verdict for the defendant, and the case is here on appeal.

David F. Evans and T. B. Falls lived at Galla Creek, in Pope county. On the night that Evans was killed they had been to visit the sister of Falls in Knoxville, Johnson county. They were each about 20 years of age. They desired to return home that night. The night train did not stop at Knoxville, but did stop at the junction about 2½ miles west of Knoxville. They walked toward the junction, and, it being a warm night, they stopped to rest. Falls went to sleep eight or ten feet from the north side of the track. Falls woke up, and noticed that Evans was lying right up to the end of the ties. He told Evans to get up; that a train was likely to come along and kill him. He remembered Evans raising up. They were waiting for an east-bound train. The body of Evans was lying nearly parallel with the track, and his head was resting on the end of the tie when Falls told him to get up. His head

was towards the east. The train which killed him was going west. Falls did not wake up again until the train had half way passed him. He jumped up, and looked down the track, and saw the engineer's head sticking out of the cab on the side he was on, looking back. Falls then began to look for Evans, but did not find him. He then went back to Knoxville. The next morning he and the railroad agent went back, and found the remains of Evans a rail or two west of where he was lying when he was hit. The track was straight 900 feet or more east of where the two boys were lying, and there was nothing to obstruct the view of the engineer. The foregoing was the version given by Falls. George Embrey testified that he was the engineer in charge of the locomotive that killed deceased; that he was running about 35 miles an hour, and was keeping a lookout for people and stock on the track or right of way; that he did not discover that Evans or his companion were human beings until he was 75 feet from them; that he made no effort to stop the train because they were in the clear—that is to say, that the train could pass without striking them—that he did not have time to stop after he discovered that they were human beings; that he made a statement at Knoxville the next day in which he said that he saw two men lying beside the track; that he thought they were in the clear, and thought, if he blew the whistle, he might scare them, and they would jump on the track. James Evans, the brother of the deceased, testified that he discovered blood and hair on the right side of the cowcatcher which resembled the hair of his brother. The testimony also showed that a train composed of the number of cars of the one in question could be stopped with safety to passengers in 200 feet, and, when running 40 miles an hour, in 400 feet.

We are of the opinion that it was a question for the jury to determine under the evidence whether or not the defendant railway company exercised the proper care after discovering the dangerous situation of the deceased to avoid injuring him. It is only where the facts are undisputed, and are such that reasonable minds may draw but one conclusion from them, that the question of negligence is one of law for the court. Of course, under the undisputed facts as disclosed by the record, no reasonable man would say that the engineer could have stopped the train in time to have saved the deceased from injury after he discovered his perilous position, but he might have given an alarm by sounding the whistle. No doubt the engineer thought he was acting for the safety of deceased in not giving the alarm signal; for he gives as a reason for not doing so that he feared that it would cause the boy to jump towards the track, and that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is made against the company in contemplation of section 6773 of Kirby's Digest, providing that railroads shall be responsible for all damages to persons or property caused by the running of trains in this state. *Kansas City Southern Ry. Co. v. Davis*, 83 Ark. 217, 103 S. W. 603, and cases cited.

Counsel for appellant chiefly rely for a reversal upon the action of the court in telling the jury, in instruction No. 1, that where a train has stopped at a station, and before the passengers have had time to alight, it is the carrier's duty to give passengers, in some way, notice of all movements of the train. They cite the case of *Railway Company v. Tankersley*, 54 Ark. 25, 14 S. W. 1090, in support of their contention. This, with the argument made in their brief, shows that they have confused the duty of the railway company after the station is called and before its passengers have had time to alight with that it owes passengers after its train has stopped long enough to give them an opportunity to alight. There is no conflict in the two rules. Each is applicable to its own state of facts. Here the appellee says that she started at once to leave the train when it was stopped, and fell before she had had time to debark from it. The instruction was applicable to the state of facts under consideration, and its application to such state of facts was recognized and approved by this court in the case of *Railway v. Davis*, supra.

Counsel for appellants also objected to the giving of instruction No. 3, and ask a reversal because in it the court told the jury it was the duty of the railroad company to provide lights at its stations for the safety of passengers in arriving or departing at night. There was no error in giving this instruction. *St. Louis, I. M. & S. Ry. Co. v. Battle*, 69 Ark. 369, 63 S. W. 805; *Fordyce v. Merrill*, 49 Ark. 277, 5 S. W. 329.

Counsel for appellant argue that the fourth instruction required the company to stop the train until the passengers alighted therefrom. We do not think the instruction is susceptible of any such construction. That it was the duty of the railroad company to stop its trains at its platforms, see *Hutchinson on Carriers*, vol. 2, § 1117; *Railroad v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699.

Appellant also asks for a reversal because the court did not permit its counsel to present to the jury in his argument that the real cause of action was the fact that the negro coach passed the depot while the white coach was stopped at the depot platform. The court properly refused to allow this line of argument. There was no testimony from which such fact might be inferred, and, beside, its evident purpose was to stir up race prejudice and to hold up appellee to ridicule before the jury.

Again, appellant asks for a reversal because its counsel was not permitted to ask

appellee as to the height of her shoe heels at the time she received the injury. The question was not pertinent to the issue and was evidently asked to provoke merriment at the expense of appellee.

Finding no error in the record, the judgment is affirmed.

LATHAM v. BARWICK.

(Supreme Court of Arkansas. Nov. 2, 1908.)

MASTER AND SERVANT (§ 73*)—ABANDONMENT OF EMPLOYMENT—RIGHT TO COMPENSATION.

Under Kirby's Dig. § 5028, providing that an employé abandoning his employment without good cause before expiration of his contract shall forfeit all wages, such an employé can recover no compensation either on the contract or on a quantum meruit.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 94-96; Dec. Dig. § 73.*]

Appeal from Circuit Court, Clay County: Frank Smith, Judge.

Action by J. F. Barwick against L. G. Latham, executor. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

G. B. Oliver, for appellant.

McCULLOCH, J. This is an action instituted by appellee against appellant's testatrix to recover upon an account for wages alleged to be due him as a farm hand. He entered into a verbal contract with appellant's testatrix to work on the latter's farm from February 26 until July 1, 1906, for \$25 per month, and quit work on May 14, 1906. He sues for the amount of his earned wages. There was testimony tending to show that according to the terms of the contract the wages of appellee were to be paid one half as he earned or needed them and the other half on July 1st, that he quit the service of his employer without cause, and that at the time he quit work more than one half of his earned wages had been paid to him.

On this state of the proof the court gave a peremptory instruction to the jury to return a verdict in appellee's favor for the amount sued for, which was the balance of his earned wages, and refused to give the following instructions requested by appellant: "You are instructed that if you find from the evidence that defendant employed plaintiff to work for her in the making of a crop, and that he was to work until the 1st day of July, 1906, and was to be paid therefor at the rate of \$25 and house rent per month, then, if you further find that plaintiff quit the employ of defendant before the 1st day of July, 1906, without reasonable cause, you will find for the defendant. (2) You are further instructed that if you find from the evidence that defendant employed plaintiff to work for her in the making of a crop, and that he was to work until the 1st

day of July, 1906, and was to be paid therefor at the rate of \$25 and house rent per month, and that one-half of his wages was not to be paid until the 1st of July, 1906, and that without reasonable cause he quit the employ of defendant before the 1st day of July, 1906, and that at the time he quit he had been paid more than one-half of his wages, then, if you find this suit was begun before the 1st day of July, 1906, you will find for the defendant."

There seems to be some conflict in the authorities whether or not one employed for a specified time, who, without adequate cause, quits service before expiration of the time, can recover upon a quantum meruit; but the great weight of authority is to the effect that he cannot recover. 28 Cyc. p. 1042, and cases cited. This court adopted the rule sustained by the weight of authority. English, C. J., speaking for the court in *Hibbard v. Kirby*, 38 Ark. 105, said: "The rule seems to be that if the contract of the servant to labor be for a specified period of time, and payment is to be made, either expressly or by implication of law, at the end of the period, and the servant leaves the service of his master improperly, without a sufficient cause, and without his consent, before the expiration of that time, he can recover no compensation for his services, either on the contract or on a quantum meruit." A statute of this state enacted in 1883 puts the question entirely at rest. It is as follows: "If any laborer shall without good cause abandon his employer before the expiration of his contract he shall be liable to such employer for the full amount of any account he may owe him and shall forfeit to his employer all wages or share of crop due him or which may become due him from his employer." Kirby's Digest, § 5028. This statute is conclusive of the questions involved in this appeal. It applies, in express terms, to all verbal contracts for services for a period not longer than one year.

It follows that the court erred in giving a peremptory instruction and in refusing to give the instructions requested by appellant.

Reversed and remanded for a new trial.

PITTSBURG REDUCTION CO. et al. v. HORTON.

(Supreme Court of Arkansas. Nov. 2, 1908.)

1. NEGLIGENCE (§ 58*)—PROXIMATE CAUSE—PROBABLE CONSEQUENCES.

A person violating a duty imposed by common law is liable to every person injured as a natural and probable consequence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 71-72; Dec. Dig. § 58.*]

2. NEGLIGENCE (§ 56*)—PROXIMATE CAUSE.

A negligent act must be something more than one of a series of antecedent events with-

out which the injury would not have happened, to create a liability.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.*]

3. NEGLIGENCE (§ 62*)—PROXIMATE CAUSE.

Where subsequent to the original negligent act a new cause has intervened of itself sufficient to stand as the cause of the injury, the original negligence is too remote.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76-79; Dec. Dig. § 62.*]

4. EXPLOSIVES (§ 10*)—INJURIES—PROXIMATE CAUSE.

Where, after a boy about 10 had picked up a dynamite cap on defendant's premises and taken it home, his parents, who were familiar with explosives, permitted him to retain it in his possession for about a week, when he traded it to another boy of 13, who, in attempting to pick the dirt out of it, exploded it and injured his hand, the intervening act of the boy's parents, who had found the cap, in permitting him to retain it, broke the causal connection between the original negligent act of defendant in permitting the cap to be where it was found, and the subsequent injury to the boy to whom it was traded, and defendant was not liable therefor.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. § 7; Dec. Dig. § 10.*]

Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

Action by John A. Horton, by next friend, against the Pittsburg Reduction Company and another. Judgment for plaintiff, and defendants appeal. Reversed, and action dismissed.

This was an action brought by John A. Horton, by his next friend, S. A. Horton, against the Pittsburg Reduction Company and C. C. Brazil, to recover damages for an injury sustained by him caused by the explosion of a dynamite cap in his left hand.

The Pittsburg Reduction Company was engaged in mining bauxite at the town of Bauxite, in Saline county, Ark. Its plant consisted of mineral land, houses, sheds, machinery, and spur tracks from the railroad, etc., which were used in its business. Its plant was near the public schoolhouse, and a large proportion of the school children of the neighborhood passed by its sheds, machine and toolhouses, and spur railroad tracks in going to and from school. Appellant company owned the land surrounding and upon which its shops, machine and toolhouses, and spur railroad tracks were situated. It also had a number of tenement houses on said lands for dwelling houses for its employees. The spur railroad track passed between its main shed and toolhouse, and very close to the toolhouse on the east. There was no inclosure around the sheds, machine and toolhouses, or spur track. There was a path along the spur track, which was habitually used by the children of the neighborhood in going to and from school. This was the condition of affairs at the time of the accident, and such condition was known to appellant company. The cap which did the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

damage was picked up by Charlie Copple, a boy about 10 years of age, at the edge of the spur track near the end of the toolhouse of appellant company. The caps were in a tin snuff box and were made of brass or copper. They were very much like small metal cartridges and appeared to be empty except of dirt. The Copple boy picked them up on his way home from school and carried them home. He lived with his parents about one-fourth of a mile distant. His father was an employé of another company, which had a plant for mining bauxite near that of appellant company. Charlie Copple kept the caps at home for about one week, playing on the floor with them in the presence of his parents. When he would leave them on the floor, his mother said she would pick them up. She said she did not know what they were. She said that Charlie Copple had them there in the house, and that she supposed her husband noticed him with them. The father denied knowing that his boy had the caps until he heard of it after the accident happened. Charlie Copple said that, when not playing with them, they were left on the clock shelf. About one week after he had found them, Charlie carried them to school and traded them to Jack Horton for some writing paper. Jack Horton was a boy 13 years old. He was in the schoolhouse at the time he was hurt. He said he thought it was a shell of a 22 cartridge that had been shot; that he was picking the dirt out of it with a match when it exploded and tore up his hand. His hand was torn so that it had to be amputated. There is a great deal of testimony relative to the manner by which the caps came on the spur track, where Charlie Copple picked them up, but the view we have taken of the case renders it unnecessary to abstract it, except to say that it may be assumed that appellant C. C. Brazil, the general foreman of appellant company, threw them there from the toolhouse thinking they were empty. There was a jury trial and a verdict against both appellants for \$2,000. They have appealed to this court.

Mehaffy, Armstead & Williams and Murphy, Coleman & Lewis, for appellants. W. R. Danham and Wood & Henderson, for appellee.

HART, J. (after stating the facts as above). It is a well-settled general rule that, when a defendant has violated a duty imposed upon him by the common law, he should be held to be liable to every person injured whose injury is the natural and probable consequence of the misconduct. Hence in our consideration of this case we are first met with the proposition of whether or not the negligence of appellants in leaving the dynamite caps near the spur track, which was frequented by children, was the proximate

cause of the injury. As was said by this court in the case of *Martin v. Railway Co.*, 55 Ark. 510, 19 S. W. 314, and later approved in the case of *James v. James*, 58 Ark. 157, 23 S. W. 1099, there must be a direct connection between the neglect of the defendant and the injury; that its connection must be something more than one of a series of antecedent events without which the injury would not have happened.

It is a well-settled general rule that, if, subsequent to the original negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the injury, the original negligence is too remote. The difficulty arises in each case in applying the principle to a given state of facts. Counsel for appellee mainly rely upon the case of *Harriman v. Pittsburg, C. & St. L. R. Co.*, 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507, to establish their contention that the negligence of the appellants in leaving the caps on the spur track was the proximate cause of the injury. Other cases are cited by them to sustain their position, but they chiefly turn upon the question of the contributory negligence of the plaintiff. The facts and the gist of the holding of the court in the *Harriman Case* are fairly stated in the syllabus, which is as follows: "A train of cars, passing over some signal torpedoes, left one unexploded, which was picked up by a boy nine years old, at a point on the track which he and other children, in common with the general public, had long been accustomed to use as a crossing, with the knowledge and without the disapproval of the company. He carried it into a crowd of boys near by, and, not knowing what it was, attempted to open it. It exploded and injured the plaintiff, a boy 10 years of age. Held, that the act of the boy who picked up the torpedo was only a contributory condition, which the company's servants should have anticipated as a probable consequence of their negligence in leaving the torpedo where they did, and that that negligence was the direct cause of the injury suffered by the plaintiff." There the child did a perfectly natural thing for a boy to do. He found what appeared to be an attractive plaything. He at once carried it over to his playmates and exhibited it to them. He then began to try to open it so that they might learn what it contained. In doing this the explosion occurred which caused the injury. The result was the natural sequence of antecedent events, and ought to have been anticipated by any person of ordinary care and prudence.

In the present case, the facts are practically undisputed. Charlie Copple's father was an employé of a company engaged in a similar business to that of appellant company. Naturally, his avocation and the proximity of his residence to the mines made both himself and his wife familiar with the nature of

explosives. True, Mrs. Copple says that she did not know what the shells contained, but she did know that they were shells for some kind of explosives, that her son brought them home, and that he played with them. She admits that, when he would leave them on the floor, she would pick them up and lay them away for him. This continued for a week, and then, with her knowledge, he carried them to school. Her course of conduct broke the causal connection between the original negligent act of appellant and the subsequent injury of the plaintiff. It established a new agency, and the possession by Charlie Copple of the caps or shells was thereafter referable to the permission of his parents, and not to the original taking. Charlie Copple's parents having permitted him to retain possession of the caps, his further acts in regard to them must be attributable to their permission and were wholly independent of the original negligence of appellants. This is but an application of the well-established general rule that, to charge a person with liability for damages, the negligence alleged

must be found to have been the proximate cause of the injury to the plaintiff.

This case has given us much concern, and we have reviewed many cases illustrating the application of the general rule. It is useless to review them, for most of them recognize and approve the general rule, and, as the facts in each case are different, a review of them would add nothing to the opinion. The leading cases on the subject are cited in the respective briefs of the attorneys in this case.

As above stated, the evidence speaking on the question is undisputed, and, having determined that the intervening act of Charlie Copple's parents in permitting him to retain in his possession the caps broke the causal connection between the original wrongful act of appellants and the subsequent injury of the plaintiff, there is nothing to submit to the jury.

The judgment is therefore reversed, and the cause dismissed.

WOOD, J., not participating.

HAX-SMITH FURNITURE CO. v. TOLL et al.

(Kansas City Court of Appeals. Missouri. Oct. 5, 1908. Rehearing Denied Nov. 16, 1908.)

1. PRINCIPAL AND SURETY (§ 100*)—DISCHARGE OF SURETY—CHANGE IN OBLIGATION—BUILDING CONTRACT.

Building specifications, made a part of the contract, provided that, should the owner request any changes in the contract, he should be at liberty to make them, and the same should not affect the contract or bond securing its performance, the price to be agreed upon in writing before making such changes, and, if any dispute should arise, the same to be decided by arbitration. The bond securing the performance of the contract provided that the owner and contractor might make additions to and modifications in the contract without notice to the surety, and without invalidating the bond. *Held*, that changes made by the owner and contractor voluntarily did not fall within the class designated therein, but belonged to a class included in the bond, which covered not only changes compelled by the owner, but also those which might be agreed on by the owner and contractor, and that, as to such changes voluntarily made, the bond, and not the specifications, controlled, and a failure to agree upon the price in writing before making such changes did not discharge the surety on the bond.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 162-163; Dec. Dig. § 100.*]

2. PRINCIPAL AND SURETY (§ 82*)—DISCHARGE OF SURETY—CHANGE IN OBLIGATION.

Where a bond securing the performance of a building contract is executed subsequent thereto, as between the owner and the surety, a stipulation in the bond modifies, with the consent of the contractor, a stipulation in the building contract so far as inconsistent, and the stipulation in the bond controls so far as the surety is concerned.

[Ed. Note.—For other cases, see *Principal and Surety*, Dec. Dig. § 82.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action on a bond securing a building contract by the Hax-Smith Furniture Company against one Toll as principal and Alfred Toll as surety. Judgment for plaintiff, and defendants appeal. Affirmed.

Botsford, Deatherage, Young & Creason, and Culver & Philip, for appellants. Vinton Pike, for respondent.

JOHNSON, J. Action on a bond executed by defendants Sproul, as principal, and Toll, as surety, to secure the faithful performance by the former of a contract made by him with plaintiff for the erection of a business building on premises owned by plaintiff in St. Joseph. A jury was waived by the parties, the trial resulted in a judgment for plaintiff, and both defendants appealed.

The bond executed December 30, 1905, was in the penal sum of \$25,000, and expressed the following obligation: "The condition of the above obligation is such that whereas the said contractor [defendant Sproul] has entered into a contract with the said owner

[plaintiff] to do certain work and furnish certain materials for the said owner: Now, therefore, if the said contractor shall well and truly perform said work and shall furnish all material in accordance with drawings, specifications and contract * * * and shall protect, defend, and hold harmless the said owner against any and all liens or claims of any kind that may be filed by laborers, mechanics or materialmen, within the time specified by law after the date of the completion of this contract, then this obligation shall be void; otherwise to remain in full force and effect." The parties stipulated in the instrument that "the said owner and the said contractor may from time to time make additions to, omissions from and modifications in said contract without notice or consulting the sureties and without prejudice to or invalidating this bond." It is alleged in the petition, and the proof shows, that defendants failed to protect the property against mechanics' liens, and that plaintiff was compelled to pay the demands of a number of lien claimants in order to prevent its property from being sold under executions. The court, after deducting the credits and offsets, found the aggregate amount of plaintiff's loss on account of such outlays to be \$3,417, and assessed plaintiff's damages at that sum in the judgment entered.

Defendant Toll presents the special defense, duly pleaded in his answer, "that without the knowledge or consent of the surety certain changes in the contract were made by the owner and contractor, which provided for additional work and materials, the price of which was not agreed to in writing before said work was begun or said materials were furnished." This defense is founded on the specifications (by reference made part of the contract between the owner and contractor) which provided, "should the owner at any time during the progress of the work request any alterations, deviations, additions or omissions from the contract, he shall be at liberty to do so and the same shall in no way affect or make void this contract or bond, but will be added to or deducted from the amount of the contract as the case may be, by a fair and reasonable valuation. The price to be agreed upon in writing before being put into execution, and if any dispute shall arise regarding the valuation, the same shall be decided by arbitration." To escape liability on the bond the surety relies here on two changes in the plans and specifications which were made on oral agreement of the owner and contractor, after the execution of the contract and bond, and without notice to the surety. First, the trenches for the footings of the foundations and walls and the concrete footings were made deeper and wider than specified, resulting in extra expense of \$500, which the owner paid the contractor; and, second, the form of the building was altered

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

slightly. The plans and specifications describe a building four stories high, 263 feet long, 120 feet wide, and in the form of a right-angled parallelogram. When the work was begun it was found that the street on which the building would front slightly varied from a true course, and if built as designed, one of the front corners of the building would be on the street line, and the other four or five feet therefrom. It was on the suggestion of the contractor, reluctantly adopted by the owner, that the form of the building was changed to that of a rhomboid, in order that the front wall might be parallel with the street. If we were sitting as a trier of fact, we would find from the evidence that the contractor offered to make the alteration without extra charge; but, since the trial court found otherwise by allowing the contractor a credit of \$254.41, as the extra cost to him of the alteration, and the finding is supported by substantial evidence, we shall treat it as we would the verdict of a jury. The deepening and widening of the foundation was made necessary by the nature of the soil encountered in the excavation of the trenches. This necessity was recognized by the owner, architect, and contractor, and the change was agreed to as a matter of course and the owner agreed to compensate the contractor for making it.

Shortly after the work was begun, the contractor, prompted by his subcontractor, requested that the owner put in writing the agreement to pay for the extra work, whereupon plaintiff wrote a letter addressed to the architect, in which it agreed to pay \$6 per yard for the extra concrete, and 25 cents per yard for the extra grading. Counsel for defendant Toll argue that, since the provision of the contract to which we have referred required the price "to be agreed upon in writing before being put into execution," this letter, written while the work was in progress, was not a compliance with that requirement under the strict rules of construction which obtain in favor of a surety. We shall concede only for the purposes of argument the soundness of this position, and, dismissing this letter from consideration, shall treat the feature of the case now before us from the standpoint that, with respect to the alterations of the plans and specifications, the price of the extra work in neither instance was agreed on in writing. This omission should not be held to have released the surety from the obligation of the bond, for the reason that under no reasonable construction of the contract between the owner and surety may it be said that the alterations in question belonged to the class which the contract contemplated should be made only on a written contract between the owner and contractor fixing the price of the extra work. Should we concede that the stipulation in the specifications is inconsistent with that in the bond, and that they should be construed together as parts of one contract, it would

avail defendants nothing. Clearly the intention expressed in the provision in the specifications was to provide a method by which the owner might compel the contractor to make such changes in the plans and specifications as he might desire during the progress of the building, and had no purpose of restricting the freedom of the owner and contractor to make changes in the plans and specifications by voluntary agreement. The language "should the owner at any time during the progress of the work request any alterations, * * * he shall be at liberty to do so," cannot well be reconciled to any other interpretation, and the idea that the subject of the provision was possible compulsory changes is borne out by the final clause, which provides for submitting the question of price to arbitration in instances where the parties might be unable to come to an agreement respecting it. The changes under consideration in no sense were compulsory, but were made by the owner and contractor voluntarily. They did not fall within the class designated in the specifications, and were not controlled by its provisions. *Bagwell v. Surety Co.*, 102 Mo. App. 707, 77 S. W. 327. They did belong to a class included in the stipulation in the bond. That stipulation covered, not only changes compelled by the owner, but also those which might be agreed on by the owner and contractor. It did not place any restrictions on the right of the parties to make such changes, nor prescribe any method by which they were to be made. Within the legitimate scope of the proposed improvement the parties were accorded complete freedom to contract as they pleased, and the utmost effect that could be given the provision in the specifications (on the theory that it should be read into the bond) is that the method it prescribed applied solely to alterations compelled by the owner, and not to those made by voluntary agreement. To the extent, at least, that the bond enlarged the right of the parties to make alterations over that provided in the contract between the owner and contractor, its terms must control, and in that field are exclusive of the contract and conclusive of the scope of the right and the methods by which it may be exercised. *Bagwell v. Surety Co.*, supra. The surety will not be released on the ground that the alterations were made in an unauthorized manner.

Both defendants tender in their answers, and argue here, a defense based on alleged false and fraudulent representations made by plaintiff to defendant contractor, by which he was induced to reduce materially his bid below what it would have been had he not been deceived by the representations. The declarations of law given show quite clearly that the court found the facts against defendants on this issue, and we do not see how a different conclusion could have been drawn from the evidence. It is enough that we find in the record substantial evidence supporting the finding. We shall not weigh the evidence,

nor do we deem it necessary to discuss its details pro and con.

Complaint is made of the following declaration at law given at the instance of plaintiff: "The contract between plaintiff and Sproul was executed on the 28th day of December, 1905, before the bond in suit, which was executed on the 30th day of said December. As between plaintiff and Toll, their stipulation written in said bond modified, with the consent of Sproul, the stipulation in the building contract as far as any inconsistency may exist between them, and the stipulation in the bond controls so far as defendant Toll is concerned." The proposition of law thus declared is sound, but, as we have indicated, its employment was not necessary to a proper disposition of the case, since, on the hypothesis that bond and contract are consistent, we have found that the surety should not be released.

The judgment is affirmed. All concur.

STATE v. FRANKLIN.

(Kansas City Court of Appeals. Missouri. Oct. 19, 1908. Rehearing Denied Nov. 16, 1908.)

1. MUNICIPAL CORPORATIONS (§ 691*)—USE AND REGULATION OF PUBLIC PLACES—STREETS—OBSTRUCTIONS—POWERS OF TRUSTEES.

The authority given trustees of towns and villages to open, clear, regulate, grade, pave, or improve streets and alleys, and to regulate stables, does not vest in the trustee the right to maintain obstructions in highways or to suffer such nuisances to be maintained by private persons.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 691.*]

2. MUNICIPAL CORPORATIONS (§ 697*)—USE AND REGULATION OF PUBLIC PLACES—STREETS AND OTHER PUBLIC WAYS—RIGHTS AND REMEDIES AS TO OBSTRUCTIONS.

Where a municipality breaches the trust conferred on it in regard to control of highways, the state can correct the abuse, through the Attorney General or the prosecuting attorney of the county wherein the nuisance is maintained, by suit in equity, or, under Rev. St. 1899, § 6130 (Ann. St. 1906, p. 3077), the circuit court may, on proceedings in the name of the Attorney General or prosecuting attorney, administer the proper relief, and hence, where a town neglected to remove an obstruction erected by an individual in a street, the prosecuting attorney might maintain an action against the town and the individual to remove the obstruction, and this right was not affected by Rev. St. 1899, § 9674 (Ann. St. 1906, p. 4415), imposing a fine on one obstructing a public road.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 697.*]

3. MUNICIPAL CORPORATIONS (§ 657*)—STREETS—POWER TO VACATE.

The power of a municipality to vacate public streets cannot be lawfully exercised for any but public purposes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 722; Dec. Dig. § 657.*]

4. MUNICIPAL CORPORATIONS (§ 697*)—STREETS—RIGHTS AND REMEDIES AS TO OBSTRUCTIONS OF ROAD—PARTIES TO ACTION.

Where an individual erected an obstruction in a street, and the only offense of the town was its neglect of duty to make him vacate, the town was not a necessary party to an action by the prosecuting attorney of the county to abate the nuisance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1504; Dec. Dig. § 697.*]

5. JUDGMENT (§ 17*)—VACATING—ERROR AS TO ONE DEFENDANT.

That, in an action by the prosecuting attorney against a town and an individual to compel the removal of an obstruction erected by the individual in a street, the town was not legally served with process, and judgment was erroneously entered against it, did not require the disturbing of the judgment against the individual defendant, since the execution of the judgment against the individual would abate the nuisance without affecting any property right of the town.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 27; Dec. Dig. § 17.*]

Appeal from Circuit Court, Osage County.

Action by the state against James D. Franklin and another. From a judgment for plaintiff, defendant Franklin appeals. Affirmed.

W. S. Pope, for appellant. Gove & Davidson, John P. Peters, and Monroe & Zevely, for the State.

JOHNSON, J. In August, 1907, the prosecuting attorney of Osage county brought this action against James D. Franklin and the incorporated town of Linn, for the purpose of obtaining an order of court on the defendants to remove certain obstructions erected and maintained by defendant Franklin in a public highway and within the limits of the town. Process was issued commanding the sheriff to summon F. J. Bollot, H. Gove, Peter Gove, B. J. Brandt, H. C. Finck, and James D. Franklin. The return of the sheriff shows service on all of these persons, but the petition, summons, and return all fail to disclose that the first-mentioned five persons sustain any relation to the suit. We are told by the prosecuting attorney that Bollot was the chairman of the board of trustees of the town, and that the other four were members of the board; but that fact does not appear on the face of the record. The town did not appear to defend the action, and judgment was entered against it by default. Defendant Franklin appeared and demurred to the petition on the grounds that no cause of action is stated, that defendant town is not a necessary or proper party to the suit, "the contention being about a public county road." that there is "a defect of proper parties both plaintiff and defendant, and that the suit cannot be determined with only the parties hereto before the court." The demurrer was overruled, defendant Franklin stood on the demurrer, refused to plead further, and, aft-

er judgment was entered against him, in accordance with the prayer of the petition, brought the cause here by appeal. He is the only appealing defendant.

It is alleged: That the suit is brought by the prosecuting attorney, "who in this behalf prosecutes for the state of Missouri"; that the town of Linn is incorporated under the laws of Missouri relating to the incorporation of towns and villages; that defendant Franklin owns land in the town over which passes a public highway known as the Linn and Rich Fountain public road; that Franklin has erected a stable and fences in the road where it bisects his land, and thereby wholly obstructed its use as a public highway; that "the defendant the town of Linn, aforesaid, has been notified of the obstructions aforesaid and requested to remove the same, but has wholly failed so to do, and has failed and refused to institute any kind of proceedings whatever to compel the said defendant James D. Franklin to remove and abate said nuisance"; and that, "if the state of Missouri has no right to complain of the nuisance herein mentioned, then there is no remedy left to the public or to any private individual by which they can effect the removal of aforesaid obstructions and cause the nuisance herein complained of to be abated." The prayer is that the court make an order "directing said defendants, and each of them, to remove the obstructions aforesaid from the public highway aforesaid, and forever cease from doing any act which shall interfere with the use of said public highway by the public at large, and that said obstructions be removed by the defendants or either of them within a certain time to be named by the court, and, if not so removed within the time specified by said court, then the sheriff of Osage county, Mo., be ordered to remove the same, and return the possession and use of said public highway to the public, and for such other and further orders as the court may deem proper in the premises."

Defendant contends that an action of this character cannot be maintained, for the reason that the purpresture is in an incorporated town, and the town alone has jurisdiction over public thoroughfares within its boundaries, and is vested alone with the right to prosecute actions for the abatement of obstructions erected in such highways which are public nuisances. We are cited to sections 6004, 6010, 6012, 6015, 6016, 9549, 9550, 9674, Rev. St. 1899 (Ann. St. 1906, pp. 3032, 3034, 3037, 3038, 4373, 4415), and to State ex rel. Mermod v. Heege, 39 Mo. App. 49, as authority for this position. Defendant is right in saying that authority is given to the trustees of towns and villages "to open, clear, regulate, grade, pave or improve the streets and alleys of such town," and "to regulate livery, sale and feed stables"; but such authority does not vest in the trustees the right to maintain obstructions or to suffer such nuisances to be main-

tained by private persons. The power over the public ways conferred by the laws of the state is in the nature of a trust which the municipality must execute in furtherance of the object of the trust, and, where the municipality is guilty of a breach of this trust by acts either of commission or omission, the visitatorial right of the state empowers it to proceed in court to correct the abuse. This it may do, through the arm of the Attorney General, or of the prosecuting attorney of the county wherein the nuisance is maintained, by suit in equity, or suit brought under section 6130, Rev. St. 1899 (Ann. St. 1906, p. 3077), which provides: "Whenever any property, real or personal, is held by any municipal corporation in a fiduciary capacity, the circuit court shall have jurisdiction upon proceedings instituted in the name of the Attorney General or prosecuting attorney, to inquire into any breaches of trust, fraud or negligence, and to administer the proper relief."

We strongly approve what was said on this subject by the St. Louis Court of Appeals, speaking through Judge Goods, in State ex rel. v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009: "The Attorney General of the state, or the prosecuting attorney of the county in which the nuisance exists, may proceed in equity, in behalf of the sovereignty of the state, for its abatement. This is the rule, independent of any statute touching the matter, as has been adjudged in many cases. *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; *State v. Dayton*, 36 Ohio St. 434; *Hunt v. Railroad*, 20 Ill. App. 282; *People v. Beaudry*, 91 Cal. 213, 220, 27 Pac. 610. We apprehend that the right of those officials to interfere grows out of the visitatorial power of the state in respect of trusts of a public nature, and that the interference is akin to the suits in equity brought by Attorney Generals for the regulation of public charities, which are frequently met with in the reports. *Att. Gen. v. Haberdasher Co.*, 15 Beav. 307; *Parker, Atty. Commonwealth, v. May*, 5 Cush. (Mass.) 336. The usual mode of proceeding in seeking relief respecting either charities or purprestures and other nuisances is by an information in equity, which pleading corresponds nearly to a bill in equity filed by a private suitor for his own benefit. The information is in behalf of the sovereignty of the state, to redress some grievance of which the state may complain in equity on its own account, or on account of persons or interests under its special protection, like idiots, lunatics, and charities. And informations in equity are filed by the officer representing the sovereignty of the state; that is to say, the Attorney General, or, in this commonwealth, some prosecuting attorney. This sort of information possesses most of the characteristics of a bill in equity and differs from the latter in form rather than in function. 1 Encyc. Pl. & Pr. pp. 857, 859; *Story, Eq. Pl. § 8*; *People v. Stratton*, 25

Cal. 242. Some of the formal differences between the two are pointed out in the opinions in *Atty. Gen. v. Moliter*, 26 Mich. 444, 449, and *Atty. Gen. v. Evart B. Co.*, 34 Mich. 462, 472. The right of the prosecuting attorney of Audrain county to maintain the present proceeding is made clear by both ancient and modern decisions of equity courts and is supported by a statute of this state, which provides that whenever any property, real or personal, is held by a municipal corporation in a fiduciary capacity, the circuit court shall have jurisdiction of a proceeding instituted in the name of the Attorney General or prosecuting attorney to inquire into any breaches of trust, fraud, or negligence and to administer proper relief. Rev. St. 1899, § 6130 (Ann. St. 1906, p. 3077). An inquiry into breaches of trust and fraud would naturally be conducted by a court of equity and according to equity pleading and practice. A purpresture in a highway is a grievance of sufficient importance to justify its abatement at the instance of the state. *Atty. Gen. v. Evart B. Co.*, 34 Mich. 473; *State v. Dayton*; *Hunt v. Railroad*; *People v. Beaudry*, supra." The authority to vacate public streets found in many of the grants to municipalities has its limitations. It cannot be lawfully exercised for any but public purposes, certainly not for private gain or advantage. "The grant of power in this particular is to be construed in view of the purposes for which the municipality is invested with the control of its streets, alleys, and public grounds." *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393.

Both on reason and authority, it is quite clear that the maintenance of the obstructions in the public highway by the defendant Franklin and the neglect of the town to perform its duty to proceed for the abatement of the nuisance justified the state in employing its visitatorial power for the correction of the abuse. The petition states a cause of action. The right to prosecute the suit either as one in equity or under the statute quoted is not affected by the provisions of section 9674, Rev. St. 1899 (Ann. St. 1906, p. 4415). While we concede the contention of the appealing defendant that the town of Linn was not legally served with process, and that judgment against it was entered erroneously (*Cloud v. Inhabitants of Pierce City*, 86 Mo. 357), we do not share his conclusion that the judgment against him should be disturbed on that account. Since it appears from the averments of the petition, which in the present posture of the case must be accepted as true, that defendant Franklin is the owner of the obstructions, is in occupation of the street, and that the only offense of the town consists in its neglect of the duty to make him vacate, we do not think the town is a necessary party to an action against the real offender. The execution of the judgment against Franklin

will completely abate the nuisance without affecting any property interest or right of the town. The state is merely doing what the town should have done, and there is no reason for making the town a party.

The judgment is affirmed. All concur.

MARCHECK et ux. v. KLUTE et al.

(St. Louis Court of Appeals. Missouri.
Oct. 20, 1908.)

1. LANDLORD AND TENANT (§ 162*)—INJURIES FROM DANGEROUS CONDITION OF PREMISES—LANDLORD'S DUTY TO TENANT.

Where only a part of a building is leased or separate parts leased to different tenants and the landlord retains control of the part not leased, he is bound to use reasonable diligence to keep in a safe condition the part over which he retains control; his retention of control being the test of his liability.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 629; Dec. Dig. § 162.*]

2. LANDLORD AND TENANT (§ 124*)—USE OF PREMISES—APPURTENANCES—MEANS OF ENTRANCE.

Where defendant leased plaintiff two rooms in the loft of a stable, entrance to the rooms being up a stairway to the loft and along the unoccupied part of the loft to the rooms, the lease carried with it the right to use the stairway and the portion of the loft necessary to pass in and out of the rooms.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 437, 438; Dec. Dig. § 124.*]

3. LANDLORD AND TENANT (§ 164*)—INJURIES FROM DANGEROUS CONDITION OF PREMISES—LANDLORD'S DUTY TO TENANT.

Where defendant leased plaintiff two rooms in the loft of a stable, entrance thereto being up a stairway and through the portion of the loft used for storing hay, etc., that portion of the loft being also used by any one engaged in defendant's business therein, he retained control of the passageway for the purpose of repairs, and was bound to keep it reasonably safe, so that he would be liable for injuries to plaintiff's son by falling through a chute if it was so near the passageway as to be dangerous.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 630, 631, 633; Dec. Dig. § 164.*]

4. LANDLORD AND TENANT (§ 162*)—INJURIES FROM DANGEROUS CONDITION OF PREMISES—EXTENT OF LANDLORD'S DUTY—DUTY TO TENANT'S FAMILY.

A landlord owes no greater duty to the tenant's children to keep premises in reasonably safe condition than to the tenant himself.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 162.*]

5. LANDLORD AND TENANT (§ 164*)—INJURIES FROM DANGEROUS CONDITION OF PREMISES—INJURIES TO TENANTS—FAILURE TO GUARD DANGEROUS PLACES—NEGLIGENCE.

The entrance to rooms leased plaintiff in the loft of a stable was by a stairway leading to an outside landing and through a part of the loft not occupied by plaintiff, and a boy chute, through which plaintiff's child fell, was at least three feet to the right of the passageway to the rooms and against the wall through which entrance was made, so that, to fall into it, it would be necessary to go three feet to the right immediately after entering the outer door. Held, that the position of the chute did not render the passageway to the rooms dangerous.

so as to make the landlord liable for injuries to plaintiff's child from falling through it.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630, 631, 633; Dec. Dig. § 164.*]

6. LANDLORD AND TENANT (§ 169*)—INJURIES FROM DANGEROUS CONDITION OF PREMISES—INJURIES TO TENANT—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action by a tenant for the death of his child by falling through a chute in the unoccupied portion of a stable loft in which plaintiff's rooms were located, the evidence held to show that the child was not using the ordinary passageway to the rooms when he fell, but was running across the part not occupied by plaintiff.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 169.*]

7. LANDLORD AND TENANT (§ 165*)—INJURIES FROM DANGEROUS CONDITION OF PREMISES—INJURIES TO LICENSEE.

Even if a tenant's children were licensed to play in the unoccupied part of the loft of a stable in which rooms rented by plaintiff were situated, the landlord was not bound to keep that part of the loft safe, and, in the absence of misfeasance, would not be liable for injuries to them while using it, and hence was not liable for injuries to a child by falling through an unguarded chute in that part of the loft.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 630; Dec. Dig. § 165.*]

8. NEGLIGENCE (§ 23*)—CONDITION OF BUILDING—PLACES ATTRACTIVE TO CHILDREN.

The doctrine of the "turntable" cases, imposing a liability for maintaining dangerous places attractive to children, will not be extended.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 34; Dec. Dig. § 23.*]

9. LANDLORD AND TENANT (§ 169*)—INJURIES FROM DEFECTS—ACTIONS—PLEADING.

In order to entitle a tenant to recover for injuries received because of the landlord's failure to protect a dangerous place near the leased premises as agreed, he should have alleged such promise and the landlord's breach in his petition.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 169.*]

10. LANDLORD AND TENANT (§ 164*)—INJURIES FROM DEFECTS — BREACH OF COVENANT TO REPAIR—RIGHT OF ACTION.

As a general rule, a lessor's covenant to repair will not support an action for personal injuries resulting from his failure to repair; such injuries being deemed too remote to have been contemplated by the parties when the covenant was given.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630, 631; Dec. Dig. § 164.*]

11. LANDLORD AND TENANT (§ 164*)—INJURY FROM DEFECTS—BREACH OF COVENANT TO REPAIR—RIGHT OF ACTION.

Where a landlord, when he rented rooms in a stable loft, agreed to properly guard the entrance to a hay chute in the unoccupied part of the loft in order to protect the tenant's children, a child of the tenant could recover for injuries resulting from the landlord's failure to make such repairs; the rule that a landlord's covenant to repair will not support an action for personal injuries for failure to repair having no application, since an injury to the child was contemplated when the agreement to repair was made.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630, 631; Dec. Dig. § 164.*]

12. LANDLORD AND TENANT (§ 164*)—INJURIES FROM DEFECTS — BREACH OF COVENANT TO REPAIR—RIGHT OF ACTION.

The rule that a landlord's covenant to repair will not support an action for personal injuries for his failure to repair is applicable only by analogy to a landlord's agreement to guard the entrance of a chute in the unoccupied part of a stable loft in which the leased rooms were situated, as the stipulation was not to repair the leased premises or an appurtenance thereto.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630, 631; Dec. Dig. § 164.*]

13. LANDLORD AND TENANT (§ 164*)—BREACH OF LANDLORD'S COVENANT TO REPAIR—ACTION FOR PERSONAL INJURIES.

An action for personal injuries resulting from a breach of the landlord's covenant to repair is allowed when the injury was contemplated by the parties when executing the covenant, or when the landlord omitted to perform his agreement after he knew that its performance was essential to the safety of the tenant and his family.

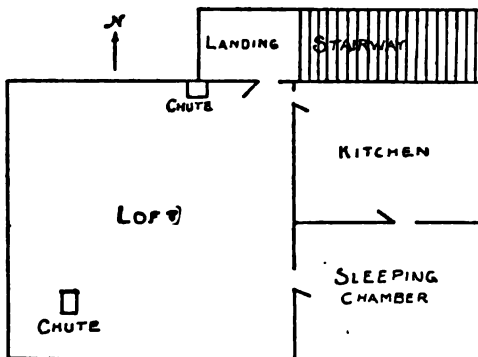
[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 630, 631; Dec. Dig. § 164.*]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by William J. Marcheck and wife against August F. Klute and others. From an order granting a motion for a new trial upon verdict for plaintiffs, they appealed. Order affirmed, and cause remanded.

These plaintiffs are husband and wife, and their suit is for damages for the death of their son Oliver Anthony Marcheck, alleged to have been caused by the negligence of defendants in particulars to be stated presently. Defendants conduct a grocery store at No. 3900 Shenandoah avenue, in St. Louis. The description of the premises by the witnesses was fragmentary, but we understand they were on the southwest corner of Shenandoah avenue and some other street. The lot fronts on the avenue and runs southwardly to an alley. A two-story stable where defendants' horses and vehicles were kept stood on the rear end of the lot. In February, 1906, plaintiff William J. Marcheck entered defendants' employ. His duties were to deliver goods and take care of the horses and vehicles of the firm, for which services he was to be paid \$7 a week and granted the use of two rooms in the second story of the stable for a residence. The entrance to the rooms was by a stairway running up the north side of the building to a landing, from which a door opened into the second story or loft of the stable. Immediately to the left of the entrance was the first of the two rooms occupied by plaintiffs and used by them for a kitchen. Further down was the second room which they used for a sleeping chamber. The rooms were on the east side of the second story of the stable, which was about 18 or 20 feet deep north and south. The west part of the loft was used as a storage place for harness, a buggy, and hay. There were

two hay chutes in this part of the loft, about $1\frac{1}{2}$ by 3 feet in dimensions. One of these was toward the south end of the loft and the other against the north wall, and at a distance from the entrance door, estimated by the witnesses, at from three to six feet. Some witnesses said, when the door from the outside landing was opened into the loft and turned back against the north wall, it nearly touched the north chute; whereas, other witnesses said it fell two or three feet short of reaching the chute. Hay was dumped into the chutes, and slid from the loft to the mangers below. These chutes were constructed of boards extending down to the mangers, projecting seven or eight inches above the floor of the loft and with the openings uncovered. Between the two chutes harnesses and hay were deposited and a buggy was swung. This sketch shows how the loft was arranged:



SECOND FLOOR PLAN OF STABLE.

Two months after plaintiffs had moved into the loft their son Oliver fell into and down the north chute, alighting on his stomach over a crossbar which separated the manger at the foot, and receiving an injury from which he died two days afterward. The accident happened before noon of April 24, 1908, and what is known about it was testified by the mother of the child. She said she was working in the kitchen, with the door between it and the loft open. Oliver said he wanted to play in the yard where his father was, and she told him he could not go alone, but she would take him as soon as she had the time. As this was said, the child ran out of the kitchen and into another part of the loft to get a toy wagon to take with him to the yard when his mother was ready to go. She instantly heard the wagon strike the chute, called to her son, who answered, and, on going to the mouth of the chute, she saw him lying across the crossbar. Mr. Marcheck testified defendants required him to live in the stable so he could be near the horses, and testified, further, defendants knew he had small children; that he spoke to one of them about the hay chutes, and this defendant promised to have them fixed so as to be safe, saying they would send

for men to put hinged covers on them; that he (Marcheck) took it for granted this would be done, and said no more about the matter. The petition declares on defendants' negligence in permitting the hay chutes to remain uncovered in dangerous proximity to the part of the loft plaintiffs and their family were compelled to use in going to and from their rooms, but nothing is said about the promise to cover the chutes; the substance of the charge being that the chutes were in close proximity to the stairway and in the common passageway to plaintiffs' rooms, and defendants negligently failed to provide coverings or guards for them as was their duty under the law, and negligently permitted them to remain without guards or protection of any kind, though defendants knew them to be dangerous to plaintiffs and their family; and, in consequence of this negligence, plaintiffs' child fell into the chute and was killed.

The answer is, first, a general denial; second, an averment the rooms occupied by plaintiffs and the floor of the hay loft were in the same condition when the accident occurred as when plaintiffs took the rooms; third, that defendants did not, when they hired Marcheck, or when he moved into the premises, make any representation or statement to plaintiffs, or either of them, concerning the condition of the premises, and the condition of the floor of the loft and of the chutes was obvious, and plaintiffs assumed whatever risk attended the occupancy. The court instructed the jury, in substance, as follows: That if plaintiff Marcheck was in the employ of defendants, and was residing as a tenant with his family in the rooms in and adjoining the hay loft, in defendants' possession and control, and it was necessary for plaintiff and his family to pass over part of the hay loft to reach the stairway leading to the ground, and defendants permitted a hay chute to remain without covering or guarding it, so near the passageway from said rooms as to make the same dangerous to persons using it with ordinary care, and if such condition was known to defendants, or by ordinary care could have been known to them, and defendants, in the exercise of ordinary care to persons occupying said rooms, could have guarded or covered said hay chute and made the same safe, then the omission of defendants to cover it and leaving it without guards constituted negligence, and they were liable to plaintiffs for all damages which directly resulted from such negligence; and, if the jury found plaintiffs' minor son, while rightfully in and about the passageway and in the exercise of such discretion as would be exercised by a child of his age, fell through the hay chute because of its unguarded and dangerous condition, the verdict must be for plaintiffs. The court refused all the instructions asked by defendants, which were, in the main, to the following effect:

If the jury believed plaintiffs' son came to his death while he was playing in the hay-loft, the verdict must be for defendants; that if the openings in the floor were obvious, visible, and apparent, and known to plaintiffs when they took the rooms, they could not recover; that plaintiffs by occupying the rooms assumed all the risk incident to the openings in the floor; that there was no evidence of a warranty by defendants of the safety of the premises which plaintiffs would occupy or the safety of the passageway or approach thereto, and the law would not, when the defects complained of were visible and apparent, imply a warranty. Two or three other instructions which we deem unnecessary to recite were refused. The jury returned a verdict for plaintiffs for \$2,000, but on motion of defendants for a new trial it was set aside by an order reciting this was done because the court had erred in admitting evidence and in the refusal of instructions. The present appeal was prosecuted from the order sustaining the motion for new trial.

W. D. Izenberg and Sturtevant & Sturtevant, for appellants. Rassieur, schuurmacher & Rassieur, for respondents.

GOODE, J (after stating the facts as above) The question of the duty of a landlord to keep in reasonably safe condition for use parts of premises he retains control of, intending them to be used by tenants to whom other parts are let, has been the source of conflicting decisions. Many cases on the subject are collected in the note to *Dollard v Roberts*, 14 L. R. A. 238, and the conflict will be observed on reading said note and the text and notes of standard treatises on landlord and tenant law. The question has been presented usually in instances where an owner of a house had let apartments in it to several tenants, but had retained control of such parts as porches, halls, and stairways for the use in common of his tenants; and it is generally held the owner, whether he agrees to do so or not, must look after the condition of these common appurtenances. But as to whether an owner's duty to a particular tenant is to keep an appurtenance of which the owner has control only in as good repair as when the tenant took possession, or in safe repair, or the tenant must take care of himself, there are contrary opinions, as the following citations make manifest: *Looney v. McLain*, 129 Mass. 33, 37 Am. Rep. 295; *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Moy nichan v. Allyn*, 162 Mass. 270, 38 N. E. 497; *Quinn v. Perham*, 151 Mass. 162, 23 N. E. 735; *Neyer v. Miller*, 51 N. Y. Super. Ct. 516; *Bold v. O'Brien*, 12 Daly (N. Y.) 160; *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47; *Peil v. Reinhardt*, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; *Humphrey v. Wait*, 22 N. C. C. 581; *Payne v. Irvin*, 144 Ill. 488, 33 N. E.

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756; *Buckley v. Cunningham*, 103 Ala. 449, 15 South. 826, 49 Am. St. Rep. 42; *McCarthy v. Bank*, 74 Me. 315, 43 Am. Rep. 591; *Rosenfield v. Arrol*, 44 Minn. 395, 46 N. W. 768, 20 Am. St. Rep. 584; *Jones v. Freidenburg*, 66 Ga. 505, 42 Am. Rep. 86. And see note in 14 L. R. A., *supra*. A rule on this subject was prescribed by our Supreme Court in *McGinley v. Alliance Trust Co.*, 168 Mo. 257, 66 S. W. 153, 56 L. R. A. 334, and the text of the 18 Am. & Eng. Ency Law (2d Ed.) 220, adopted. It reads as follows: "The rule laid down by the weight of authority is that when the landlord leases separate portions of the same building to different tenants, and reserves under his control those parts of the building or premises used in common by all the tenants, he is under an implied obligation to use reasonable diligence to keep in a safe condition the parts over which he so reserves control."

In the *McGinley Case* the evidence justified the conclusion that the owner of certain tenement houses wherein apartments were let to different parties had retained control of the porches and stairways for purposes of construction and repair; and, this being true, he was held liable for an injury to the daughter of a tenant due to a defective outside stair railing giving way, it appearing the landlord could have learned of the condition of the railing by ordinary care. The premises in question were not demised to several tenants, but the case falls within the principle of the *McGinley Case* and others that deal with the responsibility of owners of apartments. It involves the essential fact on which such owners are held responsible for the condition of those parts of the buildings not turned over to the tenants; i. e., that the landlord is in control of those parts, and may enter on them to make repairs. That this is the decisive fact in determining where the duty rests to provide for the safe condition of any part of demised premises was declared in the *McGinley Case*, and is recognized generally. The Supreme Court said that ordinarily, when repairs are needed on a house in the possession of a lessee, he may make them, and no one else has the right to enter for the purpose; that right and duty go together in such matters, and if one may enter by virtue of his estate in the premises, and safety requires repairs, it is his duty to make them, but, when he has no right to enter, he has no such duty.

No part of the upper loft of defendants' stable was let to Marcheck except the two living rooms; but the lease carried the right to use the stairway, the landing, and a portion of the loft in front of the doors of the rooms to pass in and out. *Jones, L. & T. § 104*; *Taylor, L. & T. (9th Ed.) 160*. The outside door used by plaintiffs and their family in going to and from their rooms was immediately beside the first room, or kitchen. No aisle down the length of the loft was railed off for a passageway, but in reason

plaintiffs were entitled to use at least the width of the entrance; and we hold under the decision *supra* of the Supreme Court it was the duty of defendants, even though they gave no promise about it, to use care to keep this portion of the floor reasonably safe. The strip was not turned over to plaintiffs for their exclusive use, but might be used as well by whomsoever had occasion to go into the unleased side of the loft on defendants' business. It is fairly inferable that the strip remained in defendants' control for the purpose of repairs. If so, they were liable for the accident to plaintiffs' son, if the chute into which he fell was so near the passageway as to render the latter dangerous. This question was submitted to the jury as an issue of fact; and, indeed, the gravamen of the case stated in the petition was the dangerous proximity of the chute. Study of the evidence has satisfied us a case for the jury was not made out. The chute which projected considerably above the floor was so far from the passageway that to conclude it made the passageway dangerous would be unreasonable. Defendants owed no greater duty to the deceased than they owed to their tenant Marcheck himself. This proposition was decided in the McGinley Case, wherein it was said any member of a tenant's family stands in the same relation to the landlord as the tenant himself, so far as the right to recover for an injury due to defects in the tenement is concerned; and that the question of the landlord's liability when a member of the tenant's family is hurt might be thus stated: "Is a landlord liable to his tenant for damages under such circumstances?" To the same effect is *Peterson v. Smart*, 70 Mo. 34, wherein a child about the age of plaintiffs' deceased son was injured by falling from a high terrace; the suit being founded on the supposed negligence of the owner of the property in removing the fence along the top of the terrace. The chute down which deceased fell was, according to the testimony most favorable to plaintiffs' cause, more than three feet from the entrance door, and, moreover, was against the north wall of the building. Therefore it was so far out of the way or aisle that, in order to reach the chute in going to the outside door, a person would have to diverge from three to six feet from the right course, and would have to go within a foot and a half of the north wall at a point three or more feet from the door. Plainly the chute in that position cannot be regarded as rendering the approach to plaintiffs' rooms dangerous.

There is another important fact to be noticed. It is clear from the testimony of Mrs. Marcheck the boy was not endeavoring to use the passageway in order to go out of the loft when he fell into the chute. He had asked permission to go to the yard where his father was, and his mother told him he could not go alone, but she would accompany him presently. Thereupon the child ran for his wagon

that he might take it with him when his mother was ready to go, and immediately she heard the wagon strike the chute. No conclusion can be drawn from these facts except that the boy was running across the loft with his wagon when he fell, and was not attempting to go out of the door or otherwise use the passageway. The accident occurred in broad daylight, and probably is to be attributed to the heedlessness of childhood.

Having determined the chute did not render the approach to the leased premises dangerous, our next inquiry relates to defendants' duty to plaintiffs and their family in respect of keeping the floor of the part of the loft which was neither parcel of nor appurtenant to the leasehold in such a state that one might walk on it safely. No one was bound to use said part of the floor except Marcheck, who would have occasion to do so in attending to his duties as hostler. Still it is reasonable to infer the rest of the family were not forbidden to walk over it; in other words, were licensed to do so. Conceding plaintiffs' children were licensed to play in the loft, defendants were under no duty to keep the floor safe for their use in that manner, and, unless guilty of misfeasance, were not liable for an accident received by them. See *Glaser v. Rothschild*, 106 Mo. App. 418, 80 S. W. 332, and cases cited in opinion. This is true unless we say the chute was so apt to lure a child into danger as to range the action with the "turntable" cases; there being no deception about the state of the premises chargeable to defendants and the condition of the chute being obvious. *Railroad v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Koons v. Railroad*, 65 Mo. 592. The doctrine of those cases will not be extended. *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891, 47 Am. St. Rep. 668; *Barney v. Railroad*, 126 Mo. 373, 28 S. W. 1069, 26 L. R. A. 847. But suffice it to say on this point the petition and proof proceeded on a different theory, to wit, that the aperture deceased fell through was so near the passageway as to render the way unsafe. The cause was submitted in the instructions for plaintiffs on an unsound theory of law, as the case pleaded was not established *prima facie*.

It is insisted by counsel for plaintiffs the answer of defendants aided the petition, and under the answer Marcheck's testimony of defendants' promise to cover the chute was competent, and plaintiffs could recover on it. This promise was not declared on, as it must have been to afford plaintiffs a cause of action. The portion of the answer supposed to help the petition and make evidence of the promise competent was the plea of assumption by plaintiffs when they accepted the premises of the risk of injury from the chute. If plaintiffs had established a *prima facie* case in tort by evidence proving the chute made the passageway dangerous perhaps they might have proved defendants promised to

cover it in refutation of plaintiffs' supposed assumption of risk. Did any duty on the part of defendants accrue to deceased by virtue of the promise to cover the chute, and could deceased, if he had lived, have recovered damages resulting from nonperformance of the duty? The weight of authority is that a lessor's covenant to repair will not support an action for a personal injury due to failure to make repairs, because those injuries are deemed too remote to have been contemplated by the parties when the covenant was given. 18 Ency. Law, 216; McAdam, L. & T. 438; Jones, L. & T. 592; Thompson v. Clemens, 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580 and cases cited on page 206 of 96 Md., page 921 of 53 Atl. (60 L. R. A. 580). This rule cannot be applied to the present case for two reasons. In the first place, the very purpose of the promise was to safeguard plaintiff's children, and hence an injury to one of them in consequence of a failure to perform was contemplated by the parties when the stipulation was given. In the next place, the stipulation was not for repairs on the leasehold, or an appurtenance, but on another portion of the premises which plaintiffs and their family were licensed to use; and therefore the rule as between landlord and tenant would be in point only by analogy, even if the stipulation had not been made with a view to taking precautions against a personal injury. And sometimes when the covenant is to repair leased premises the courts allow a recovery for a personal injury due to a breach, either because it appears this kind of injury was within the intention of the covenant or the circumstances of the failure to perform show negligence on the part of the landlord; that is to say, show not only that he omitted to do what he had agreed, but omitted after he was apprised that performance was essential to the safety of the tenant and his family. Thompson v. Clemens, 96 Md., loc. cit. 209, 211, 53 Atl. 919, 60 L. R. A. 580. If plaintiffs' son had been injured, but not killed, we hold he might have sued on defendants' promise, which seems to have been an integral part of the original contract with Marcheck, therefore supported by a consideration, and given for the benefit of plaintiffs' little children, of whom the deceased was one. Cress v. Blodgett, 64 Mo. 449; Markel v. Telegraph Co., 19 Mo. App. 80.

Other questions spring into sight in connection with such an action. One is whether it would lie in tort or only in contract; the duty to cover the mouth of the chute not being imposed by law in the absence of a stipulation. There are decisions allowing an action in tort in the nature of trespass on the case for failure to keep such a stipulation. Thompson v. Clemens, supra; Edwards v. Railroad, 98 N. Y. 245, 248, 50 Am. Rep. 659; Spellman v. Bannigan, 36 Hun, 174;

Sieber v. Blanc, 76 Cal. 173, 18 Pac. 260. A cognate question was investigated by this court in Wernick v. Railroad (Mo. App.) 109 S. W. 1027. The other cases just cited arose between landlords and tenants, but we suppose the principle of the decisions would include a stipulation to make licensed premises safe for a tenant who was privileged to use them in connection with his leasehold.

Another question to be considered is whether, if the deceased might have sued in contract had he lived, the right to sue in that form of action was transmitted to the plaintiffs on his death by our statute, which provides that when the death of any person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect, or default was one for which the party killed might have sued if he had been injured merely, the party in fault shall be liable to the survivors of the deceased as designated in sections 2864 and 2865 of the statutes (Rev. St. 1899 [Ann. St. 1906, pp. 1637, 1644]). We have found no case wherein the court considered whether default in the performance of a contract whereby another's death was caused falls within the purview of such a statute. All the decisions we have seen were in actions of tort. Still the words "act, neglect or default" are broad and various. It might be necessary to determine whether an amendment to the petition declaring on defendants' promise would substitute a new cause of action.

These questions have not been treated by counsel, and we are unwilling to decide them without the help of briefs or arguments. Hence we will simply affirm the order for new trial and remand the cause, for plaintiffs to take such a course as their counsel may advise. All concur.

TATE v. JASPER COUNTY FARMERS' MUT. INS. CO.

(Kansas City Court of Appeals. Missouri.
Nov. 16, 1908.)

1. INSURANCE (§ 151*)—FIRE INSURANCE—DESCRIPTION OF PROPERTY — VARIANCE BETWEEN POLICY AND APPLICATION.

Though a by-law of insurer makes the application for insurance a part of the contract of insurance, yet the policy, executed, delivered, and accepted at a later date than the application, will control it in case of variance between them in the description of the property.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 308; Dec. Dig. § 151.*]

2. INSURANCE (§ 163*)—PROPERTY INSURED—"ADDITION."

A building detached from the main dwelling, but used as a part of it, is an "addition" within a fire policy on "dwelling and addition."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 341; Dec. Dig. § 163.*]

For other definitions, see Words and Phrases, vol. 1. pp. 175-177.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. INSURANCE (§ 163*)—PROPERTY INSURED—"CONTENTS OF DWELLING."

A policy on "dwelling and addition" and "contents of dwelling" does not cover contents of the addition.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 163.*]

For other definitions, see Words and Phrases, vol. 8, pp. 2285-2295; vol. 8, p. 7646.]

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by J. P. Tate against the Jasper County Farmers' Mutual Insurance Company. From the judgment both parties appeal. Affirmed.

McReynolds & Halliburton, for plaintiff.
Joe D. Harris and H. L. Shannon, for defendant.

BROADDUS, P. J. This is a suit on a policy of insurance issued by defendant on the 22d day of June, 1905, whereby defendant insured the plaintiff against loss by fire on the following property: "Dwelling and addition, * * * in the sum of thirteen hundred dollars, and upon the contents of said dwelling in the sum of twelve hundred dollars." On February 10, 1906, a structure, claimed to be an addition to said building, was destroyed by fire with the goods and contents therein, and the main building was damaged. The defense is: That plaintiff made application on property described as follows, to wit: "Frame dwelling, 16x38 feet, 1½ stories, age 14 years; frame addition, 18x38, 1 story, age 14 years; 1 porch." And that, by the constitution and by-laws of the organization of which plaintiff is a member, the said application became a part of the contract of insurance. The plaintiff replied to the effect that the only application he ever made for such insurance was in blank, and that, if there was any written description inserted therein, it was the act of the defendant. The testimony tends to show that there was a structure close to the main building that was used in connection with it, and in which were kept family stores and other things used for family purposes, but not directly attached to such main building. The application, signed by plaintiff, was introduced by defendant, in which the description of the property coincides with the statement in defendant's answer. Plaintiff's evidence was that he signed it in blank, while that of defendant was that the description was inserted upon information given by plaintiff. Under the by-laws of the company, such applications are made a part of the contract of insurance. There is also a by-law that provides that: "Insurance on property incumbered by mortgage, deed of trust, or mechanic's lien, shall be payable, in case of loss, to the person or persons holding such incumbrances unless the owner give security that he will use the money to rebuild or repair loss or damages."

It appeared that a third party had a mortgage on the property. The court permitted plaintiff to recover for the destruction of the detached structure and for damage to the main building, but would not permit him to recover for the contents of the so-called addition. The defendant appealed, and the plaintiff appealed from the action of the court in refusing him judgment for the value of the contents of the detached building.

The only questions raised by the defendant's answer are that it did not insure such addition to the main building as described in the written policy, and that the building destroyed was not an addition to the main building. To these two questions we will confine our examination and decision, although defendant has raised other questions outside of the issues.

There is a substantial variance in the description in the policy and that contained in the application, and yet under the by-law in question both are made a part and parcel of the same contract. They were, however, executed at different times. The policy was the last executed and was delivered by the company to plaintiff, who accepted it as written. It was prepared by defendant's secretary who had previously filled out the blank application. As it described plaintiff's property he intended to insure, we think it should control. The recitations in an application cannot be invoked for the purpose of contradicting the terms of the contract as contained in the policy.

Was the detached building, although used as a part of the main dwelling, an addition within the description of the policy? The question is answered in the affirmative by numerous decisions, of which the following are a part: Phoenix Ins. Co. v. Martin (Miss.) 16 South. 417; Robinson v. Pa. Ins. Co., 87 Me. 399, 32 Atl. 996; Pettit v. State Ins. Co., 41 Minn. 299, 43 N. W. 378.

The contention of the plaintiff that the court committed error in not allowing him a judgment for the contents destroyed in the addition we think is not sustained. The policy insures "dwelling and addition" and "contents of dwelling." If it had been the intention to insure the contents of the addition, the policy should have read, "dwelling, addition, and contents," etc. There is no doubt about the meaning.

The cause is affirmed on both appeals. All concur.

STATE v. KELLOGG.

(Kansas City Court of Appeals. Missouri. Oct. 5, 1908. Rehearing Denied Nov. 16, 1908.)

1. INTOXICATING LIQUORS (§ 34*)—LOCAL OPTION LAW—ELECTION—TIME AND PLACE—MANDATORY PROVISIONS.

The provisions of local option law (Rev. St. 1899, § 3027 [Ann. St. 1906, p. 1733]) relating to time and place of holding an election there-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

under are mandatory, so that an election held more than 40 days after the receipt of the petition by the county court is void.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 34.*]

2. INTOXICATING LIQUORS (§ 32*)—LOCAL OPTION ELECTION—TIME—PETITION—REFILING.

A petition for local option election was received by the county court October 3, 1887, when the petition was ordered filed and the matter continued. On February 6, 1888, an order was entered reciting that "the petitioners in said cause" were granted leave to withdraw the petition, and on February 8th a new petition was filed, praying for such election, on which an election was ordered held March 9, 1888. The petition withdrawn was embodied in that filed two days later; the list containing the names of the new petitioners being incorporated with the old to form the new petition. *Held*, that the original petitioners were entitled to withdraw their petition, acting together as shown by the order, and were not disqualified from signing another and all consenting from using parts of the old paper to make the new, which being filed constituted a new petition, so that the election was held within 40 days from the filing of the petition, as required by Rev. St. 1899, § 3027 (Ann. St. 1906, p. 1733).

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 32.*]

3. INTOXICATING LIQUORS (§ 33*)—LOCAL OPTION ELECTION—ORDER—SUBMITTED QUESTION.

Rev. St. 1899, § 3027 (Ann. St. 1906, p. 1733), provides that the question to be submitted at a local option election is whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of the county. *Held*, that where, in the published notice of election, the proposition to be voted on was stated in the language of the statute, and the proper form of ballot was used, the election was not void because the order recited the question "whether or not the sale of intoxicating liquors shall be prohibited in said county in accordance with the provisions of the local option law"; there having been a substantial compliance with the statute.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 40; Dec. Dig. § 33.*]

4. INTOXICATING LIQUORS (§ 33*)—LOCAL OPTION ELECTION—ORDER—PUBLICATION OF NOTICE.

Rev. St. 1899, § 3029 (Ann. St. 1906, p. 1736), providing that an order for local option election shall direct the clerk to "cause to be published a notice of said election in some newspaper published in said county for at least four consecutive weeks," etc., requires the court to direct in the order the newspaper in which the notice is to be published.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 33.*]

5. INTOXICATING LIQUORS (§ 33*)—LOCAL OPTION ELECTION—NOTICE—PUBLICATION.

Where the court erroneously omitted to designate the newspaper in which the notice of an order for local option election was to be published, as required by Rev. St. 1899, § 3029 (Ann. St. 1906, p. 1736), such omission was rendered harmless by the clerk's publication of the notice in all the newspapers published in the county.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 33.*]

Appeal from Circuit Court, Worth County; Wm. C. Ellison, Judge.

Ed Kellogg was convicted of violating the local option law, and he appeals. Affirmed.

J. W. Peery and Kelso & Kelso, for appellant. L. M. Phipps and John Ewing, for the State.

JOHNSON, J. Defendant was indicted, tried, and convicted on a charge of violating what is known as the local option law (art. 3, c. 22, Rev. St. 1899 [Ann. St. 1906, p. 1733]), and brings the case here by appeal.

For the purposes of the case, defendant admitted making the sale charged in the indictment, and interposed as his sole defense the claim that the election in Worth county (where the sale was made) "to determine whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of such county," was not held in conformity with mandatory provisions of the statute. The first attack on the validity of the proceedings is leveled at the petition of the qualified voters of the county in which the election was ordered. The record of the county court relating to the petition embraces the following entries:

"Oct. 3, 1887. In the matter of the petition of divers taxpayers of Worth county for an order for an election to determine the question of the adoption or rejection of local option with regard to the manufacture and sale of intoxicants. It is ordered by the court that the petition presented be filed for record and the matter is continued until the next term of this court or until the constitutionality of the act be determined.

"Feb. 6, 1888. In the matter of the petitions filed by the taxpayers on October 3, 1887, in this court praying for an order of election on the question of local option and continued at said term until the constitutionality of said act be determined, now come the petitioners in said cause and ask leave to withdraw the same from the consideration of said court. It is therefore ordered by the court that they be permitted to withdraw the same.

"Feb. 8, 1888. Now at this time comes Carson Reed, B. N. Danford, and Rev. Watkins and file their petition in open court praying the court to order an election to submit to the qualified voters of the county the question of prohibiting the sale of intoxicating liquors in the county of Worth in accordance with the provisions of the Wood local option law, Session Acts of 1887, at page 180, which said petition is taken up and considered by the court, and the court doth find that the said petition is signed by at least one-tenth of the qualified voters of Worth county, as required by law. It is therefore ordered by the court that an election be held on the 9th day of March, A. D. 1888, at the various voting precincts in said county, to determine whether or not the sale of intoxicating liquors shall be prohibited in said county in accordance with the provisions of the local option law. It is

further ordered that the clerk of this court cause to be published a notice of said election in some newspaper published in said county for at least four consecutive weeks; the last insertion to be within ten days next before said election."

Oral evidence was admitted, from which it appears beyond question that the petition withdrawn on February 6, 1888, was embodied in the petition filed two days later, and the evidence tends to show that lists containing the names of new petitioners were incorporated with the old lists and entered into the composition of the petition presented on February 8, 1888. The statute provides (section 3027, Rev. St. 1899 [Ann. St. 1906, p. 1733]): "Upon application by petition signed by one-tenth of the qualified voters of any county * * * the county court of such county shall order an election * * * to take place within forty days after the reception of such petition," etc. Defendant contends that the provision requiring the election to be held in 40 days after the reception of the petition is mandatory, and that "since the evidence shows that the petition was received by the county court October 3, 1887, and remained on file until February 6, 1888, when it was withdrawn and refiled February 8th, and the election ordered to be held on March 9th, 156 days after the receipt of the petition by the county court, the election was therefore void."

It was held by the St. Louis Court of Appeals, in *State ex rel. v. Ruark*, 34 Mo. App. 325, and by this court, in *State v. Webb*, 49 Mo. App. 407, that the statutory provisions relating to the time and place of holding an election under the local option law are mandatory and not merely directory, and that an election held on a day more than 40 days after the receipt of the petition by the county court must be declared void. This view of the law has our sanction, and we pass to the question of whether the election in the present instance was appointed for a day within the statutory period. Defendant says that when the petition was received by the county court on October 3, 1887, its sole function was performed, and that by withdrawing it and re-filing it the petitioners could not prolong its life, and thus extend the time of holding the election beyond the statutory limit of 40 days. Reliance is placed on *State v. Webb*, supra, to support this contention. There a petition signed by about 1,800 voters was presented to the county court on July 10, 1888, and an election was ordered. Some three weeks later, a few of the petitioners (so the record stated) appeared in court, and, for reasons not important here, asked and obtained leave to withdraw the petition. Without leaving the courtroom, they then refiled the petition and obtained an order for an election, which was held 52 days after the original filing. Speak-

ing of this proceeding, we said: "We regard this as a mere idle performance. There was only one petition presented, and that was on July 10th. It then served its purpose and from that time on was powerless to institute another such proceeding. The 1,800 signers to that petition had presented the same to the county court, and it had been acted on under the common understanding that there was to be an election looking to the enforcement of prohibition only in that portion of Cass county outside of Harrisonville and Pleasant Hill. A few of these signers attempted before the county court to withdraw the petition and offer it for another and different purpose; that is, to enforce this prohibition in Harrisonville as well as other portions of the county. It was all the time the same petition. It was lodged with the court on July 10th and would serve under the law a basis for the order of an election to be held within 40 days after said July 10th, but not later."

The facts before us differ in essential particulars from those stated in the case under review, and call for the application of a different rule. Here the record recital is that the petitioners themselves appeared and asked leave to withdraw their petition. Their number is not disclosed, but, whether it was 100 or 1,800, we have no right to reject as false this solemn record declaration, especially in view of the fact that its verity is not attacked in any manner. Rightly understood, there is nothing in the opinion in the *Webb* Case to militate against the view we entertain that they who petition for anything have an inherent right to withdraw their petition at any time before the accomplishment of its purpose, and we went no further than to deny to a small minority of the petitioners the right, on their own motion, and without authority from the others, to bind the whole body to a substantial alteration of the original purpose by a mere manipulation of the petition. Clearly this was right, but it falls far short of being a pronouncement that the petitioners themselves might not have withdrawn their petition at any time before the order for the election was made, as was done in the present case. The effect of such withdrawal was to divest the county court of jurisdiction over the subject-matter, and, with the proceeding at an end, there was nothing to prevent the same persons who signed the other petition from appearing again as petitioners. They had not disqualified themselves, and, having the right to petition, why put them to the trouble of signing another paper? We perceive no reason for saying that they might not use the same lists again. If all consented to another presentation, such consent revitalized the document, and it would be absurd to hold that their consent could be evidenced only by signing a different paper. The presumption of right acting which attaches to official acts compels us to assume, in the absence of a showing

to the contrary, that, in the two days which intervened between the withdrawal of the first petition and the presentation of the second, the consent of the first petitioners was obtained to the refile of the original lists.

Next, defendant contends that the order for the election is fatally defective for the reason that it provides for the submission to the voters of a proposition not authorized by the statute. The question stated in the order is "whether or not the sale of intoxicating liquors shall be prohibited in said county in accordance with the provisions of the local option law." That approved by the statute (section 3027) is "whether or not spirituous and intoxicating liquors, including wine and beer, shall be sold within the limits of such county." In the published notice of the election, the proposition to be voted on was stated in the language of the statute, and a proper form of ballot was given. In proceedings of this character, it always is advisable to follow closely the language of the statute, and where this is not done, and the variance is substantial, the election must be declared void. *Black on Intoxicating Liquors*, § 95; *Ex parte Beaty*, 21 Tex. App. 426, 1 S. W. 451. But where, as here, there has been a substantial compliance with the statute, it is immaterial that its exact words were not employed in the order. It is the substance, not the form, that is all important. Unquestionably, the voters knew that the proposition to be determined was that authorized by the statute, for the order itself so stated, and, in addition, they were so informed by the published notice, as well as by the form of the ballot. If there was no room for a voter of ordinary intelligence to be deceived or misled about the question to be voted on—and we think there was none—mere verbal inexactness in the order should be disregarded. To hold otherwise would involve the injustice and logical absurdity of sacrificing the spirit and reason of the law to its bare letter. The function of the order was accomplished fully when the voters were given a legal opportunity to vote on the very question the law required to be submitted to them.

Finally, it is argued that the order was defective because it failed to name the newspaper in which the notice of election was to be published. The order directed the clerk to "cause to be published a notice of said election in some newspaper published in said county for at least four consecutive weeks," etc. It unquestionably appears from the evidence that the clerk published the notice in all of the newspapers published in the county. In *State v. Baldwin*, 109 Mo. App., loc. cit. 578, 83 S. W. 267, we said: "Under section 3029 (Ann. St. 1906, p. 1736), of said local option law, it devolved on the county court to direct in what newspaper published

in the county, if there was more than one so published, in which notice of the election should be published, and to order such other notice as it might think proper," etc. That is true. The law does not contemplate that the county court may leave it to the clerk to make a choice from among two or more papers. Such a course might lead to attempts to suppress the dissemination of information intended by law to be given full publicity. But in the case in hand, while the order apparently did attempt to delegate the selection of the newspaper to the clerk, no harm was done, for the reason that he wisely refused to make a choice and employed all of the papers in the county. In doing this, he substantially complied with the requirements of the statute, since he accomplished all that would have been accomplished had the order named the newspaper.

We are of opinion that the election was legal, and, as its alleged invalidity is the only defense offered, it follows that the judgment must be affirmed. All concur.

KELLOGG v. GERMAN AMERICAN INS. CO.

(Kansas City Court of Appeals, Missouri. Oct. 5, 1908. Rehearing Denied Nov. 16, 1908.)

1. INSURANCE (§ 126*)—"PROPERTY" INSURABLE—INTOXICATING LIQUORS.

Intoxicating liquors, being recognized as property in Missouri, are insurable.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 126.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

2. INTOXICATING LIQUORS (§ 238*)—KEEPING LIQUORS—INTENT.

The presence of a quantity of intoxicating liquors in a drug store is not necessarily indicative of a purpose on the owner's part to violate the liquor law by making illegal sales thereof.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 238.*]

3. INSURANCE (§ 138*)—ILLEGAL CONTRACT—INSURANCE OF LIQUORS—VIOLATION OF LAW.

If when plaintiff, a druggist, insured his drug stock, containing a quantity of beer and whisky, he intended to conduct an unlawful business and sell the liquor contrary to law, the insurance would be void as directly protecting plaintiff in his illegal purposes; but if plaintiff, when he procured the insurance, was actuated by an intent to conduct a legitimate drug store and use the liquors only in connection with that business in the usual and lawful manner, the insurance was valid.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 251; Dec. Dig. § 138.*]

4. INSURANCE (§ 668*)—DRUGGISTS—ILLEGAL BUSINESS.

The presence in a drug stock of 10 barrels of beer and 70 gallons of whisky and the fact that plaintiff occasionally made unlawful sales and had a thriving trade in whisky and beer did not establish as a matter of law that the plaintiff's business and practices were unlawful, rendering a policy on the stock void.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1734; Dec. Dig. § 668.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. INSURANCE (§ 668*)—PAYMENT OF LOSS—VEXATIOUS REFUSAL—PENALTIES—QUESTION FOR JURY.

In an action on a fire policy, whether defendant has been guilty of vexatiously refusing to pay the loss, so as to entitle plaintiff to recover the penalty authorized under such circumstances by Rev. St. 1899, § 8012 (Ann. St. 1904; p. 3808), is for the jury.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 668.*]

Appeal from Circuit Court, Buchanan County; William D. Rusk, Judge.

Action by W. E. Kellogg against the German American Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Fyke & Snyder and W. B. Pistole, for appellant. Mytton, Parkinson & Crow, for respondent.

JOHNSON, J. Action on two policies of fire insurance, which covered merchandise and fixtures in a drug store owned and operated by plaintiff in the town of Athelstan, Worth county. The policies were duly issued, plaintiff paid the premiums demanded, and the property was destroyed by fire during the period of insurance; but defendant refused to acknowledge liability and endeavors to justify its position on ground thus pleaded in the answer: "At the time said policy was issued, said plaintiff made application to defendant in writing for the policy sued on, in which said application plaintiff represented and stated over his signature the said insurance was wanted upon such goods as are usually carried and kept for sale by a drug store, and warranted in said application that the building described and within which the insured property was located and insured was occupied, first story, 'Drug store, and proprietor sleeps in small room,' and that the basement was used as a storage room, and warranted that such statement was a just, true, and full exposition and statement concerning the property to be insured, and the basis upon which the insurance was to be effected, and a continuing warranty on the part of the applicant, said plaintiff, which said statements and warranties defendant alleges were untrue and were a misrepresentation and concealment of material facts and circumstances concerning the insurance and subject thereof and a fraud upon defendant, in this: That the risk to be insured was not a drug store, but was or became a saloon and place where intoxicating liquors were sold, not for medicinal purposes, but in violation of law for use as beverages, and plaintiff's principal business was the unlawful sale of intoxicating liquors. That the merchandise for the loss of which plaintiff makes claim was not such goods as are usually kept for sale in a drug store, but were supplies for a saloon, consisting principally of whisky, beer, and other intoxicat-

ing liquor. That plaintiff did not apply to defendant for insurance upon a saloon or a place conducted as a saloon, and defendant did not issue its policy to cover such risk, nor to insure against such conditions, and, had it known the facts as they existed, would not have issued its said policy. * * * At the time the policy sued on was issued, and at the time of the fire mentioned in plaintiff's petition, and for a long time prior thereto, the sale of intoxicating liquors, wine and beer, was forbidden by law in Worth county, Mo., where the property in question was situated. That on the ——— day of ———, an election of the qualified voters of said county outside of cities of 2,500 population had been held, and, all as provided by law, the sale of intoxicating liquors in said county had been prohibited, and that plaintiff in keeping for sale intoxicating liquors, wine and beer, and selling the same, was acting in violation of law and conducting a business unlawful and forbidden by law, in all of which the property destroyed was used and was a part. That plaintiff was forbidden by law to keep and sell such merchandise, which consisted of intoxicating liquors, wine and beer, and other things to promote the sale thereof, and by reason thereof is not entitled to enforce a claim for their loss in a court of justice."

The policy on which the cause pleaded in the first count of the petition is founded was issued June 16, 1906, for a period of one year. It provided for insurance of \$900 on plaintiff's "stock of merchandise, consisting principally of patent medicines, drugs, paints, oils, liquors, and such other goods not more hazardous as are usually kept for sale in a drug store," and for \$175 "on store furniture and fixtures, including iron safe, counters and shelving," and recites that it is made and accepted subject to the following stipulations and considerations: "It is a part of the consideration of this policy and the basis upon which the rate of premium is fixed that, in the event of loss, this company shall not be liable for an amount greater than three-fourths of the actual cash value of the property covered by this policy at the time of such loss, and in case of other insurance * * * then for only its pro rata proportion of such three-fourths value. * * * This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof. * * * This policy is made and accepted subject to the foregoing stipulations and considerations. * * * " The policy pleaded in the second count, issued August 26, 1906, for one year, placed \$300 on the stock of merchandise "consisting principally of drugs, patent medicines, notions, stock food, paints and such other goods not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

more hazardous as are usually kept for sale in a drug store." It is in the same form as the other policy. The application made by plaintiff for the first policy contains questions and answers as follows: "(8) Occupation. First story drug store, and proprietor sleeps in small room. Basement as storage room." "(10) Is the property steadily profitable? A. Yes. (11) Are there any other facts or circumstances affecting the risk? A. None." The applicant then covenants and agrees "that the foregoing is a just, true and full exposition and statement concerning the property to be insured, being the basis on which the insurance is to be effected, and a continuing warranty on the part of the applicant."

Plaintiff testified that in June, 1905, he purchased two stocks of drugs, etc. (in which were very little intoxicating liquors), consolidated them into a single stock, and opened a drug store in Athelstan. A year later, and just before the first policy in suit was issued, he took an inventory, from which it appears that the fixtures in the store were of the value of \$246.30, and the merchandise \$1,612.72. The merchandise included 10 barrels of beer and perhaps 70 gallons of whisky, the value of which is not stated. The fire occurred March 13, 1907, and the total purchases of merchandise made by plaintiff between June 16, 1906, the date of the inventory, and the day of the fire, amounted to \$1,625, of which \$682.80 was for beer, \$579.50 for whisky, \$16.53 for alcohol, \$101.05 for tobacco and pipes, and the remainder for drugs and drug store articles. Plaintiff states, and there is no direct proof to the contrary, that he sold no spirituous liquors except on prescription, but that generally he sold beer without prescriptions. He was indicted and convicted on five different charges of violating the local option law. The cases were appealed to this court, and one of them was decided at this term. *State v. Kellogg* (not yet officially reported) 113 S. W. 660.

At the close of the evidence, defendant's request for an instruction peremptorily directing a verdict in its favor was refused, and at its request the court instructed the jury, in part, as follows: "The court instructs the jury that the policies sued on insured a drug store and merchandise therein, consisting of patent medicines, drugs, paints, oils, liquors, and such other goods as are usually kept for sale in a drug store. If you find from the evidence that the principal business of plaintiff was the sale of intoxicating liquors, and was not that of a druggist, and that the place described therein was one where intoxicating liquors were principally sold, and not a legitimate drug store conducted, and the drug business was a mere cover for his liquor traffic, then the same was not insured by the policies sued on, and plaintiff cannot recover. The court instructs the jury that under the policies sued on only such liquors were insured as are

usually kept in and are necessary to the business of a drug store, situated as plaintiff's store was situated; and if you find from the evidence plaintiff kept liquors not used in or necessary to a drug business and not sold incidental to his drug trade, or that his principal business consisted of the sale of intoxicating liquors, then he cannot recover for the value of any intoxicating liquors destroyed by the fire complained of in excess of the usual amount of such liquors necessary to the business of a druggist."

Verdict was for plaintiff on both counts of the petition, and, after unsuccessfully moving for a new trial, defendant brought the case here by appeal.

The first and most important questions presented for our determination are involved in the contention of defendant that the demurrer to the evidence should have been sustained. This contention is based on the hypothesis that the evidence, even in its aspect most favorable to plaintiff, shows beyond question that the business inaugurated and conducted by him was nothing less than an illicit dramshop, and that a stock of drugs was carried in connection with the business merely as a device to conceal the real purpose, which in its execution necessarily involved a continuous violation of law. From this standpoint, defendant reaches the conclusion that the policies are void on two grounds: First, because of the false representation of plaintiff that the property to be insured was being used and would be used in a legitimate and lawful manner, whereby defendant was deceived into issuing policies on a different and more hazardous risk than that represented; and, second, because the law should denounce as *contra bonos mores*, and therefore unenforceable, a contract made in aid of a scheme to violate the law, even should it appear that the insurer was not deceived.

In *Kelly v. Insurance Co.*, 97 Mass. 288, it appeared that the subject of insurance was a stock of intoxicating liquor which the owner at the time of the insurance and during its currency kept for sale in violation of law. "It was liable to be seized and confiscated as a nuisance, and the place where it was kept was made a nuisance by the plaintiff's intent to sell it illegally. By thus keeping it, and also by thus selling it, the plaintiff committed an offense which was punishable by fine and imprisonment." After referring to the well-recognized doctrine of marine insurance, which holds void a policy of insurance issued on a vessel or its cargo where the object of the voyage is illegal, the court said: "The same principle upon which it is held that goods, which are carried for an illegal purpose or in an illegal manner, cannot be the subject of a valid insurance against the perils of the sea, applies with equal force to an insurance against fire upon goods which are so unlawfully kept in a store that the owner is liable to fine and imprisonment, the store made a nuisance, and the goods subject to

seizure and forfeiture. In the present case, the insured was the guilty party, and his direct purpose in taking the policies was that he might continue his offense with the greater safety. His contract was in contravention of law and void as to him, because he entered into it in order to protect himself in his illegal acts."

In *Niagara Insurance Co. v. De Graff*, 12 Mich. 124, a general stock of merchandise, including dry goods and groceries, was insured. At the time of the fire, plaintiff had in stock spirituous liquors and alcohol. The trial court refused to instruct the jury "that, since the passage of the prohibitory liquor law, alcohol and spirituous liquors are not included in the term 'groceries' as used in reference to goods kept for sale, and charged that the question whether they were so included was one of fact for the jury." The Supreme Court of Michigan sustained this ruling, saying: "It was claimed on behalf of plaintiffs in error that, if these liquors can be allowed to be included in a policy, the policy will be, to all intents and purposes, insuring an illegal traffic, and several cases were cited involving marine policies on unlawful voyages and lottery insurances, which have been held void on that ground. These cases are not at all parallel, because they rest upon the fact that in each instance it is made a necessary condition of the policy that the illegal act shall be done. The ship being insured for a certain voyage, that voyage is the only one upon which the insurance would apply, and the underwriter becomes thus directly a party to an illegal act. So insuring a lottery ticket requires the lottery to be drawn in order to attach the insurance to the risk. If this policy were in express terms a policy insuring the party selling liquors against loss by fire or forfeiture, it would be quite analogous; but this insurance attaches only to property, and the risks insured against are not the consequences of illegal acts, but of accident. Our statute does not in any way destroy or affect the right of property in spirituous liquors, or prevent title being transmitted, but renders sales unprofitable by preventing the vendor from availing himself of the ordinary advantages of a sale, and also affixes certain penalties. If the owner sees fit to retain his property without selling it, or to transmit it into another state or country, he can do so. By insuring his property, the insurance company have no concern with the use he may make of it, and, as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner, unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which these may be remotely connected. In the case of *Insurance Company v. Polleys*, 13 Pet. 157, 10 L. Ed. 105, an insurance upon a ship known by the insurance company to be liable to for-

feiture under the registry laws of the United States was held valid, and a recovery was permitted for a loss while sailing under papers known to be illegal. The case of *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468, is still stronger. It is difficult to perceive how public policy can be violated by an insurance of any kind of property recognized by the law to exist."

The Supreme Court of Vermont, in dealing with facts very closely akin to those under consideration in the present case, had this to say: "If the purpose of the contract in question had been to protect the assured in the sale of intoxicating liquors, it would have been null; but the greater part of the property insured consisted of goods insurance upon which was subject to no objection. The contract was legal upon its face, nothing appearing to show that the wines and liquors were intended for illegal sale; and it is a fact not needing proof that, in compounding medicines, liquors, especially wines and alcohol, are of daily use, and for that purpose their possession and use by druggists legitimate. The assured was a dealer in drugs and medicines, and in that respect legitimately and presumably using liquors. There was evidence tending to show that he illegally sold them, including those not used in compounding medicines, and the fact may have been that the latter trade was the larger and his main one. If such illegal traffic was the business of the assured, and his legal traffic and transactions with other property a mere cover, ostensibly carried on for the purpose of enabling him to secrete and disguise his iniquity, the purpose of the contract would be to protect him in his illegal ventures, and it would therefore be void; but if he carried on his business, using alcoholic liquors legitimately in his drug trade, and occasionally sold them in violation of law, we think that, if no illegal design entered into the making of the contract in its inception, it would be so far collateral to the illegal acts that it would be inconsistent and in accordance with no well-adjudged case to hold it null. * * * The distinction is between cases where the contract is void in its inception, entered into for the purpose of protecting a prohibited traffic, and those cases where the contract is collateral, and into which no illegal design enters, although by the subsequent acts of the assured it becomes remotely connected with illegal transactions." *Carrigan v. Insurance Co.*, 53 Vt. 418, 38 Am. Rep. 687.

The doctrine of this case was approved by the Supreme Court of Iowa in *Erb v. Insurance Co.*, 98 Iowa, 606, 67 N. W. 583, 40 L. R. A. 845, where it is said: "The facts to bring the policy within the rule to make it void are wanting. The drugs and liquors are recognized property in this state and as legitimate subjects of insurance as other property. It is the illegal use of them that gives rise to the questions before us. We have not seen a case in which, because of

the mere use of property for illegal purposes, not increasing the hazard, in the absence of stipulations to that effect, a policy has been held void because of such use. It is not a case in which the contract itself is against public policy, by the parties, at the inception of it, intending it to be in aid of purposes or designs to violate the law. This case simply presents the question whether, where a party uses property for an unlawful purpose that is susceptible of legitimate use, such use will render the insurance contract void as against public policy. We think that no authority sustains such a rule, and it does not seem to be dictated by reason."

The Supreme Court of Kansas, in *Insurance Co. v. Evans*, 64 Kan. 770, 68 Pac. 623, recognized as sound the principles followed in the Michigan, Vermont, and Iowa cases from which we have quoted, and so we regard them. Intoxicating liquors, being recognized as property in this state, are insurable, and their presence in a drug store is not necessarily indicative of a purpose on the part of their owner to violate the liquor laws by making illegal sales of them. If, at the making of the contract of insurance, plaintiff intended to conduct an unlawful business, the contract of insurance should be held void, on the ground that its direct effect was to protect plaintiff in his purpose to violate the law. If, on the other hand, plaintiff, at the time the insurance was procured, was actuated by the intent to conduct a legitimate drug store and to use intoxicating liquors in connection with that business only, in the usual and lawful manner, we perceive no reason for declaring the contract void. There is nothing on its face to bespeak such improper purpose. As before stated, it deals with a legitimate subject of insurance, and the indemnity provided is for the accidental loss or injury of the property by fire, and not against loss sustained in consequence of a violation of law. We cannot say, as a matter of law, that the presence in the stock at the time the insurance was contracted of 10 barrels of beer and 70 gallons of whisky indubitably stamped the business and practices of plaintiff as unlawful; nor should we indulge in such inference from the additional facts that, after the insurance was procured, plaintiff occasionally made unlawful sales and had a very thriving trade in whisky and beer. Such facts tend to prove the existence of unlawful intent, but they are not conclusive, and, in effect, go no further than to raise an issue of fact for the solution of the jury. We think the court properly overruled the demurrer to the evidence and submitted the issue to the jury in instructions which correctly declared the law of the case.

Point is made that the verdict is excessive, but we find the excess has been eliminated by a remittitur entered by plaintiff.

Objection is made to the submission to the

jury of the question of whether or not a penalty should be imposed on defendant, under the provisions of section 8012, Rev. St. 1899 (Ann. St. 1906, p. 3808), for vexatiously refusing to pay the loss. What was said by the Supreme Court in the case of *Keller v. Ins. Co.*, 198 Mo., loc. cit. 460, 95 S. W. 909, completely answers the objection: "The question of vexatious delay on the part of the defendant in paying this death claim was one of fact to be determined by the jury."

It was said by this court, in *Brown v. Railway Assurance Co.*, 45 Mo., loc. cit. 227: "The whole question of vexatious refusal or delay is a matter of fact to be determined by the jury. They must make up their verdict by a general survey of all the facts and circumstances in the case; and if, upon a full consideration, they conclude that the refusal was unjustifiable and vexatious, the law authorizes them to assess the damages. The statute will not admit of the construction contended for by counsel for the plaintiff in error that, before damages are allowed, it must be explicitly proved by the plaintiff that the delay or refusal was vexatious. In our opinion, the record discloses sufficient evidence to warrant the court in submitting the question of vexatious delay in the payment of this claim to the jury, and we shall not undertake to usurp the province of the jury and retry such questions upon this appeal."

The judgment is affirmed. All concur.

BELL v. BELL et al.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908.)

1. HUSBAND AND WIFE (§ 171*)—CONTRACTS OF WIFE—MORTGAGE OF REALTY.

A married woman, by conforming to the requirements of the statute, may make a valid mortgage upon her realty not held to her separate use, though the debt or liability secured thereby be that of her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 671-683; Dec. Dig. § 171.*]

2. HUSBAND AND WIFE (§ 171*)—VALIDITY—CONSIDERATION—PRE-EXISTING DEBT.

A mortgage given by a wife to secure the payment of a pre-existing debt of her husband, supported by no new consideration, neither a benefit to the wife nor detriment to the mortgagee or a third person, is invalid.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 671-683; Dec. Dig. § 171.*]

Appeal from Circuit Court, Cedar County; L. W. Shafer, Judge.

Foreclosure suit by J. S. Bell against Charles C. Bell and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Silvers & Dawson, for appellant. Thos. J. Smith, for respondents.

JOHNSON, J. This is a suit to foreclose a mortgage on real estate. Defendants pre-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

valled in the trial court, where the cause was tried without a jury. Plaintiff appealed.

On October 6, 1887, defendant Charles C. Bell borrowed \$502.75 from his brother, the plaintiff, and delivered to his brother his negotiable promissory note for that sum, payable July 1, 1888, and bearing 10 per cent. interest per annum from date. On November 1, 1887, said defendant borrowed \$1,305.77 from plaintiff, and gave his note due July 1, 1889, for that amount, with interest at 10 per cent. per annum from date. December 13th of the same year, defendant Charles C. Bell and his wife, Mary R. Bell, joined in the execution of a mortgage on land owned by the wife in Cedar county, Mo. The instrument contains the recital: "This grant is intended as a mortgage to secure the payment of one thousand eight hundred eight and 54-100 dollars, according to the terms of tow certain promissory notes executed by the said C. C. Bell to the party of the second part, Jas. S. Bell, date Oct. 6, 1887, due July 1, 1888, amount \$502.75; second note dated Nov. 1, 1887, due July 1, 1889." The mortgage was delivered to plaintiff, and was recorded in the office of the recorder of deeds of Cedar county, June 11, 1889. No payment of either principal or interest was made on the first-described note. Two payments were made and indorsed on the larger note, one of \$500 on July 14, 1890, and one of \$62.60 on November 3, 1892. This suit was brought in the circuit court of Cedar county the 26th day of January, 1907, after both notes were barred by the statute of limitations. One of the defenses interposed by the answering defendants thus is pleaded: "That if said mortgage was executed, same was without consideration, having been received by said Mary R. Bell, or any one to her use, or having been given by the plaintiff or any one for him to induce the execution of said mortgage, and that, if executed at all, said deed of trust was executed by both makers without any consideration whatever."

The recitals in the mortgage and the testimony of plaintiff show indisputably that the mortgage was given by Mrs. Bell on her land to secure a pre-existing debt of her husband, and without any new consideration of any kind to her or her husband. The loans were made by plaintiff to her husband without a demand by the former or a promise by the latter that such security or any security would be given. Plaintiff parted with his money and accepted his debtor's promissory notes for it; then, a month or more after the transaction had been closed and before the maturity of either note, demanded security, and received the mortgage in suit in compliance with the demand. The rule is well settled that "a married woman, when conforming to the requirements of the statute, has the unquestioned power to make a valid mortgage upon her real estate which is not held

to her separate use, though the debt or liability secured thereby is that of her husband." *Meads v. Hutchinson*, 111 Mo. 620, 19 S. W. 1111. And it is just as well settled that a mortgage given to secure the payment of a pre-existing debt of another is invalid if not supported by a new consideration. "The least benefit or advantage to the promisor, or the lease injury or detriment suffered by the promisee or a third person, will support the contract." *Lamp Co. v. Mfg. Co.*, 64 Mo. App. 115, and cases cited. But there must be some consideration, and where, as here, it appears by all the evidence, including the recitals of the instrument itself, that there was none, the mortgage should be held invalid. This conclusion adequately supports the judgment rendered by the trial court for defendants, and relieves us of the duty of discussing other questions ably presented by counsel.

The judgment is affirmed. All concur.

STATE ex rel. LINDQUIST v. BUTLER.
(Kansas City Court of Appeals. Missouri. Nov. 16, 1908.)

COSTS (§ 298*)—IN CRIMINAL PROSECUTIONS—RIGHTS ON ACQUITTAL—PETIT LARCENY—STATUTORY PROVISIONS.

Rev. St. 1899, § 2778 (Ann. St. 1906, p. 1612), provides that where proceedings are presented before a justice at the instance of the prosecuting witness for certain offenses not amounting to felonies, except for petit larceny, and accused is discharged, the prosecuting witness shall pay the costs. Section 2836 (Ann. St. 1906, p. 1628) provides that if upon trial of an indictment or information accused shall be acquitted, and the prosecuting witness shall be liable for the costs, judgment shall be rendered against him, "and in no case shall the same be paid by the county or state." *Held* that, under section 2778, in prosecutions for petit larceny, the prosecuting witness is not liable for costs where accused is discharged, and section 2836 merely requires judgment against the prosecuting witness where accused is discharged if the witness is liable therefor under section 2778 (Ann. St. 1906, p. 1612), the phrase, "and in no case shall the same be paid by the county or state," referring only to cases where the prosecution is liable for the costs under that section.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 1129-1187; Dec. Dig. § 298.*]

Mandamus by the State, on the relation of Frans E. Lindquist, to compel John P. Butler, Judge, to approve and certify a bill of costs. Peremptory writ ordered.

Frans E. Lindquist, for relator.

BROADDUS, P. J. This is a proceeding by mandamus to compel the Honorable John P. Butler, Judge of the Twelfth judicial circuit, to approve and certify a certain bill of costs.

The facts are that on the 6th day of May, 1908, one Zoe Farrell was tried in the court of the relator, a justice of the peace within and for Linn county, upon an information

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

filed by the prosecuting attorney of the county, based upon the affidavit of one J. H. Cassity, charging her with the crime of petit larceny; that a trial before a jury was had, which resulted in a verdict of not guilty, and the said defendant was duly discharged; that relator made out a proper fee bill of the costs against Linn county that had accrued in the case and certified the same to the circuit clerk of the county; that thereupon said clerk made out, as is usual in such cases, a fee bill of said costs, and delivered the same to the said prosecuting attorney, who approved and certified its correctness; that thereafter, on the 23d day of June, 1908, said bill of costs was duly presented to the respondent, judge of said court as aforesaid, for his approval, but who refused to approve the same in the following language: "Approval refused, June 23rd, 1908. [Signed] John P. Butler, Judge." It is agreed by the parties that no alternative writ of mandamus shall be issued, and that, if a peremptory writ be issued, it may issue in the first instance, and it is further agreed that respondent may file his return to the petition herein. The respondent in writing has waived his return, and submits the case upon the matters and things set forth in the petition and writ. The controversy, if any, the respondent having filed no brief or argument, arises upon a construction of sections 2778, 2836, Rev. St. 1899 (Ann. St. 1906, pp. 1612, 1628).

The first section reads as follows: "When the proceedings are prosecuted before any justice of the peace, at the instance of the injured party, for the disturbance of the peace of a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall be entered by the justice on his docket as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor; but in no case shall the prosecuting attorney be liable for costs. In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint." The second reads as follows: "If, upon the trial of any indictment or information, the defendant shall be acquitted or discharged, and the prosecutor or prosecuting

witness shall be liable to pay the costs according to law, judgment shall be rendered against such prosecutor for the costs in the case, and in no case shall the same be paid by either the county or state." The language of section 2778 is plain to the effect that, in prosecutions for petit larceny, the injured party, or as otherwise designated the prosecuting witness, is not liable for the costs of the proceeding wherein the defendant is discharged. Section 2836 is not in conflict with section 2778. Construed together, the former is merely directory; that is, in case the defendant is acquitted or discharged, judgment shall be rendered against the prosecutor wherein he is liable for the costs according to law—i. e., under section 2778—or in all cases not amounting to a felony and except for petit larceny. And the negative language in section 2836, viz., "and in no such case shall the same be paid by either the county or state," merely refers to cases where the prosecutor is liable for the costs according to law; i. e., section 2778.

It follows, therefore, that it was the duty of the respondent to approve of said fee bill, and it is ordered that a peremptory writ of mandamus be issued commanding him to do so. All concur.

DONNER v. METROPOLITAN ST. RY. CO.
(Kansas City Court of Appeals. Missouri. Nov 18, 1908.)

EMINENT DOMAIN (§ 119*) — RIGHTS IN STREETS—STREET RAILROADS—SPUR TRACKS.

Where a city allowed a street railway company to operate a spur track to connect its main tracks with its car barns, the servitude was not different from that contemplated in the original dedication of the street, and an abutter cannot recover for injury caused by a proper maintenance of such track, though he can recover for damages resulting from its negligent maintenance at such an elevation as to seriously obstruct the free use of the sidewalk.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 305-309; Dec. Dig. § 119.*]

Appeal from Circuit Court, Jackson County; Edw. E. Yates, Special Judge.

Action by Nels P. J. Donner against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

John H. Lucas, Frank G. Johnson, and Ben F. White, for appellant. A. N. Adams and Scarritt, Scarritt & Jones, for respondent.

JOHNSON, J. This suit is for the recovery of special damages alleged to have been sustained by plaintiff in consequence of the erection and maintenance by defendant of an obstruction in the public street in front of property owned and occupied by plaintiff in Kansas City. Verdict and judgment were for plaintiff in the sum of \$1,200, and the cause is here on the appeal of defendant.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The premises of plaintiff are at No. 3229 Troost avenue, and consist of a lot 20 feet by 150 feet and a two-story brick business building thereon. Plaintiff operates a confectionery store in the building, and lives over the store. The property is on the east side of Troost avenue, and has a frontage of 20 feet on that thoroughfare. The property immediately to the south is owned by defendant, a street railway company, and for some time prior to the trial of this cause had been occupied by barns for the storage, etc., of electric cars in use on defendant's lines in Kansas City. One of these lines, a double-track road, runs along the middle part of Troost avenue. Two spur tracks, curved in from the north, connected the east main track with the barns, and cars were run in and out over these spurs, when they were withdrawn from or put into service for the carriage of passengers. The first of these spur tracks is the cause of the present controversy. It was constructed in 1902, and ever since has been, so plaintiff contends, a serious obstruction to free ingress and egress to and from his store. His evidence tends to show that, on account of the closeness of this track to his property, the frequency of the passage of cars over it and the fact that it crosses the sidewalk immediately south of that in front of his store access to his building by his customers is impeded and made somewhat dangerous, that vehicles cannot remain standing for any time in front of his store, and that, on account of the negligent elevation of the track above the proper grade, the sidewalk on that side of the street is not as convenient and attractive to pedestrians as otherwise it would be. It is shown that the market value of plaintiff's property has been greatly depreciated by the presence of this track and the operation of cars over it. Further, it appears that because of the elevation of the track the flow of surface water is arrested, and trash and debris collected in front of the store. The cause of action thus is stated in the petition: "That the defendant on or about September, 1902, wrongfully and unlawfully constructed, and has since wrongfully and unlawfully maintained, a switch or spur across the roadway and sidewalk of said Troost avenue in front of and adjoining plaintiff's said lot from the main line of said Troost avenue car line to defendant's car barn, situate on a lot adjoining plaintiff's said lot on the south. That said switch or spur is only 8½ feet from the curbing at the north line of plaintiff's said lot, and from thence curves slightly to a point in the curbing at its intersection with the south line of plaintiff's said lot. That defendant, in the construction of said switch or spur, changed and elevated the surface and grade of the roadway of said Troost avenue in front of and adjoining plaintiff's said lot about eight inches, and destroyed the roadway, the pavement, curbing, and sidewalk on said street in front of and adjacent to plaintiff's said lot. That defendant, acting

by and through its agents and servants, has wrongfully and unlawfully run its cars during the day and night over said switch or spur into and out of their said barn, not for the purpose of carrying passengers, but for its private use and convenience, since September, 1902, and will continue to so use them until the year 1925. That passengers are not carried over said switch or spur. That in the passage of cars over said switch or spur the cars extend a distance of two feet over said sidewalk in front of plaintiff's said lot, and thereby defendant permanently appropriates that portion of said sidewalk to its private use. That, by reason of the wrongful and unlawful construction and use of said switch or spur, and the operation of cars thereon, as aforesaid, passage over and along said Troost avenue in front of said lot is greatly hindered. That thereby the ingress of plaintiff and his customers and the public having business with him to said building from said Troost avenue is greatly impeded and rendered hazardous. That thereby plaintiff and his customers are greatly hindered in their use of said Troost avenue, and the use of the sidewalk in front of said lot of plaintiff. That thereby the value of plaintiff's said lot and the buildings thereon is greatly diminished. That defendant has not paid or tendered plaintiff any compensation for the said damage to said property. Plaintiff states that the damage caused by the wrongful and unlawful construction and use of said switch or spur and the operation of cars thereon as aforesaid is special to him and his said property, and is not common to other property owners along said Troost avenue." The answer contains a general denial and the allegation that the construction and maintenance of the switch was authorized by an ordinance of the city. The proof offered by defendant supports this allegation, and the fact alleged is not denied by plaintiff.

The demurrer to the evidence offered by defendant was overruled, and, at the instance of plaintiff, the court instructed the jury "that if you believe from the evidence the plaintiff is and was at the time hereinafter referred to the owner and occupant of a certain lot having a frontage of 20 feet on Troost avenue, and extending back therefrom 150 feet, known and described as the south 20 feet of lot 6 in Linwood, an addition to Kansas City, Mo., and the improvements thereon, and that said lot fronts on Troost avenue in said city, that defendant on or about September, 1902, began the construction and shortly thereafter completed a switch or spur from the main line of the car line on said Troost avenue into its car barn, and that the said car barn was situate on the lot adjoining plaintiff's said lot on the south, and that said switch or spur crosses the roadway of said Troost avenue from the said car track at or near the center thereof to the east line of said street in front of and adjacent to the plaintiff's said property, and

that said switch or spur was not constructed to be used, and has not been used, to carry passengers thereon, and was constructed to be used, and has been used only for, the private use of defendant in taking cars to and from the car track on said Troost avenue to its said car barn, and that by reason of the construction of the said switch or spur and the use thereof, as aforesaid, the use of said Troost avenue in front of plaintiff's said lot by the plaintiff and the public has been unreasonably obstructed and impeded, as to the use of said avenue for passage along the same, in front of plaintiff's premises, and for ingress and egress between said property and said street, and that thereby plaintiff's said property has been depreciated in value and damaged to an extent and in a manner that is special and peculiar to plaintiff's said property, and not common to other property along said Troost avenue then your verdict should be for the plaintiff in such a sum as will compensate him for such damage, and the amount of such recovery, if any, should be the difference between the fair market value of said property before and after the said acts of the defendant, provided that you find from the evidence the value thereof after the said acts of the defendant is less than it was immediately before, and that said difference was caused by the said acts of the defendant."

It is argued by defendant that the demurrer to the evidence should have been sustained on the ground that the facts alleged in the petition and sustained by proof fail to show the existence of any damages suffered by plaintiff of a kind different from that borne by the general public. In *Placke v. Railroad*, 140 Mo. 634, 41 S. W. 915, plaintiff, the owner of property abutting on a public street, brought suit in equity to enjoin the defendant from constructing and operating an electric street railway along the street. The Supreme Court affirmed the judgment, which was for the defendant. We quote from the opinion: "The plaintiff relies upon *Lockwood v. Railroad*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547, as sustaining his claim. That case and the subsequent cases (*Knapp, Stout & Co. v. Railroad*, 126 Mo. 26, 28 S. W. 627, and the *Schulenburg-Boeckeler Lumber Co. v. Railroad*, 129 Mo. 455, 31 S. W. 796—decide that a city has no power to authorize such use of a street as will destroy its use as a public thoroughfare, and enjoined the maintenance of steam railroads in said streets under the peculiar circumstances in each of said cases. It is a misapplication of those cases, however, to apply them to the construction of street railways unless such street railways are so defectively constructed as to prevent the current use of the highway by the public in the ordinary course of travel. This petition seeks to enjoin, not the construction of a street railway which is not laid at grade, or is to be otherwise defective-

ly or dangerously built or laid, but the construction of any street railway, claiming that the use of the street for any such railway is an invasion of the plaintiff's rights as an abutting owner. * * * We think it must now be regarded as settled law that an electric street railway laid to grade is not an additional servitude, and does not infringe upon the property rights of those whose lots abut on the street. *Dean v. Railroad*, 93 Mich. 330, 53 N. W. 396; *Koch v. Railroad*, 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377; *Lockhart v. Railroad*, 139 Pa. 419, 21 Atl. 26; *Railroad v. Railroad*, 156 Ill. 255; *Taggart v. Railroad*, 16 R. I. 608, 19 Atl. 326, 7 L. R. A. 205." The rule approved in this and other decisions of the Supreme Court is that the construction and maintenance of a street railroad in a public street pursuant to authority granted by the city does not subject the street to a servitude different from that which was contemplated in the original dedication, and the damage to an abutting owner resulting from such use of the street is *damnum absque injuria*. *Nagle v. Railway*, 167 Mo. 89, 66 S. W. 1090; *Ransom v. Railroad*, 104 Mo. 375, 16 S. W. 496; *Ruckert v. Railway*, 163 Mo. 260, 63 S. W. 814. "The law is quite well settled that the property owner must show, to entitle him to recover damages for an obstruction to a highway that the damages are peculiar to him, different in kind, and not merely in degree, from those suffered by other members of the community." *Rude v. City of St. Louis*, 93 Mo. 408, 6 S. W. 257. But it was said in *De Geofroy v. Railway*, 179 Mo., loc. cit. 715, 79 S. W. 392, 64 L. R. A. 959, 101 Am. St. Rep. 524: "That the power of a city or other municipal corporation in Missouri to authorize the construction of railroads in the public streets is a 'modified right, a right hedged about with many qualifications'; that it does not include the right to grant a railroad the exclusive use of the surface of a street even when laid at grade. *Lockwood v. Railroad*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547; *Sherlock v. Railroad*, 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551; *Knapp, Stout & Co. v. Railroad*, 126 Mo. 26, 28 S. W. 627; *Lumber Co. v. Railroad*, 129 Mo. 455, 31 S. W. 796; *Corby v. Railroad*, 150 Mo. 457, 52 S. W. 282. Neither can the municipal authority grant the power to a railroad company of such use of a street as will destroy or unreasonably interfere with the right of an abutting property holder of access to or egress from his property, or deprive him of his easement of light and air from the street. The street on which a railroad is constructed on the grade cannot be used for side tracks, the storing of cars, for water tanks, or like structures. *Lackland v. Railroad*, 31 Mo. 188; *Tate v. Railroad*, 64 Mo. 149; *Spencer v. Railroad*, 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668.

And it is argued by plaintiff that the doc-

trine of this case sustains his contention that the installation and maintenance of the spur track of itself constituted an unreasonable interference with his right of ingress and egress. We do not think so. Defendant owned the adjoining land and likewise possessed the right of ingress and egress to and from its property. Its use of the property as a place for its barns was a legitimate use. The barns were as much a part of the railroad and perhaps as essential to the proper service of the public as were the main tracks or the cars, and the spur tracks which connected them to the main line were as much a part of the street railroad as were the main tracks themselves. We think the city had the power to grant defendant the privilege of laying and operating the spur track, and that the servitude thereby imposed on the street was no different from that contemplated in the original dedication. This spur track was not of the class of constructions to which belong "side tracks, water tanks, or like structures." Such structures must be placed on private grounds, and their presence in a public street would be a nuisance per se. The track in question could not be laid on private property, and it was indispensable to the proper operation of the road, and therefore to the proper service of the public. The damages suffered by plaintiff from the presence of the track had it been properly constructed are general and not special, and they afford plaintiff no cause of action.

But it is alleged in the petition and the evidence of plaintiff tends to show that the track was negligently constructed and maintained in the respect that it was placed at an elevation so much above the grade of the street that it offered a serious obstruction in front of plaintiff's property to the free use of the sidewalk. The damages inflicted on plaintiff's property by such negligence are special damages which he is entitled to recover. The right of defendant to lay the track in the street carried with it the duty to construct and maintain it in a proper manner. Defendant had no right to increase the servitude by its negligence, and an abutting owner injured thereby suffers an injury not borne by the general public.

It follows from what we have said that no error was committed by the court in overruling the demurrer to the evidence. It likewise follows that the judgment must be reversed, and the cause remanded on account of palpable error in the instruction given at the request of plaintiff. The theory of the instruction is that the track in controversy belonged to the class of constructions that has no proper place in a public thoroughfare, unless it was used in the transportation of passengers. For the reasons stated, this theory is erroneous. We have considered other

points made by defendant, and find them to be without merit.

The judgment is reversed and the cause remanded. All concur.

JACKSON v. PETTIGREW.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908.)

TRESPASS (§ 25*)—DEFENSES—AUTHORITY OF PERSON IN POSSESSION.

The cutting and hauling, from time to time, during a course of years, of trees for fire wood, indicated only by the stumps left, is not such actual possession of the land by the person so doing that authority from her would be a defense, against the actual owner, to trespass by defendant.

[Ed. Note.—For other cases, see Trespas, Cent. Dig. §§ 54, 55; Dec. Dig. § 25.*]

Appeal from Circuit Court, Nodaway County; Wm. C. Ellison, Judge.

Action by William T. Jackson against Cameron L. Pettigrew. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

T. A. Cummins and A. F. Harvey, for appellant. Shinabarger, Blagg & Ellison, for respondent.

BROADDUS, P. J. This is a suit for damages for the alleged trespass of defendant in cutting timber on plaintiff's land. The dispute is in reference to three acres of land. The land originally belonged to George W. Jackson, deceased. The plaintiff, his son, after the death of his father, became the owner by purchase of the interest of the other heirs of his father, and was at the institution of this suit the apparent record owner of the title. It is admitted that defendant entered upon the disputed territory and cut and removed timber therefrom. Although plaintiff had the title to the land, he was not in the actual possession at the time of the institution of this suit.

The defense is that the defendant was in the actual possession under claim and color of title. The tract, according to the testimony of some of the witnesses, was included within the fences which inclosed the Pettigrew land on the west up to six or seven years before the bringing of this action, since which time it has been unfenced. Mrs. Pettigrew, the widow of Charles Pettigrew, the then owner of the land, was introduced as a witness upon the part of defendant to prove that her husband had bought the land from Geo. W. Jackson, plaintiff's father. Her evidence is: That she carried by direction of her husband a receipt, acknowledging payment for the land, to Jackson, who signed it, and told her to go to a man by the name of Robinson and tell him to draw up a deed conveying the property to her husband, add that he would sign it. He also told her to

*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

take a deed, called the O'Howell deed, from which Robinson would be enabled to make out a proper description of the land intended to be conveyed; that she took the receipt and the O'Howell deed to Robinson, who prepared a deed to be signed by Jackson, and informed him that it had been prepared, whereupon Jackson said to her that as "quick as he got well he would go and sign it"; and that he died before doing so. Charles Pettigrew, the husband of Mrs. Pettigrew, died in April, 1895, and Jackson died in a short time thereafter. The plaintiff objected to the introduction of the receipt mentioned, which objection the court sustained, and objected also to the competency of Mrs. Pettigrew as a witness, and to the competency of her evidence for various reasons. Parts of her statements were admitted and parts excluded, but it is exceedingly difficult to determine what was excluded and what was admitted by inspection of the abstract. The evidence of defendant tended to show that at times Mrs. Pettigrew cut and hauled timber from the land for fire wood, and that one year, while the fence remained, she leased it to a neighbor. The timber on the land was large, and there was little or no grass. Mrs. Pettigrew made no improvements whatever, and there were no visible marks to indicate that the land was in the possession of any one, and had not been for several years prior to the alleged trespass. The defendant cut the trees upon direction of Mrs. Pettigrew.

Among other instructions, the plaintiff asked the court to say to the jury that there was no evidence that defendant was in the actual visible possession of the land, which the court refused. The court gave the following instruction at the instance of defendant: "The court instructs the jury that actual possession does not imply that the occupant must actually stand upon his property constantly to keep off intruders, or that he must keep his servant or agent there. Any overt acts indicating exclusive dominion and a purpose to permanently occupy, and not to abandon, the premises, will satisfy this requirement." Also this instruction: "The court instructs the jury that, if they believe from the evidence that, at the time defendant cut the trees described in the petition, said land was not in the actual possession of plaintiff, but was in the actual, visible possession of defendant, or of some third person under whose permission, authority, or consent defendant was acting, and that defendant, under such circumstances, cut the trees in good faith under claim of right, then the jury should find for defendant, although the land and trees, in fact, belonged to plaintiff."

There is no question of law involved in the case, as the instructions given in behalf of defendant are unobjectionable from a legal standpoint; the question being whether they

should have been given under the evidence. Waiving all objections to the competency of Mrs. Pettigrew to testify and the competency and relevancy of her testimony, we are impressed with the conviction that defendant, under his evidence, was a trespasser without justification. Mrs. Pettigrew, under whom he claims authority for entering upon the land and cutting the timber, had no such possession as warranted his act in entering. For six years before the alleged trespass, there had been no fence inclosing the land. No house of any kind, no cultivation whatever, or anything of any nature to indicate her possession, was shown by the evidence, save and excepting the stumps of trees that had been cut in the course of years. Had there been color of title shown and any evidence of occupation, however slight, the instructions would have been proper. But both these factors were lacking.

In *Carter v. Hornback*, 139 Mo. 238, 40 S. W. 893, it is held that the "cutting and hauling fire wood, sawing timber, making and hauling fence rails from the land, and clearing up same, do not constitute actual possession." Such is the general rule. It is useless to further discuss the question. Plaintiff's instruction, which was in the nature of a demurrer to defendant's case, should have been given.

Reversed and remanded. All concur.

HEBERLING v. CITY OF WARRENSBURG.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908.)

1. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—EVIDENCE—WITHDRAWAL.

In an action against a city for injuries from a defective street, the withdrawal by plaintiff's counsel in the presence of the jury of evidence that the city repaired the street after plaintiff's injury, and the court's announcement of the withdrawal, and direction that the evidence should not be considered, cured the error of its admission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178, 4179; Dec. Dig. § 1053; * Trial, Cent. Dig. § 977.]

2. EVIDENCE (§ 472*)—OPINION EVIDENCE—MATTERS DIRECTLY IN ISSUE.

In an action against a city for injuries caused by a trench in a street which had been filled by the city after removing a culvert therefrom, whether or not the trench had been properly filled was for the jury under the evidence, and opinions of witnesses were properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

3. MUNICIPAL CORPORATIONS (§ 783*)—DEFECTS IN STREETS—INJURIES—MANNER OF FILLING TRENCHES.

That a trench in a city street which had been filled by the city was filled the same as it filled all such holes in streets would not relieve the city from liability for an injury occasioned thereby, since the manner in which the city or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dinarily filled such holes was not a standard of safety.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 783.*]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Personal injury action by William H. Heberling against the City of Warrensburg. Judgment for plaintiff, and defendant appeals. Affirmed.

Jos. K. Tuttle, Chas. E. Morrow, and Jas. A. Kemper, for appellant. O. L. Houts, for respondent.

ELLISON, J. This action is for personal injury received on one of defendant's streets by reason of plaintiff being thrown from a vehicle in which he was riding with a friend, and receiving serious injury. The judgment was for plaintiff. There was a former trial in which the verdict was for the defendant. The court granted plaintiff a new trial, and defendant appealed to the Supreme Court, where the order was affirmed (204 Mo. 604, 103 S. W. 36), and the trial now appealed from followed. By reference to that report, there will be found a full statement of the facts upon which the case is founded, and they need not be repeated here further than to say that defendant's officers took out of the street a wooden culvert reaching fairly across its width, 14 inches deep and 20 inches wide. The place was filled in with loose dirt. Rains and travel made the filling soft, so that the wheels of a vehicle would drop suddenly to a considerable depth. A rain had filled the wagon tracks and depressions with water so as to leave the defects in the place less likely to be observed. Plaintiff and a companion were driving along in an ordinary trot, when the front wheels of their vehicle suddenly dropped into the place, throwing plaintiff forward between the horses onto the tongue and doubletrees. The horses ran, and plaintiff was injured. An examination of the points made satisfy us that reversible error was not committed. Evidence was received showing that the city repaired the street after the injury to plaintiff. This was withdrawn by counsel for plaintiff in the presence of the jury, and the court announced its withdrawal, and directed that it be not considered. That in a civil case cures the error. *Buckman v. Railway Co.*, 100 Mo. App. 30, 73 S. W. 270.

Complaint is made that two persons said to the street commissioner when he was filling the place from which he had taken the culvert that it was dangerous, and some one would get hurt; but this was not so much for the purpose of getting the opinion of the witness as it was to show notice or knowledge of the defect. Such evidence seems not to have been regarded as improper. 204 Mo. 610, 103 S. W. 36. At any rate, no one can fairly say that such evidence in the circum-

stances, considering the state of the proof from other sources, was of such character as to require the verdict to be set aside.

It is also made a matter of complaint that the court should have permitted witnesses to state whether the place was filled in the usual, ordinary, and proper manner. The witnesses had stated it was "filled good. It was filled up round, about 10 inches wide, good and high." The court refused their opinion whether that was the proper way. That was a question for the jury. The Supreme Court stated that it was not proper exculpatory evidence to show that this place was filled as other places were, as that was not a standard of safety. 204 Mo. 618, 103 S. W. 36. And so we think the better examination would have been to have asked how the work was done, etc., and then let the jury say if it was proper. *Eubank v. Edina*, 88 Mo. 651; *King v. Railway Co.*, 98 Mo. 235, 11 S. W. 563. We think there is no substantial ground for objection to the mere showing that Thompson was street commissioner; nor do we think there was any error as to exclusions of offer to show what witnesses Fountain and Ridge would state in reference to the place being filled in the ordinary way.

A full examination of the record and briefs of counsel leaves us convinced that we have no right to overturn the verdict, and the judgment is therefore affirmed. All concur.

GALLAGHER v. CITY OF TIPTON.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908.)

1. MUNICIPAL CORPORATIONS (§ 767*)—STREETS—DRAINS—MUNICIPAL POWER.

Municipalities can maintain their streets with the center elevated and gutters or drains on the sides to carry away surface water.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1623; Dec. Dig. § 767.*]

2. MUNICIPAL CORPORATIONS (§ 764*)—CROSS-WALKS—MUNICIPAL DUTY.

A municipality must keep cross-walks, where they pass over gutters, in reasonably safe condition in the light of the plan adopted.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1616, 1620; Dec. Dig. § 764.*]

3. MUNICIPAL CORPORATIONS (§ 768*)—TOWNS—GOVERNMENTAL OR CORPORATE ACTS—STREET IMPROVEMENTS—CROSS-WALKS.

While a city may adopt a plan of street crossings, including a way over the gutter, without being liable for injury from a danger inherent in the plan adopted, it will be liable for negligent construction or maintenance under the plan.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1624; Dec. Dig. § 768.*]

4. MUNICIPAL CORPORATIONS (§ 821*)—INJURY ON CROSS-WALK—NEGLIGENCE—JURY QUESTION.

Whether a city was negligent respecting a cross-walk over a gutter held a jury question in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

an action for injury to a pedestrian who stepped off it at night.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1747; Dec. Dig. § 821.*]

5. MUNICIPAL CORPORATIONS (§ 822*)—INJURY ON CROSS-WALK—INSTRUCTIONS.

It was improper to authorize recovery by one suing a city for injury caused by stepping off a cross-walk into the gutter at night, if a guard on the walk was necessary, and if plaintiff exercised ordinary care, where there was evidence tending to show that plaintiff got into the gutter in a way which a railing would not have prevented.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1758, 1761; Dec. Dig. § 822.*]

6. MUNICIPAL CORPORATIONS (§ 821*)—INJURY ON CROSS-WALK—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether a pedestrian, injured by stepping off a cross-walk into a gutter at night, was guilty of contributory negligence, *held* under the evidence a jury question.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1754–1756; Dec. Dig. § 821.*]

7. NEGLIGENCE (§ 3*)—RELATIVE TERM.

"Negligence" is a relative term, and what would be negligence in one situation might not be in another.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 5; Dec. Dig. § 3.*]

8. EVIDENCE (§ 472*)—OPINIONS—IMPROPER SUBJECTS—NECESSITY FOR STREET DRAINS.

In an action for injury to a pedestrian, who stepped into a street drain from a cross-walk, it was improper to allow testimony whether it was necessary to have or permit the drain; that being for the jury under all the evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2186; Dec. Dig. § 472.*]

Appeal from Circuit Court, Moniteau County; W. H. Martin, Judge.

Action by Thyrza Gallagher against the City of Tipton. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

R. M. Embry, W. F. Quigley, and C. D. Corum, for appellant. A. L. Shortridge and W. D. Steele, for respondent.

ELLISON, J. This action is for personal injuries received by plaintiff, which she alleges was through the negligence of defendant in failing to keep one of its streets in repair. The judgment was for the plaintiff in the trial court.

The defendant is a city of the fourth class and maintained its streets by excavating gutters or drains on the sides of the roadway and elevating the roadway in the center and by constructing sidewalks near the lines of the streets. To connect these walks crossings were put in at street intersections. At the place where plaintiff was injured, the gutter was shown to be somewhere between 2 and 2½ feet below the crossing at that point. Tiling, about 5 feet in length and 15 inches in diameter, was placed in the gutter under the crossing with gravel on top of it, and on

this was placed a flagstone 3 feet wide and near 6 inches thick. There was no railing, nor was there a light, and this constituted the crossing over which pedestrians passed to the sidewalk. Plaintiff, with her husband and sister-in-law, had been attending a night church meeting near by and were returning home. She was familiar with the crossing. On arriving at the gutter her sister-in-law passed over first; plaintiff following with her husband just behind her. Plaintiff stepped off the edge of the crossing and fell into the gutter, receiving injuries, the severity of which is not questioned by defendant and therefore need not be dwelt upon.

Defendant insists that no case was made for the plaintiff, and that its demurrer to the evidence should have been sustained. We concede that towns and cities must be allowed to maintain their streets with gutters or drains on the sides so as to carry away surface waters, thereby improving the street for travel and protecting the health of the inhabitants, and that, necessarily, there must be a covering over the gutter at crossings, making a passageway for the convenience of the people in passing from one side of the street to the other. This way over the gutter is, ordinarily, in some degree, greater or less, more dangerous than the crossing at other points; but, notwithstanding this, it is yet the duty of the city to maintain it by some mode reasonably adapted to keeping it in a reasonably safe condition when considered in the light of the plan adopted by the city.

In coming to a proper conclusion as to whether the city was guilty of negligence, it is necessary to consider the right of the city to adopt plans for its improvement and for the safety of its inhabitants. A city has a right in its governmental capacity to adopt the plan of having its streets thrown up in the center with gutters or drains on either side to take off surface water, and to adopt a plan of street crossings, including a way over the gutter. If an injury results from a danger inherent in the plan adopted, the city is not liable; but, if the danger has arisen from negligent construction or maintenance of the plan, it is liable. *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168. Thus a city may adopt a wooden sidewalk. It may not be as safe, under some conditions, as one of stone. Yet the city would only be liable for a negligent construction or maintenance of the wooden walk. It is common knowledge that towns and cities have the plan of drainage gutters on the sides of the streets with covering at crossings for the passage of pedestrians. It would be a startling announcement to say that the city incurred liability to any one injured by stepping off the cover into the gutter, and we would hold that plaintiff was without standing in this case, as a matter of law, were it not that there was some evi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

dence tending to show that the gutter was negligently constructed or maintained in carrying out the plan. It may be that it was permitted to cut or wash out to an unnecessary depth; or, if at that place a depth was needed greater than that required for the ordinary course of the gutters of the city, it may be that either a light or a railing was necessary to the reasonable safety of the place, and the absence of both would make out negligence on the part of the city. Plaintiff is but little supported by the case of *Loewer v. Sedalia*, 77 Mo. 431, for that case did not involve the suggestions here made. In that case there was a ravine in the street 12 or 15 feet deep over which an unguarded bridge had been built. In this case, in view of what we have stated, it would be proper to give defendant's refused instruction No. 12.

After considering the evidence and applying it to the suggestions just made, we have concluded that the case made by the plaintiff was one for the jury. We cannot say as a matter of law that defendant was not negligent, nor can we say that plaintiff was guilty of contributory negligence as a matter of law.

The court gave for plaintiff an instruction which we believe allowed or authorized a verdict for her, though she may have been liable to the same mishap had the crossing been guarded as submitted in the instruction. There was evidence in the cause which tended to show that plaintiff got into the gutter in a way which a railing would not have prevented, and yet the court directed that, if the jury believed "a railing or other guard was necessary for safety, as instructed by the court, and that plaintiff in the exercise of such [ordinary] care received the injuries complained of, then they will find the issues for the plaintiff." In support of this instruction, plaintiff relies upon *Loewer v. Sedalia*, supra. In that case there was an instruction (No. 3 for plaintiff, found at page 438); which was like the one given for this plaintiff, except that it was qualified by the words "which he would not have received had defendant placed a railing or other proper protection on the bridge." In view of the evidence in this case, such qualification was far more necessary than in that case. Again, in an instruction in that case given of the court's own motion, found at page 443 of the report, the jury was required to find not only that the defendant therein was guilty of negligence in not having the railing, but that through such fault and negligence the plaintiff stepped off the bridge. If the care thus taken to protect the defendant was thought necessary in that case, it is much more necessary in the one at bar, for in that case the bridge was over a deep ravine (not necessary for the street), while here it was a drainage gutter, at most only 2½ feet deep.

In considering objections to plaintiff's first

instruction, it is well to remark that in taking instructions from other cases care should be observed to see that the cases are so nearly alike in the character of negligence shown as to make a direction in one apply to the other. Negligence is a relative term, and what would be negligence in one situation might not be in another. *Foster v. Swope*, 41 Mo. App. 137. In the *Loewer Case*, an unnecessary and deep ravine bridged in a street is a far different condition from a drainage gutter with a stone crossing over it on the side of a street. Therefore it would be better and more conducive to a fair trial to omit from that instruction the special reference given to the width and height of the crossing and the danger of falling from it, and substitute therefor that the jury should consider the character of the crossing and the purpose for which it was maintained.

Error was also committed in permitting witness Zoll to be asked if it was necessary to have or permit the drain or ditch. That was a matter for the jury in view of all the evidence, and was not a matter of opinion from a witness. *Gobel v. Kansas City*, 148 Mo. 477, 50 S. W. 84; *Benjamin v. Railway Co.*, 133 Mo. 289, 34 S. W. 500; *Brown v. Railway Co.*, 89 Mo. 155, 1 S. W. 129; *Koenig v. Depot Co.*, 173 Mo. 721, 73 S. W. 637.

The judgment is reversed, and the cause remanded. All concur.

WOOD v. CRAIG.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908.)

1. WATERS AND WATER COURSES (§ 78*)—NATURAL WATER COURSES—DIVERSION—OVERFLOW ON LAND OF LOWER PROPRIETOR.

The rule that the owner of land through which a water course runs may divert the water from its usual channel to another course, provided he returns it into the original stream before it reaches the land of the next proprietor, does not entitle one to so divert the stream, though the change be made altogether on his own land, as to cause the stream to overflow the land of a lower proprietor.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 69; Dec. Dig. § 78.*]

2. WATERS AND WATER COURSES (§ 83*)—NATURAL WATER COURSES—DIVERSION—ACTIONS—INJUNCTION.

Injunction is a proper remedy to prevent such a diversion of a natural water course by a landowner as will cause the stream to overflow the land of a lower proprietor, though the diversion has not been completed, and the damage which will result has not been inflicted.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 84-90; Dec. Dig. § 85.*]

Appeal from Circuit Court, Atchison County; Wm. C. Ellison, Judge.

Suit by William S. Wood against Andrew B. Craig to enjoin the digging of a ditch and diverting the course of water. Decree

for plaintiff, and defendant appeals. Affirmed.

J. P. Lewis and C. A. Anthony, for appellant. W. R. Littell and L. D. Ramsay, for respondent.

ELLISON, J. This is a proceeding in equity to enjoin defendant from digging a ditch and diverting the course of water so as to cause it to flow upon and over plaintiff's lands. The decree in the trial court was for the plaintiff.

It appears that plaintiff and defendant are adjoining owners of large tracts of bottom lands in the valley of the Tarkio river. Plaintiff's lands were south of and were lower than defendant's. The "East Tarkio" river came into defendant's land near the northeast corner, and ran a very crooked course in a southwesterly direction through his land, until it reached plaintiff's land at a point about midway of his north and defendant's south line, and thence, on its crooked course, was the boundary line between plaintiff and defendant; the result being that, from a point in the center to the west line, plaintiff's north boundary being the river, his land would extend up apparently (as it would appear on a map) into defendant's land, and, defendant's south line being on the river, his land would apparently extend down into plaintiff's. As just stated, this river was exceedingly crooked. It would run for a space in one direction and then turn sharply back, but its general course was to the southwest. There was a branch which came into defendant's land on the east side at about the line between him and plaintiff. It ran north through defendant's land, bearing some to the west, on across a public road into lands of Rankin, and then emptied into the East Tarkio river a short distance north of defendant's north line. Prior to the trouble between plaintiff and defendant, the latter cut a ditch from this branch along his north line, between him and Rankin, for a short distance west until it emptied into the East Tarkio. The only effect of this was to connect the branch with the Tarkio a short distance south of where it did before he cut the ditch. Thus it is seen the waters of the branch found their way into the Tarkio up in the northeast corner of defendant's land; it being remembered that plaintiff's laid south of his tract. It should be here stated that the waters (aside from this branch) which generally flowed in the East Tarkio had been diverted to the West Tarkio river by a large drain ditch dredged out, so that the only water left in the East Tarkio was that which came from the branch just described and the drainage from the vicinity in time of rain. In this situation of affairs, defendant began the construction of the ditch (now sought to be enjoined) at the branch on the southeast corner of his

land running southwest until it came to or near plaintiff's northeast corner, thence due west, just north and near his south line, which divided his and plaintiff's lands, intending to run it into the East Tarkio at a point (one of the sharp turns) just north of where that stream becomes the dividing line between plaintiff and defendant. The effect of this would be to stop the water now flowing in this branch through his land from the southeast corner in a slight northwesterly direction to where it connects with the East Tarkio on the north side of his land, thence running in that river, in its crooked course, through the body of his tract, and divert it through the proposed ditch into the East Tarkio within a few feet of where it strikes plaintiff's land. It was shown that, if that is done, on account of plaintiff's land being lower, the water would probably break out of the ditch at the northeast corner of plaintiff's land where the ditch turns from a southwest to a due west course as just described, but that, if it did not, it would inevitably break over at the point further on where it strikes the East Tarkio where that stream becomes the dividing line between the two tracts. There are two reasons why the water would break over at the latter point. One is that the bed of the Tarkio has filled up so that it is about on a level with plaintiff's land, and the other that the ditch would strike the sharp turn in the Tarkio at so near right angles that the bank of that stream would be an obstruction at that point.

It will be observed from the foregoing statement that defendant's operations are confined within the boundaries of his own premises. It is the law that the owner of land through which a water course runs may divert the water from its usual channel to some other course, provided he returns it into the original stream before it leaves his premises. The rule is thus expressed in *Norton v. Volentine*, 14 Vt. 239, 39 Am. Dec. 220: "The dominant proprietor may divert the water from its usual channel, but, if it is returned to the same channel before it reaches the land of the next proprietor below, no one can complain."

But that rule will not justify one in so diverting the stream, though the change is made altogether on his own land, as to cause it to discharge on or overflow onto the land of a lower proprietor. *Porter v. Durham*, 74 N. C. 767; *Hargreaves v. Kimberly*, 28 W. Va. 787, 53 Am. Rep. 121; *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11. See, also, *Railway Co. v. Carr*, 38 Ohio St. 448, 43 Am. Rep. 428.

Although the act is not completed, and the damage which will result therefrom has not been inflicted, yet injunction is a proper remedy to prevent the wrong. *Gould on Water Courses*, §§ 513, 517, 519, 534, 536; *Holke v. Herman*, 87 Mo. App. 123, 142; *Caskey v. Edwards*, 128 Mo. App. 237, 107 S. W. 37.

The rule of equity and the principles of law being as herein indicated, we find the evidence justified the trial court's conclusion, and the decree is affirmed. All concur.

GIDDINGS v. CHICAGO, R. I. & P. RY. CO.
(Kansas City Court of Appeals. Missouri.
Nov. 16, 1908.)

RAILROADS (§ 350*)—ACCIDENT TO TRAVELER AT CROSSING—ACTIONS—NEGLIGENCE.

At the approach to a railroad crossing there was a sharp curve in the track, and weeds grew to a considerable height close to the ties. Plaintiff, an elderly woman, approached the track on the highway wearing a sunbonnet, and did not hear and could not see a train. Within three or four feet of the track, she stopped, listened, and looked, but did not see or hear a train, after which she started to cross, looking neither way while actually on the track, and was struck by a train before getting over. No whistle was sounded nor bell rung. Held, that she was not negligent as matter of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1169-1172; Dec. Dig. § 350.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Personal injury action by Mary Giddings against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Brown & Dolman, for appellant. Mytton & Parkinson, for respondent.

ELLISON, J. Plaintiff sustained personal injury from being run upon by one of defendant's engines. She brought this action for damages, and recovered judgment in the trial court.

Since the verdict was for the plaintiff, we will assume the facts in the case to be what the evidence in her behalf tends to show them. She was injured at a wagon crossing in the city of St. Joseph. At the approach at that point there is a sharp curve in the track, and weeds had been permitted to grow to considerable height along close to the ends of the ties. Plaintiff, who was an elderly woman, approached the track wearing a sunbonnet. She did not hear and could not see a train. She proceeded on to within three or four feet of the track, when she stopped and looked both ways, and did not see a train. She listened and did not hear one. She then proceeded to cross over the rails. She did not look either way while actually on the track. She was struck by a train before getting over. No whistle was sounded, nor was a bell rung. The court properly ruled that plaintiff was not guilty of contributory negligence as a matter of law, and refused defendant's demurrer to the evidence.

The instructions refused for defendant in effect made it necessary, in order for plaintiff to recover, that she should have looked

for a train while actually upon the track, while walking across it. That is an excess of caution which should not be demanded of the injured party as a matter of law. Instead of such absolute demand, the trial court instructed that, if plaintiff stopped, listened, and looked both ways when within three or four feet of the track, then it was a question for the jury to say whether she was in the exercise of the ordinary care of an ordinarily prudent person in crossing over without again looking. We think the trial court's view was correct, and that there is no just ground of complaint of the action taken on the instructions. We do not consider the cases of *Hornstein v. Railway Co.*, 195 Mo. 440, 92 S. W. 884, 4 L. R. A. (N. S.) 729, 113 Am. St. Rep. 693, *Kelsay v. Railway Co.*, 129 Mo. 362, 30 S. W. 339, and others cited by defendant, as applicable to the case as made for the plaintiff.

The judgment is affirmed. All concur.

FARMERS' & MERCHANTS' BANK OF SPRINGFIELD v. ZOOK.

(Kansas City Court of Appeals. Missouri.
Nov. 16, 1908.)

1. APPEAL AND ERROR (§ 1082*)—WAIVER OF ERROR—PLEADING.

A judgment of the circuit court on appeal from justice court sustaining a defense of usury will not be reversed because the defense was not pleaded, where the case was tried by both parties on the theory that usury was the only issue.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1082.*]

2. APPEAL AND ERROR (§ 171*) — REVIEW — THEORY OF TRIAL BELOW.

One will not be permitted, after unsuccessfully trying a case on one theory, to change front in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1055; Dec. Dig. § 171.*]

3. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Any error in admitting a deposition was harmless, where the matter testified to was shown by other witnesses without contradiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4172; Dec. Dig. § 1052.*]

4. APPEAL AND ERROR (§ 1026*)—REVERSIBLE ERROR—WHAT CONSTITUTES.

To be reversible, error must be prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4029; Dec. Dig. § 1026.*]

Appeal from Circuit Court, Boone County; Samuel Davis, Judge.

Action by the Farmers' & Merchants' Bank of Springfield, Mo., against Ellsworth E. Zook. From a judgment of the circuit court for defendant on appeal from justice court, plaintiff appeals. Affirmed.

J. J. Spriggs, for appellant. Charles J. Walker, for respondent.

JOHNSON, J. This suit was brought in a justice court and is on a promissory note

of \$25 executed by defendant to plaintiff. No answer was filed, but the defense of usury was interposed in the justice court and in the circuit court, where the cause was taken by appeal. A jury was waived by the parties, evidence was introduced, and judgment was entered for plaintiff in the sum of \$25.30. The court found that usury had been exacted by plaintiff and adjudged the costs of the suit against plaintiff under the provisions of section 3709, Rev. St. 1899 (Ann. St. 1906, p. 2077). A motion to retax costs filed by plaintiff was overruled, and plaintiff appealed.

Both parties tried the case in the circuit court on the theory that the payment of usury was the sole issue of fact between them. The declarations of law asked by plaintiff and given by the court are all addressed to that issue. The evidence introduced by plaintiff shows, without contradiction, that usury was exacted by plaintiff and paid by defendant. In this posture of the case, it is idle for plaintiff to urge now that the judgment should be reversed on the ground that usury was not pleaded in the answer. No rule is better settled than that which precludes a party from voluntarily trying a case on one theory in the circuit court, and, after defeat, attempting to change front in the appellate court.

The point made by plaintiff that error was committed by the trial court in the admission of a deposition offered by defendant, likewise, is without merit. We think the deposition was properly admitted, but, if we thought otherwise, would hold the error harmless. The witness, who was plaintiff's cashier, testified, in effect, that he exacted usurious interest from defendant. That fact, as we have said, was proved by other evidence introduced by plaintiff and was not contradicted by evidence. Had the court sustained the objection to the deposition, its finding that usury had been exacted and paid necessarily would have been the same, since that was the only conclusion the evidence would permit. Error, to constitute a ground for reversal of a judgment, must appear to have been prejudicial, and this alleged error clearly was not prejudicial.

The judgment is affirmed. All concur.

ATCHISON v. CITY OF ST. JOSEPH.
(Kansas City Court of Appeals. Missouri.
Nov. 16, 1908.)

1. TRIAL (§ 252*)—INSTRUCTIONS AGAINST EVIDENCE.

In an action for injury caused by plaintiff's vehicle striking the end of a girder, which separated the railway of a viaduct from the sidewalk, an instruction based on plaintiff's ignorance of the location of the girder was properly refused, where she knew as much about it as any one could know without taking measurements.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 603; Dec. Dig. § 252.*]

2. TRIAL (§ 251*)—INSTRUCTIONS—UNAUTHORIZED HYPOTHESIS.

An instruction, in an action for injury on a viaduct, was properly refused, where it authorized recovery if the viaduct was not reasonably safe for travel, though lights were burning, where the petition relied on the fact that no lights were burning.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587, 593; Dec. Dig. § 251.*]

3. MUNICIPAL CORPORATIONS (§ 692*)—STREETS—OBSTRUCTIONS.

The general rule that a city cannot maintain, nor permit, obstructions in a street, does not apply to permanent obstructions incident to public necessities, such as telegraph or telephone poles, supports for viaducts, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1493; Dec. Dig. § 692.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Personal injury action by Nannie Atchison against the city of St. Joseph. From an order granting a new trial on verdict for defendant, defendant appeals. Reversed and remanded, with directions.

W. B. Norris and O. E. Shultz, for appellant. John S. Boyer, for respondent.

ELLISON, J. Plaintiff was injured by being thrown from a buggy while driving over a viaduct maintained by the defendant city along and as a part of one of its streets. She brought this action for damages. The verdict was for the defendant. The trial court granted plaintiff a new trial, and defendant appealed from that order.

The reason assigned by the court for ordering a new trial was that it considered it had committed error in refusing instructions Nos. 5 and 6, offered by the plaintiff. We think those instructions were properly refused. The evidence shows the viaduct consisted of a roadway of ample width, and that on either side there was a sidewalk space of about six feet. Those sidewalk spaces were protected on the outside by a railing extending from down along the street before the viaduct was reached, and were separated from the roadway on the viaduct by a part of the structural iron work or large girder rising out of the floorway of the bridge or viaduct a height of more than two feet. This extended the full length of the bridge and at either end, on each side, stood perpendicular. It is thus seen that one driving a vehicle along the street approaching the viaduct must avoid this structure so dividing the sidewalk, or footbridge, as it is called in the record. Plaintiff, with a companion, who was driving, were in a buggy passing along the street approaching the viaduct, in the nighttime. They drove the buggy so as to collide with the end of the girder and balustrade described. She was thrown out and injured. She admitted, in giving evidence in her own behalf, that she knew of the construction of the viaduct and of the girder

dividing the sidewalk or footbridge from the main roadway, but said she did not know it was so far (six feet) out in the viaduct. We regard her statement, in the circumstances disclosed by the record, as showing that she knew as much as any one could know, without taking specific measurement, all about the position of the girder so separating the roadway from the footway, and for that reason the court did not improperly refuse her instruction No. 5, which is affirmatively based upon "the absence of any knowledge upon her part of the position and location of said girder" and the obstruction made thereby. The instruction was in the face of the evidence.

Instruction No. 6 was not improperly refused, for it submits an hypothesis not authorized by the petition. The petition charges that no lights were burning at the time of the injury. The instruction submits that question, and then proceeds to submit that, if there were street lights burning, yet, "if the viaduct was not reasonably safe for travel at said time," defendant was liable.

But, aside from the foregoing considerations, which result in sustaining the verdict for defendant, and reversing the order for new trial, it is manifest that the plaintiff was without legal standing for her complaint. In general terms it may be said that a city cannot rightfully maintain, or permit to be maintained, obstructions in a street. Yet that rule does not obtain concerning that class of permanent obstructions which are incident to public necessities authorized by law, such as telegraph or telephone poles, supports for viaducts passing over streets, etc. This principle was brought out and considered by the Supreme Court in an opinion by Marshall, J., in *Siebert v. Ry. Co.*, 188 Mo. 657, 87 S. W. 995, 70 L. R. A. 72, a case which may well be likened to the one at bar.

We do not regard other causes assigned, outside the reasons stated by the trial court, as sufficient to sustain the order.

The judgment will be reversed, and the cause remanded, with directions to enter judgment on the verdict.

All concur.

BAILEY v. METROPOLITAN ST. RY. CO.
(Kansas City Court of Appeals. Missouri. Oct. 5, 1908. Rehearing Denied Nov. 16, 1908.)

1. TRIAL (§ 139*) — QUESTIONS FOR JURY — WEIGHT OF EVIDENCE.

The weight of evidence is a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 332; Dec. Dig. § 139.*]

2. TRIAL (§ 140*) — QUESTIONS FOR JURY — CREDIBILITY OF WITNESSES.

The question of the credibility of a witness is one for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

3. APPEAL AND ERROR (§ 1003*)—CONCLUSIVENESS OF VERDICT.

Where there is evidence to sustain a verdict, the appellate court is concluded thereby and cannot set it aside because of the preponderance of the evidence against it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

Appeal from Circuit Court, Jackson County; H. L. McCune, Judge.

Action by Napoleon Bailey against the Metropolitan Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Lucas and C. C. Madison, for appellant. Buckner & Houston, for respondent.

BROADDUS, P. J. This is an action for injuries sustained by plaintiff in alighting from a street car of defendant in Kansas City January 10, 1906. The plaintiff was a passenger on an east-bound Fifteenth street car of defendant, and bases his right of action upon the alleged negligence of defendant in starting its car forward while he was in the act of alighting therefrom at the intersection of Fifteenth street and Kansas avenue. The judgment was for the plaintiff, from which defendant appealed.

The defendant contends that the evidence of plaintiff as to how the injury occurred was so vague and indefinite as to leave the matter in doubt, while that of defendant shows that plaintiff stepped off the car while it was going at its ordinary speed. The plaintiff testified that just after the car passed Benton Boulevard, he said to the conductor: "Oh! I did want to get off here at Benton, but I will be all right; just be sure to let me off at Kansas." That the conductor said, "all right." That at the time he was standing inside of the car close to the rear door. He then went on to state as follows: "He did halt. He halted. He stopped, as I asked him, when we got to Kansas, but he did not stop, you know, but hardly more than a minute; and after I told him, you know, and he said, 'All right,' why, when she stopped, you know, why then I made a step—this foot. I aimed to step with this foot, you know (indicating), and before I could get my hand hold, you know, it dashed me you know. It went off so quick, you know, and it threwed me out, you know, on that side, you know, and just split my skill, you know." In answer to further questioning, he said the car was standing still while he was on the platform preparing to get off. His language was that: "It stopped right still, you know, but it didn't stop but a little time, not long enough for me to get off." The occurrence was a little after 6 o'clock p. m. and dark at that time of the year. On cross-examination, among other matters, he was asked if he was not at the front of the car, instead of

the rear platform, when he attempted to get off, to which he answered, "No."

The only witness other than plaintiff who testified in his behalf was John Baker. It may be gathered from his testimony, however, that the car stopped before it crossed Kansas avenue, and that, just as the plaintiff was in the act of getting off, it started, and he was thrown onto the street. The evidence of this witness, as well as that of the plaintiff, was both indefinite and inconsistent. While the former stated that the car did not stop, he also stated that it did. He was an ignorant negro and appears to have been unusually voluble even for one of his race, to which circumstance may be attributed his want of consistency and accuracy. It was for the jury to weigh his testimony and to give it that degree of credibility to which it was entitled.

The defendant's two conductors, and motorman and several other witnesses all testified that the car did not stop, and that plaintiff attempted to alight while it was in motion. The testimony of these witnesses was clear and positive, and ought to have been effective in producing a different verdict, but, as there was evidence to sustain the verdict rendered, we are concluded by it. We are not clothed with the authority to set aside the verdict of a jury because the preponderance of the evidence is against its finding. That duty is lodged in the trial court alone.

The defendant urges objections to some of plaintiff's instructions. It is sufficient to say that they are entirely hypercritical and have no substantial foundation.

Affirmed. All concur.

McLAUGHLIN v. HARDIN.

(Kansas City Court of Appeals. Missouri.
Nov. 16, 1908.)

1. BROKERS (§ 86*)—ACTIONS FOR COMPENSATION—EVIDENCE.

Evidence in an action to recover a commission for the sale of defendant's real estate considered and *held* to support a finding for defendant.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116, 117; Dec. Dig. § 86.*]

2. APPEAL AND ERROR (§ 1065*)—HARMLESS ERROR—INSTRUCTIONS.

An erroneous instruction in a trial without a jury is harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3371, 4219; Dec. Dig. § 1065.*]

Appeal from Circuit Court, Jackson County; E. E. Porterfield, Judge.

Action by George S. McLaughlin against Ben T. Hardin. Judgment for defendant, and plaintiff appeals. Affirmed.

M. A. Fyke and W. F. Wilkinson, for appellant. Walsh & Morrison and Ben T. Hardin, for respondent.

ELLISON, J. This action was brought for commission charged to be due plaintiff by reason of a sale which plaintiff alleges he made of defendant's real estate. The judgment in the trial court was for the defendant.

There was evidence tending to prove that defendant placed a tract of land with plaintiff for sale; that one Jenne was attracted to plaintiff's office in Kansas City by his advertisement of lands; that, while this advertisement did not include defendant's land, yet plaintiff referred him to it, pricing it at \$135 per acre. Jenne went out on that or the next day and went upon the land. On the next day he telephoned plaintiff that he did not want the land, and that he intended to go to look at a farm in Kansas. Three days thereafter plaintiff wrote to Jenne, saying that he had been looking for him to come to his office to see about buying a farm in Kansas; that he had some bargains there, and for him not to fail to come, as he "wanted to sell him a bargain." On the second day after Jenne had refused to take defendant's land, as above stated, he again went out to see it, and there met defendant's tenant, who was authorized by defendant to sell it. The tenant showed him over the place. The next day the tenant took him to defendant. They agreed upon a price, and defendant sold him the land, paying the tenant a commission. In this connection it should be stated that plaintiff did not tell Jenne that defendant was the owner, but said the land belonged to a widow. Neither did he tell defendant that he met with Jenne or that he had any one looking at the farm. Plaintiff had no further connection with the matter than to refer Jenne to the land. The foregoing is substantially what the trial court found to be the facts, and from them he found that plaintiff was not the procuring cause of the sale. We think there was evidence to support such finding.

Objection is made to the action of the court on instruction. That, however, cannot influence our conclusions. The trial was without a jury, and the instructions are only useful as showing the theory upon which the court rendered the judgment. But in this case the court made known his theory, and it is sustained by the law. *Missouri Smoke Co. v. St. Louis*, 205 Mo. 220, 232, 103 S. W. 513; *Vandiver v. Robertson*, 125 Mo. App. 307, 102 S. W. 659.

But, aside from these considerations, our conclusion, based upon the record, is that the judgment was for the right party, and should be affirmed. All concur.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

STATE ex rel. KNOX v. SELBY et al.
(Kansas City Court of Appeals. Missouri.
Nov. 16, 1908.)

1. CERTIORARI (§ 16*)—FINAL JUDGMENT.

Under Rev. St. 1899, § 5761 (Ann. St. 1906, p. 2931), giving a mayor and city council jurisdiction to remove city officers, such body, in proceedings against relator to impeach him as police judge, entered findings expressing profound regret that the evidence showed a lack of those characteristics on relator's part which should mark a judge, and with such expression of judgment preferred to let the matter rest. Held, not a final judgment, and not reviewable by certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 31; Dec. Dig. § 16.*]

2. CERTIORARI (§ 28*)—SCOPE OF WRIT.

A writ of certiorari is not confined to cases where there is an entire want of jurisdiction, but may be resorted to where, having jurisdiction, the tribunal makes an order exceeding its powers, but not to cases when no order is made.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 41; Dec. Dig. § 28.*]

Appeal from Circuit Court, Adair County;
Samuel Davis, Judge.

Certiorari by the state, on relation of Clem Knox, against Hiram Selby and others. From a judgment denying the writ, relator appeals. Affirmed.

P. F. Greenwood and A. Doneghy, for appellant. Campbell & Ellison and Weatherby & Frank, for respondents.

ELLISON, J. Relator was police judge, and respondents were the mayor and councilmen of the city of Kirksville. Relator obtained a writ of certiorari from the circuit court directed, to the mayor and councilmen. The writ was quashed by the latter court on the motion of respondents, and relator appealed.

It appears from the petition and writ that one William Smith was convicted in the police court, over which relator presided, for carrying concealed weapons, and fined \$3. Thereafter the city attorney made complaint to the city council of the proceedings of the relator in Smith conviction, and asked that he be impeached and removed from office, as is provided by section 5761, Rev. St. 1899 (Ann. St. 1906, p. 2931). The complaint is in the following words: "To the Honorable Mayor and City Council: On March 31, 1908, I, as city attorney, filed a complaint in the police court against one William Smith, charging him with carrying concealed weapons. A warrant was issued on said complaint, and placed in the hands of S. T. Hull, marshal. Smith was arrested and appeared in court, and entered his plea, not guilty. The cause was set for trial on April 1, 1908. On April 1, 1908, the police judge was absent from the city, and the case was not tried. It was undoubtedly the duty of the police judge to reset this cause and notify the officers interested in the prosecution of the

case on what day the case was set for trial, and he was requested so to do. The record, so far, made in this case shows a trial to the court and a finding of guilty and fine of \$3 assessed. All this was done by the police judge without knowledge of the city attorney or marshal, or without any notice from the police judge to the city attorney that the case was set for trial. Section 5761, Rev. St. Mo. 1899 (Ann. St. 1906, p. 2931), provides: "The mayor may, with the consent of majority of all the members elected to the city council, remove from office, for cause shown, any elective or appointive officer of the city, such officer first being given opportunity, together with his witnesses, to be heard before the council, sitting as a court of impeachment." * * * If the police judge is permitted to handle cases in this manner, the law cannot be impartially enforced. Therefore I would ask that an investigation of the conduct of C. Knox, police judge, be had in accordance with said section 5761. Respectfully submitted, Wm. Frank, City Attorney." The proceedings of the city council, after reciting the city attorney's complaint and the police judge's appearance and defense, were set out in the petition in the following language: "After deliberation the council is unable to satisfy itself that a proper trial was had before said police judge in the said Smith Case, or that the record made in said case, where said record says that a trial was had, states a fact. The council is unable to reconcile a fine of \$3 with an alleged offense, where the minimum fine fixed by law is understood to be \$50. Although unwilling to deal severely with said Clem Knox, police judge, the council does not think said Knox, as shown by his own explanation, appreciates sufficiently the gravity of his action in the said Smith Case. The council, after expressing to said Knox its profound regret that he should, from the evidence and from his own remarks, seem to lack that dignity of bearing and mental attitude which should characterize a judge of the police court, does, with this expression of its judgment, prefer to let the matter rest."

It will be noticed from the foregoing that no judgment of conviction on the impeachment was rendered or entered in the council record. The proceedings recorded are tantamount to a judgment of not guilty, and the accompanying statements are merely the reasons for such judgment. In such condition of the record was relator entitled to the writ? We think he was not. If he did not suffer legal injury, he is not a party with sufficient interest to justify an application for such extraordinary remedy. It is common knowledge that courts, and tribunals exercising for the time the functions of courts, frequently discharge a person of an accusation with a statement of reasons therefor, which

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

often partakes somewhat of the character of lectures, admonishments, and warnings. It is true that these, in most instances, escape the record, and in consequence they are not preserved. But whatever may be improper or unwarranted in them is as improper and unwarranted where they end with the mere utterance as when they are set down in writing; and there is no more practical difference between them than there is between slander and libel. So it would seem that relator has called for the aid of an extraordinary proceeding against his superior officers for only an ordinary and harmless admonition which, though it may have been sufficient to cause embarrassment, was not of such gravity as to justify the interposition of a court in the use of a writ of such unusual character as to be rarely sought. Certiorari is not a salve for wounded feelings, and should not be allowed to take the place of actions which the law has provided for such cases. In this case the city council had jurisdiction of the impeachment proceedings; and, while the writ is not confined to cases where there is an entire want of jurisdiction, but "may be resorted to where, having jurisdiction, the tribunal makes an order exceeding its powers" (State ex rel. v. County Court, 45 Mo. App. 387), yet, in this instance, no order of any kind was made.

We agree with the trial court, and affirm the judgment. All concur.

GROOMS v. MULLETT et al.

(Kansas City Court of Appeals. Missouri. Oct. 5, 1908. Rehearing Denied Nov. 16, 1908.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—CONCLUSIVENESS OF FINDINGS.

A finding of the lower court, supported by ample evidence, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.*]

2. ESTOPPEL (§ 92*)—FORECLOSURE OF TRUST DEED—ESTOPPEL OF LIENOR TO CLAIM IRREGULARITY.

Where a lienor under a trust deed took credit for a part of the proceeds of the trustee's sale, he was estopped from denying the validity of the trust deed and the regularity of the foreclosure, since a person cannot receive the benefit of a transaction and then repudiate it.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 260, 262; Dec. Dig. § 92.*]

3. MORTGAGES (§ 376*)—FORECLOSURE—INTEREST OF PURCHASER.

Where one purchased land at the sale of a trustee under a second trust deed, he took the legal title, though the sale was irregular, and became the owner of the fee subject to the prior lien, and as such entitled to surplus proceeds realized from a sale under the first trust deed.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 376.*]

4. APPEAL AND ERROR (§ 873*)—DECISIONS REVIEWABLE—ATTORNEY'S FEES AS COSTS.

Where there was no appeal from a judgment allowing an attorney's fee as part of

plaintiff's costs in an action of interpleader, the allowance cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 873.*]

5. INTERPLEADER (§ 35*) — PROCEEDINGS — COSTS—ATTORNEY'S FEES.

Plaintiff in an action of interpleader is entitled to an attorney's fee as part of his costs.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 76; Dec. Dig. § 35.*]

Appeal from Circuit Court, Cooper County; Wm. H. Martin, Judge.

Interpleader by J. M. Grooms to adjudicate conflicting claims of Joseph Mullett and S. J. Oswald to a fund. From the judgment, interpleader Mullett appeals. Reversed, with directions to enter judgment for interpleader Oswald.

John & J. W. Cosgrove, for appellant. T. Pendleton, for respondent.

BROADBUSH, P. J. This is a suit to adjudicate the conflicting claims of Joseph Mullett and S. J. Oswald to a certain fund in the hands of the plaintiff, J. M. Grooms. The undisputed facts are as follows: On the 30th day of December, 1905, Franklin Paxton and his wife, Nellie, conveyed to plaintiff, as trustee, certain real estate in Cooper county, to secure the payment of their note to the Cooper County Bank, for the sum of \$1,400, due in 12 months thereafter. On the same day, the Paxtons conveyed said realty to J. A. Waller, as trustee, for the benefit of the interpleaders, Oswald and Mullett, who were their securities to the said bank on a promissory note for the sum of \$750, due also in 12 months, and also to secure the said Mullett as their security on a note for \$600 payable to Philip Bergmann, due in 12 months. The conveyance to the bank being first recorded, the parties concede that it created the prior lien on the property. Some time after the deed of trust to the bank became due, the plaintiff, Grooms, as trustee, made a sale of the property to satisfy the debt to the bank; the Paxtons having failed to make payment. At this sale, Mullett was the purchaser and paid to the trustee the purchase price. The proceeds of the sale, after satisfying the debt and costs, left in the trustee's hands a surplus of \$705.14. However, prior to said sale, Waller, the trustee in the second deed of trust, foreclosed same by sale of the property, and Mullett became the purchaser, subject to the prior deed of trust, for the sum of \$250, which he paid to the trustee, one half of which was applied on the \$750 note and the other half on the \$600 note. The residue of the former note was paid by the interpleaders in equal proportion.

The interpleader Oswald claimed and introduced evidence to sustain his claim, that, at the time he and Mullett went the security of the Paxtons on said \$750 note,

it was agreed that the latter would give them a second deed of trust on said realty to indemnify them as such securities, and that Mullett, when he had the deed prepared, provided therein for indemnity to himself as security on the note to Bergmann, that this was done without his knowledge, and that it was a fraud upon his rights, as the equity of redemption in the land was not sufficient security for the payment of both notes. Mullett denies the statements of Oswald, and says that there was no such agreement; but, as the court found for Oswald on that issue, and as there was ample evidence to support the finding, we will accept such finding as conclusive of the question.

Oswald also attacks the sale under the second deed of trust as irregular, for the reason that it was not made by the trustee at the request of the holder of the note, but at the request of Mullett. The deed of trust provides that the sale shall be made at the request of the holder of the note; but, as the bank was not a party to the deed, it had no interest in the matter, and was not likely to make such request, except as a mere matter of compliance with the wishes of the beneficiaries. We do not consider it a matter of importance, for the reason that Oswald does not seek to set aside the sale, nor, for that matter, does he seek to have the trust deed reformed so as to cut out that part providing for indemnity to Mullett as security on the \$600 note to Bergmann. He asks only that the latter be postponed in favor of the indemnity to himself and Mullett on the \$750 note, and the court so decreed.

The finding of the court that Mullett paid one-half of the sum realized by the sale made by Waller, the trustee on said note, is contrary to the agreed admission of the parties at the trial. The agreement was as follows: "It is agreed by the respective parties by their attorneys that out of the amount received by J. A. Waller from Joseph Mullett for the purchase price of said real estate by Mullett from said Waller as trustee, the sum of \$127.63 was paid over by said Waller to the Cooper County Bank on the \$750 note, on the 29th day of May, 1907, and that the balance of said note, to wit, \$655.70, was paid by Joseph Mullett and S. J. Oswald; each paying one-half of such balance." According to this agreement, Oswald received credit for one-half of said amount, and he approved of the sale by so doing and in afterwards paying one-half of the note less the credit of the full amount of the payment made by the trustee, Waller, and he did this with full knowledge of all the facts which he sets up as a basis for relief. The law is that a party will not be allowed to receive the benefit of a transaction and then repudiate it. Having once taken credit

for a part of the proceeds of the trustee's sale, Oswald will not be allowed to impeach it for irregularity. He is estopped from denying the validity of the deed of trust and the regularity of the foreclosure thereunder by the trustee.

As the trustee's deed vested in Mullett the legal title to the property, he became the owner of the fee, subject to the prior lien. *Hume v. Hopkins*, 140 Mo. 65, 41 S. W. 784; *Schanewerk v. Hoberecht*, 117 Mo. 22, 22 S. W. 949, 38 Am. St. Rep. 631. And, as such owner, he was entitled to surplus proceeds realized from the sale under the first mortgage.

The appellant makes objection to the action of the court in allowing plaintiff, as part of his cost, an attorney's fee. As there was no appeal from the judgment in that case, we cannot consider the objections. Besides, he was entitled to the allowance. *Woodmen of the World v. Wood*, 100 Mo. App. 655, 75 S. W. 377.

Other questions raised need not be discussed, as what has already been decided disposes of the case.

The cause is reversed, with directions to the lower court to enter up judgment for the interpleader Mullett for the fund in controversy. All concur.

COLE v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri. Oct. 5, 1908. Rehearing Denied Nov. 16, 1908.)

1. STREET RAILROADS (§ 117*)—COLLISION—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

Where, in an action for injuries in a street car collision, the evidence showed that plaintiff was negligent in getting himself into a perilous position, and that defendant was negligent in not making a reasonable effort to stop the car after the peril should have become apparent to the motorman had he been attending to his business properly, the refusal to direct a verdict for defendant was proper.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 251; Dec. Dig. § 117.*]

2. STREET RAILROADS (§ 103*)—CONTRIBUTORY NEGLIGENCE—HUMANITARIAN DOCTRINE.

The fact that the negligence of a person, which placed him in position of danger of being struck by a street car, continued to the moment of the collision, and was coincident with the failure of the motorman to perform his humanitarian duty, did not defeat a recovery.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 219; Dec. Dig. § 103.*]

3. NEGLIGENCE (§ 83*)—CONTRIBUTORY NEGLIGENCE—HUMANITARIAN DOCTRINE.

Where the operator of the instrument of injury was warned, or if by reasonable care he should have been warned, by the situation confronting him, that a human being was in peril, it was his absolute duty to make every reasonable effort to avoid the injury, regardless of whose fault brought about the peril.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 115; Dec. Dig. § 83.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. DAMAGES (§ 159*)—LOSS OF EARNINGS—WHEN RECOVERABLE.

Loss of earnings is a special damage which must be specially pleaded and proved, in order to be recoverable in an action for personal injuries.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 443; Dec. Dig. § 159.*]

5. DAMAGES (§ 162*)—LOSS OF EARNINGS—WHEN RECOVERABLE.

Where the sufficiency of a petition in a personal injury action, alleging that plaintiff was prevented by reason of injuries from attending to his affairs and business, was not attacked, and defendant answered to the merits, and at the trial offered no objection to the testimony of plaintiff that the value of his time was a specified sum per day, a recovery for loss of time was proper.

[Ed. Note.—For other cases, see *Damages*, Dec. Dig. § 162.*]

6. PLEADING (§ 34*)—PETITION—CONSTRUCTION AFTER VERDICT.

After verdict the averments of the petition not challenged by demurrer or motion are to be liberally construed in favor of the pleader.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 78; Dec. Dig. § 34.*]

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Action by A. Cole against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John H. Lucas and Ben T. Hardin, for appellant. T. B. Buckner, for respondent.

JOHNSON, J. Action to recover damages resulting from personal injuries alleged to have been caused by the negligence of defendant. Verdict and judgment were for plaintiff, and the cause is here on the appeal of defendant, whose principal contention is that its request for a peremptory instruction directing a verdict in its favor should have been sustained.

The case was here before on defendant's appeal, and the judgment was reversed and the cause remanded on account of error in the instructions. 121 Mo. App. 605, 97 S. W. 555. We decided that the facts then before us entitled plaintiff to go to the jury on the issue of defendant's negligent failure to discharge the duty it owed plaintiff under the principles of the "humanitarian doctrine," and therefore that the trial court was right in overruling the demurrer to the evidence. Defendant argues that the facts in the present record differ in essential features from those considered on the former appeal; but we fail to discover any important difference, and must hold, as we did then, that, while the evidence most favorable to plaintiff convicts him in law of negligence which directly contributed to placing him in a perilous position, it further shows that defendant was guilty of negligence in not making a reasonable effort to stop the car after the peril of plaintiff should have become apparent to the motorman, had he been attending to his busi-

ness properly. For the reasons given in our former opinion, we find no error in the refusal of the peremptory instruction. We further find that the learned trial judge, in the instructions given, correctly submitted the issue of negligence to the jury. Defendant is wrong in thinking that the contributory negligence of plaintiff, if continued to the moment of the collision, deprived him of a cause of action. The fact that his negligence may have been coincident with that of defendant in failing to perform its humanitarian duty is immaterial. That duty arises from the fact that the person endangered has negligently placed himself in peril, and the obligation it imposes in no wise is dependent on the question of whether his negligence may be antecedent to or contemporaneous with the injury. Whenever it appears that the operator of the instrument of injury was warned, or if in the exercise of reasonable care he should have been warned, by the appearances of the situation confronting him, that a human being was in peril, it then became his absolute duty to make every reasonable effort to avoid the injury, regardless of whose fault brought about the peril.

There is no merit in the contention of defendant that the court erred in authorizing the jury, in the instruction on the measure of damages, to take into consideration "the reasonable value of any loss of time from his business he has sustained on account of said injuries, if any." Loss of earnings is a special damage which must be specially pleaded and proved to be properly included with the recoverable damages. It is alleged in the petition that "he (plaintiff) has been hindered and prevented by reason of such injuries from attending to his affairs and business, and has been unable to earn for himself and family a livelihood." The sufficiency of this allegation was not attacked, but defendant answered to the merits, and at the trial offered no objection to the testimony of plaintiff (who followed the vocation of teamster) "that the value of his time and team was \$5 per day," during the period he was incapacitated from work by his injuries. The rule is well settled that after verdict the averments of the petition not challenged by demurrer or motion are to be liberally construed in favor of the pleader, and, applying this rule, we are of opinion that the allegation in question should be deemed sufficient to support a recovery for loss of time.

The judgment is affirmed. All concur.

GRIMES v. COLE.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908.)

1. APPEAL AND ERROR (§ 171*)—GROUNDS OF REVIEW—ISSUES IN LOWER COURT.

Where a party tries a case on the theory that a certain issue is a question for the jury,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the verdict is conclusive on appeal, though the evidence preponderates in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1053; Dec. Dig. § 171.*]

2. APPEAL AND ERROR (§ 171*)—GROUNDS OF REVIEW—ISSUES IN LOWER COURT.

A party is bound by the theory adopted on the trial in the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1053; Dec. Dig. § 171.*]

3. TRIAL (§ 266*)—INSTRUCTIONS.

A party cannot complain of instructions changing the phraseology of requested instructions without changing their meaning.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 665; Dec. Dig. § 266.*]

Appeal from Circuit Court, Harrison County; Geo. W. Wanamaker, Judge.

Action by O. E. Grimes against R. B. Cole. From a judgment for defendant, plaintiff appeals. Affirmed.

J. W. Peery and O. N. Gibson, for appellant. J. C. Wilson and B. W. Hurst, for respondent.

BROADDUS, J. On July 11, 1905, plaintiff commenced this suit before a justice of the peace by filing a promissory note, dated August 13, 1904, executed by defendant and made payable to plaintiff, for \$75, without interest if paid when due, otherwise to bear 8 per cent., etc. On August 8, 1905, defendant filed an answer, admitting the execution of the note, and setting up that it was given to plaintiff for the rent of a certain farm from the 26th of July, 1904, to March 1, 1906; that a short time after defendant had entered into possession of said farm he removed therefrom, but without intending to abandon the same; that plaintiff wrongfully resumed possession of the premises and converted the proceeds to his own use, thereby creating a failure of consideration for said note.

In his answer he further, by way of set-off, pleaded the following account:

O. E. Grimes to R. B. Cole, Dr.		
July 16.	To one mowing machine.....	\$21 00
" 29.	To wall paper, repairing house	8 25
" "	To paint.....	75
" "	To plastering.....	25
August 10 to 12, inclusive, work of team		
three days, \$1.50 per day.....		4 50
Total		\$34 75
By cash.....		10 00
		\$24 75

On the first trial the jury failed to agree, and the cause was set down for trial on August 19, 1905, on which day the plaintiff filed a statement as follows: "Now comes plaintiff, and, for a further and additional cause of action against defendant herein, avers that defendant is further indebted to him, in addition to the sum demanded on the note filed herein, in the sum of \$31.37, as shown by the itemized statement following." Then following is a statement of various

items aggregating \$55.75, credited with \$24.38, leaving a balance of \$31.37. On motion of defendant plaintiff's amended statement was stricken out. On the trial the judgment was for the plaintiff for \$24.13, from which defendant appealed. Before the case was tried anew in the circuit court, defendant filed an amended answer, set-off, and counterclaim, which, after stating the facts set out in the former answer, omits the averment as to failure of consideration of the note, but, instead, avers that "by reason of plaintiff unlawfully taking possession of said premises and the converting by him of the hay, fruit, and grass to his own use, and the buildings on said land, that defendant is damaged in the sum of \$95." The statement also contains itemized account first filed. Notwithstanding the court struck out the plaintiff's statement of a second cause of action containing the account alluded to, it permitted it as a set-off or counterclaim against defendant's account. The judgment was for defendant, from which plaintiff appealed.

The parties introduced evidence tending to support the issues raised by the statements: the principal one being whether or not the conduct of the defendant in leaving the premises unoccupied and moving into another in a different neighborhood constituted in law an abandonment, and justified the action of plaintiff in re-entering the premises and gathering the crops grown thereon. The plaintiff insists that on the evidence, as a matter of law, the court should have instructed the jury that the defendant's action in quitting the premises justified the plaintiff in re-entering thereon. But the court was not asked to so instruct. We have reviewed the evidence, and, while we are satisfied that it preponderates greatly in plaintiff's favor on that issue, we do not feel justified in saying that there was an entire failure of testimony that there was no such abandonment; and, as the plaintiff tried the case upon the theory that it was a question for the jury, we think he should abide by the verdict under the circumstances. He is bound by the theory he adopted on the trial.

The plaintiff complains of the action of the court in not giving to the jury instructions numbered 1, 2, and 4, as asked. The court changed the phraseology of the instructions as offered, but, upon the most careful examination, we have been unable to perceive that there was any change whatever in their meaning. We think that plaintiff has no grounds for complaining of the action of the court in the giving of his instructions, as it gave all he asked. The plaintiff insists that defendant's instruction numbered 4 is inconsistent with instruction numbered 7 given for plaintiff, and erroneous. The former is a mere definition of what constitutes aban-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he be brought in as a party. But these matters do not figure in our conclusion, and we merely state them as a part of the history of the case.

In the original petition Thomas was alone made plaintiff. In the amended petition James was added as a coplaintiff. Plaintiffs, claiming in effect that the original contract was made by Thomas for himself and James, and that James' interest and share in the contract had been omitted by mistake, asked that the contract be reformed so as to include a right for a free water supply to James' residence. The language of the petition is that the contract as by mistake written "did not specify the further consideration upon which the lease was made that said Akins and his assigns should have the right to tap the pipes at said water cock or hydrant, and use the water on any part of said premises, especially at either or both the residences situated upon said block upon which said spring was situated." The trial court, by its decree, refused to reform the contract, and we consider that to be supported by the evidence. But the court proceeded to find that James had occupied his part of the premises for several years prior to the lease, though he did not become the owner until near a year after the execution of the lease, that James put in a hydrant at his place, and the city began to supply him with water, which it afterwards "wrongfully, and in violation of its contract and lease, threatened to cut off," etc., and "that neither said city nor the plaintiffs, nor any one claiming under them, have put, or attempted to put, any hydrants upon said block 13, except the said hydrant put upon" James' premises by him. The court then proceeded to enjoin the city from shutting off the water from James' residence, and to order that it furnish him or his assigns his or their private supply during the life of the lease, "unless suit shall sooner be duly instituted against said city of Humansville to compel it to put in and maintain another hydrant or water cock upon said block 13, in which event, and upon the happening thereof, the injunction herein granted shall be dissolved, and plaintiffs' rights hereunder shall cease." We are of the opinion that the conclusions of the trial court cannot be upheld. If the contract is not to be reformed, and is to be taken as written, James had no right or part in it. It provided for but one private premises, the residence at the spring. Whether the city has or has not supplied, or made provision to supply, the other residence does not concern James, nor does it afford him any advantage or ground of complaint. The trial court must have so viewed the contract; for,

while it ordered him to be supplied during the lease, it added the proviso "unless" a suit shall sooner be instituted to compel the city to put in the hydrant agreed upon. It would appear that the court concluded that one hydrant was to be put in by the city, and until that was done it should supply with water the one put in by James. But, as already said, James cannot profit by the failure of the city to put in the hydrant agreed upon in the lease.

It is insisted by plaintiffs that defendant has not a bill of exceptions which can be recognized by the law. Leave to file a bill was given and then extended, and the claim is based on the matter of proper extension of time. It seems that judgment was rendered on the 24th of June, 1907, and a motion for new trial was filed that day. But the motion was continued, and it was not decided until the 18th of October of the following term. It was then overruled, and thereupon, on that day, leave was given until the last day of the next term thereafter to file a bill of exceptions. Afterwards the time was duly extended to the next term when the bill was filed. A bill of exceptions to matters occurring at the trial need not be filed until after the motion for new trial is overruled, even though that should not be until a succeeding term. *State v. Lar-ew*, 191 Mo. 192, 196, 89 S. W. 1031; *Fendrich v. Burress*, 129 Mo. App. 456, 107 S. W. 465; *Estate of Howard*, 128 Mo. App. 482, 106 S. W. 116; *Henze v. Ry. Co.*, 71 Mo. 636; *Givens v. Van Studdiford*, 86 Mo. 149, 56 Am. Rep. 421; *Walter v. Scofield*, 167 Mo. 537, 546, 67 S. W. 276. It appears that on the day the judgment was rendered, and the motion for new trial was filed, there was an entry of record extending time for filing a bill of exceptions "until" the following term. If that order is the one upon which the defendant must depend, the bill was not filed in time, for it was not filed until after that term had been in session many days. "Until" in this connection would mean no longer than the day of the beginning of the following term. *Queensware Co. v. Smith*, 107 Mo. App. 13, 80 S. W. 592. But that order, entered as it was on the day the motion for new trial was filed, cannot be allowed to affect the rule we have just stated. It could not apply to the condition of the case as it then existed, for at that time the bill of exceptions was to await action on the motion. We think the bill was properly preserved.

After a thorough examination of the case made we conclude the judgment should be reversed, and the proceeding dismissed. It is so ordered. All concur.

Appeal from Circuit Court, Adair County; N. M. Shelton, Judge.

Action by Rosina Myher against E. W. Myher. From a judgment quashing an execution based on a judgment for plaintiff, plaintiff appealed. Appeal dismissed.

See, also, 87 S. W. 116.

A. Doneghy, for appellant. H. F. Millan, for respondent.

BROADDUS, P. J. This is an appeal from a judgment quashing an execution. Since the appeal was taken the defendant died and the cause revived against the administrator. The judgment has been duly probated, properly classified, and paid by the administrator, in view of all which the administrator files his motion to dismiss the appeal.

As there is no longer any necessity for determining the rights of the parties in the premises, we believe the motion should be sustained. And it is so ordered. All concur.

JOURNAL CO. v. NELSON et al.

(Kansas City Court of Appeals. Missouri. Oct. 5, 1908. Rehearing Denied Nov. 16, 1908.)

1. CORPORATIONS (§ 653*)—FOREIGN CORPORATIONS—LIABILITIES OF STOCKHOLDERS.

Before a trial in the circuit court of a case appealed from a justice court against a number of defendants as copartners, on an indebtedness of a corporation represented by them, an affidavit purporting to deny that defendants were partners was filed. *Held*, that a subsequent admission by both plaintiff and defendants that the company represented by defendants was a mining corporation organized under the laws of another state, but not authorized to do business in this state, rendered such affidavit unnecessary.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 653.*]

2. CORPORATIONS (§ 653*)—LIABILITY OF INCORPORATORS AS PARTNERS.

Rev. St. 1899, § 1025, as amended by Laws 1903, pp. 122, 123 (Ann. St. 1906, p. 889), providing that the Secretary of State shall not license any foreign corporation to do business in the state when such corporation was organized under the laws of a foreign state, by citizens and residents of the state, for the purpose of avoiding the laws of the state, and that its intended incorporators will be held as partners, does not apply to the incorporators of a corporation organized under the laws of another state for the purpose of doing business in a third state.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 653.*]

3. PARTNERSHIP (§ 41*)—LIABILITY OF INCORPORATORS AS PARTNERS.

Evidence in an action against several defendants as copartners to recover for an indebtedness incurred by a corporation considered, and *held* to show that the corporation was fraudulent, and never had any legal existence.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 41.*]

4. PARTNERSHIP (§ 41*)—LIABILITY OF INCORPORATORS AS PARTNERS.

Where a pretended corporation is fraudulent and never had any legal existence, the

members of such corporation may be held as partners, and liable for debts contracted in the name of the corporation.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 58; Dec. Dig. § 41; * Corporations, Cent. Dig. § 74.]

Appeal from Circuit Court, Jackson County.

Action by the Journal Company against A. P. Nelson and others. Judgment for plaintiff, and defendants appeal. *Affirmed*.

Jamison, Elliott & Ostergard and Burke & Kimpton, for appellants. Platt, Lea & Wood, for respondent.

BROADDUS, P. J. The plaintiff, as a corporation, brought this suit against defendants A. P. Nelson, J. D. Thatcher, George Brant, and Wm. P. Cole, copartners doing business under the firm name and style of the Brant Independent Mining Company. The plaintiff is engaged in the business of publishing a newspaper in Kansas City, Mo. The claim against the defendants is for \$299.46 charged for inserting in the plaintiff's paper the prospectus of the Brant Independent Mining Company. This prospectus purports to have been signed by defendant W. P. Cole, fiscal agent. A trial was had in the justice's court, which resulted in a judgment for the plaintiff for the full amount of the claim. Before the trial in the circuit court, the appealing defendants filed an affidavit purporting to deny that they were partners, but, as it was afterwards admitted by both plaintiff and defendants that the Brant Independent Mining Company was a mining corporation organized under the laws of Arizona, but not authorized to do business in this state, the necessity for such affidavit was dispensed with. There was no question as to the correctness of plaintiff's demand, and the only question for us to decide is whether the defendants were liable as partners being members of the corporation. The capital stock of said corporation was \$5,000,000, of the par value of \$1 each. Of this amount only about \$500 had been paid, although the prospectus stated that all had been paid. The defendant Cole was the promoter of the company and was selling the stock, and the other defendants were holding themselves out as officers of the company. From the prospectus we gather that the ostensible purpose of the corporation was mining in the state of Colorado. On the back of the bound leaves of the said prospectus the following is printed in large capital letters: "Mining as a commercial enterprise." The corporation was not licensed to do business in this state. It had been organized only a short time before the publication in question. A jury was waived, and the cause was tried by the court, and the judgment was for the plaintiff.

It is the contention of plaintiff that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the accident occurred at a regular stopping place, and it was the duty of the conductor before giving the signal to start to know whether the passenger was alighting.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1327; Dec. Dig. § 321.*]

4. CARRIERS (§ 303*)—CARRIAGE OF PASSENGERS—DISCHARGING PASSENGERS.

Where a street car had stopped at a regular stopping place and passengers were getting on and off, it was the duty of the conductor, in the exercise of reasonable care, before giving the signal to start, to know whether a passenger is alighting.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1228½; Dec. Dig. § 303.*]

5. EVIDENCE (§ 123*)—RES GESTÆ—STATEMENTS AFTER EVENT.

In an action against a street car company for injuries to a passenger in alighting from the car, evidence of what the conductor said to a witness after the car had resumed its journey was no part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 354; Dec. Dig. § 123.*]

6. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR.

Defendant is not harmed by the erroneous admission of testimony which merely tends to corroborate testimony given by defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.*]

Appeal from Circuit Court, Jackson County; Frank P. Walsh, Special Judge.

Action by Catherine Alten against the Metropolitan Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Lucas and H. H. McCluer, for appellant. A. E. Martin and H. J. Latshaw, for respondent.

JOHNSON, J. Plaintiff was thrown from a street car from which she was alighting, and sustained personal injuries. She alleges that her fall was caused by the negligence of defendant in prematurely starting the car while she was in the act of alighting. The answer is a general denial, and a plea "that, if plaintiff received any injuries at the time mentioned in said petition, the same were caused by plaintiff's own fault and negligence." The trial of the cause resulted in a judgment for plaintiff for \$750, and defendant appealed.

The injury occurred December 1, 1905, at about 5:30 o'clock, at the corner of Ninth street and Cypress avenue, in Kansas City. Plaintiff and her three children had become passengers on an electric car operated by defendant on the Sheffield line of its street railway system in Kansas City. Her destination was the corner mentioned—a regular stopping place for the reception and discharge of passengers. Two of her children were girls, aged 12 and 14 years, respectively, and the third was a babe 18 months old, which she carried in her arms. The car was crowded, and, when it stopped at Ninth and Cypress, a number of passengers started to get off. It was stopped at the regular

place for the purpose of discharging and taking on passengers. Plaintiff left her seat in the middle of the car, and proceeded as expeditiously as she could to the rear vestibule. She was preceded by one of her daughters, and followed by the other. The first succeeded in leaving the car while it was still stationary, but plaintiff was not so fortunate. While she was about to step from the platform to the first step, the car suddenly started forward without warning, and caused her to fall to the street. It ran eight or ten feet, and then suddenly stopped. The above is the version of the occurrence given by plaintiff's witnesses, and differs radically from that of defendant's witnesses. They say the car stopped, and that plaintiff stepped to the street while it was stationary, but in doing so made a misstep, and stumbled, but did not fall. Negligence of defendant is alleged in the petition as follows: "Plaintiff states that, while said car was stopped at said point under the aforesaid conditions, she attempted to alight from said car, and that before plaintiff had had a reasonable time to alight from said car, and while plaintiff was in the act of alighting from said car, the servants and agents of defendant then and there in charge of said car carelessly and negligently started up said car, thereby throwing plaintiff from said car with great force and violence to the street and pavement, and injuring her as hereinafter set forth; * * * that while said car was standing still, as above set forth, and while she was attempting to alight therefrom as above set forth, defendant carelessly and negligently failed and neglected to allow plaintiff a reasonable time or opportunity to alight from said car, although defendant then and there knew, or by the exercise of due care and caution could have known, that plaintiff was then and there in the act of alighting from said car, and that plaintiff had not had a reasonable time or opportunity to alight from said car, and defendant then and there, and under said conditions, carelessly and negligently started said car up without warning the plaintiff of their intention so to do: * * * that while she was in the act of alighting from said car at said time and place, and under the aforesaid conditions, defendant started said car up, and then immediately stopped said car with an unusually sudden and severe jerk, while plaintiff was standing upon the steps of said car ready to alight therefrom, thereby throwing plaintiff with great force and violence from said car to the street and pavement thereof, injuring her as hereinafter set forth; * * * that, when she was attempting to alight from said car as above set forth, said car was either standing still, or was moving so slowly that the motion was imperceptible to plaintiff."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

FUNCK v. METROPOLITAN ST. RY. CO.
(Kansas City Court of Appeals. Missouri. Oct. 5, 1908. Rehearing Denied Nov. 16, 1908.)

1. STREET RAILROADS (§ 103*)—COLLISION WITH VEHICLE—ACTIONS—DISCOVERED PERIL—NEGLIGENCE.

If those in charge of a street car discovered, or should by the exercise of ordinary care have discovered, plaintiff's peril while driving a wagon on the track in time to have avoided a collision, and did not do so, plaintiff's negligence in failing to look back for an approaching car would not preclude his recovery.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. § 103.*]

2. STREET RAILROADS (§ 81*)—OPERATION IN NIGHTTIME—CARE REQUIRED.

A motorman operating a street car in the nighttime in a populous part of a city must look out for the safety of persons who may be on the track, and have his car under control in anticipation of any danger that may arise.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 174, 175; Dec. Dig. § 81.*]

3. STREET RAILROADS (§ 117*)—COLLISION WITH VEHICLE—ACTIONS—QUESTION FOR JURY.

Whether defendant's motorman in charge of a street car which collided with plaintiff's vehicle made proper efforts to avoid the collision after he saw, or by the exercise of ordinary care could have seen, plaintiff's peril, *held*, under the facts, to be for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 246; Dec. Dig. § 117.*]

4. APPEAL AND ERROR (§ 1170*)—REVIEW—HARMLESS ERROR—ADMISSION OF TESTIMONY—WORRY.

In a personal injury action, the admission of testimony of plaintiff that he worried because of his belief that he would not be able to work again, if error, because making worry a ground for damages, was so insignificant as not to be ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1170.*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Personal injury action by John A. Funck against the Metropolitan Street Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Lucas and Ben F. White, for appellant. Kinley & Kinley and Cook & Gossett, for respondent.

BROADDUS, P. J. This is a suit against defendant for damages as the alleged result of its negligence whereby plaintiff was injured. The plaintiff's evidence tended to show that on or about February 28, 1903, while he was driving a four-horse team and wagon with a coal oil tank thereon, east along Thirty-Ninth street, in Kansas City, Mo., which was then unpaved, except that part occupied by the tracks of defendant and space between the same, the defendant by its employes approaching him in the rear carelessly and without warning struck said wagon, whereby plaintiff was thrown from his position and was caught on the tongue of

the wagon, and was dragged some distance, and severely injured. Plaintiff's evidence was to the effect that, when he entered upon the street in question from Bell street at which time it being dark, he looked to the west for a car, and, not seeing one, turned east on Thirty-Ninth street, traveling on defendant's south track; that he thought the track was clear, and at a point not to exceed 15 feet east of Genesee street the rear end of his wagon was struck by one of defendant's cars; that the shock threw him onto the tongue or doubletree of the wagon; and that the team ran away with the wagon while he was in that position. Also the evidence showed that while driving the plaintiff sat in front of the oil tank, which came up above his head; that, after he looked back when he came onto defendant's track, he did not look back again before his wagon was struck, although there was nothing to prevent him doing so; that, where he got onto the street, it was not quite a block back to the end of defendant's car line; that he could have seen the car if it had been lighted; and that he did not hear the bell ring, if it was rung, or any noise of a coming car. It appears that, while making the switch for the return trip of the car at Bell street, the trolley pole is turned from the east to the west end of the car, and then the car is started with sufficient force to throw it onto the south track before it reaches the west end of the switch; the trolley being off the wire in the meantime, during which necessarily the lights on the car are out. Consequently the car is dark twice during the operation, once when the pole is transferred from one end of the car to the other, and once while the switching is going on. The evidence tended to show that the distance was 250 feet from Bell street to Genesee street, which was sixty feet in width, and that it was something over fifteen feet east of the latter where the wagon was struck, thus making the total distance from the latter point to Bell street at least 335 feet, and that, after leaving Bell street for a short distance, the ground is level, and then a descent begins. It was shown that the cars were carried on the level space with the motive power used to the descent in the track, where the power was released, and the car proceeded by the force of gravitation at an increased speed until it struck plaintiff's wagon. Other evidence will be referred to further in this opinion. The judgment was for the plaintiff, and defendant appealed.

The plaintiff relies for recovery upon the theory that the defendant's operator saw, or could have seen, his peril in time to have averted striking his wagon. On the other hand, the defendant contended, and introduced evidence tending to show, that, owing to the darkness, it was impossible for its motorman to have seen the wagon in time to have

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. INSURANCE (§ 819*)—LIFE INSURANCE—PROOFS OF DEATH AS EVIDENCE.

Proofs of death, furnished by a beneficiary in a benefit certificate, which recite that the member's death resulted from morphine poisoning, are conclusive on the fact that insured died from morphine poisoning, unless the beneficiary shows that the statement was erroneous, but the proofs do not show that the member committed suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2006; Dec. Dig. § 819.*]

4. INSURANCE (§ 819*)—MUTUAL BENEFIT INSURANCE—DEFENSES—SUICIDE.

Though the beneficiary in a benefit certificate did not rebut the presumption arising from the proofs of death, reciting that the member died from morphine poisoning, the society, relying on the suicide of the member, must prove, to the satisfaction of the jury, that the member took the drug to end his life.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2006; Dec. Dig. § 819.*]

5. EVIDENCE (§ 89*)—PRESUMPTIONS.

The presumption of law is against suicide, and to overcome it, the fact of suicide must be established beyond all reasonable doubt.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 111; Dec. Dig. § 89.*]

6. INSURANCE (§ 825*)—MUTUAL BENEFIT INSURANCE—DEFENSES—SUICIDE OF MEMBER—EVIDENCE.

In an action on a benefit certificate, void on the member committing suicide, evidence held to require the submission to the jury of the issue of suicide.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.*]

7. INSURANCE (§ 825*)—MUTUAL BENEFIT INSURANCE—FORFEITURE OF CERTIFICATE—EVIDENCE—QUESTION FOR JURY.

Whether a member of a beneficiary society had forfeited his membership by the intemperate use of drugs and alcoholic drinks, in violation of the certificate, held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 2009; Dec. Dig. § 825.*]

8. APPEAL AND ERROR (§ 302*)—REJECTION OF EVIDENCE—INSTRUCTIONS—REVIEW.

Errors in the rejection of evidence and in the instructions, not called to the attention of the trial court in the motion for new trial, cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1747, 1748; Dec. Dig. § 302.*]

9. TRIAL (§ 133*)—MISCONDUCT OF COUNSEL—IMPROPER ARGUMENT.

Where, on objection to the remarks of counsel for plaintiff, the court stated that it wished that a motion had been made to strike out the testimony on which the remarks were based, and counsel for plaintiff replied that, if there was any question about it, he would withdraw everything, and the court struck out the testimony, and plaintiff's counsel withdrew his remarks, they were not ground for reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. § 133.*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by Virginia Belle Almond against the Modern Woodmen of America. From a judgment for plaintiff, defendant appeals. Affirmed.

Ben. D. Smith and John Sullivan, for appellant. Jno. I. Williamson (James Fairweather, of counsel), for respondent.

BROADDUS, P. J. This is a suit to recover \$2,000 on a benefit certificate issued by the defendant to one Henry Betts Almond, on the 2d day of April, 1904, in which the plaintiff was the beneficiary. The petition is predicated upon the theory that defendant is a life insurance company under the laws of Missouri, but the court very properly held that it was not such, and tried the case upon the theory that it was a fraternal beneficiary society, organized under the laws of the state of Illinois. The defendant pleaded two defenses viz., that the deceased member committed suicide, and that he was intemperate in the use of alcohol. The certificate provided that the defendant did not indemnify the member against death from suicide, "sane or insane, if occurring within three years from date of certificate or from death resulting from occupations prohibited by law." There is a by-law of the society which provides that, if any of its members "shall become intemperate in the use of alcoholic drinks, or in the use of drugs or narcotics, the benefit certificate held by said neighbor shall by such acts become and be absolutely null and void as to the benefits, and all payments thereunder shall be forfeited." By the terms of the benefit certificate said by-law became a part of the contract of indemnity. There was no dispute as to the death of the member, but the contest was over the affirmative defenses set up by defendant. The defendant introduced in evidence, in support of its defense, the proof made by the plaintiff of the death of the said Almond. As the defendant places much stress upon this document, we quote from it that part which bears directly on the controversy viz.: "I, Virginia Belle Almond, being first duly sworn, on oath state that I am the beneficiary named and referred to in benefit certificate * * * issued to Henry B. Almond, deceased, * * * whose death resulted from morphine poisoning. * * *" The evidence of the coroner, Dr. Thompson, was in effect that he found no evidence, by external examination of deceased's body, of the cause of his death; that death by morphine poison did not manifest such as the cause by the mere external appearance of the body; that he found in deceased's room a bottle that had contained 25 quarter grains of morphine; that the vial was empty with the exception of 1 quarter grain; and that he also found a note on the dresser. The doctor's opinion from what he saw, and not from the appearance of the deceased, was that his death might have been produced by morphine poisoning. The defendant introduced much evidence to the effect that deceased a short time before his death contemplated suicide,

directing a verdict for the defendant. For the reason given we do not think the decision has any application to the question. The evidence in this case was purely circumstantial. It consisted mainly, as we have seen, in the fact that a vial was found with the deceased, which had contained morphine sufficient to have caused his death, and his previous and repeated threats to end his life. So much stands uncontradicted. We must then assume, because of the threats and the taking of morphine, he committed suicide before defendant was entitled to a direction from the court to the jury to return a verdict to that effect. We must assume that the deceased took the drug for the purpose of ending his life, and to reject every other reasonable supposition that such was not his purpose. The deceased may have taken the drug for the purpose of throwing off the depression under which he was laboring, and took too much by mistake. This is not a far-fetched supposition, for such instances are not uncommon. Or he may have been suffering from valvular disease of the heart or angina pectoris, as Dr. Thompson stated, or he may have taken it for the purpose of inducing sleep, which, from the statement of his landlady that he walked the floor for hours, he was not able to obtain, and took by mistake an overquantity. The evidence furnished by Dr. Thompson tends to rebut the prima facie case in behalf of defendant, implied by the statement in plaintiff's proof of loss that the deceased died from the effects of morphine poisoning. The doctor assumed from what he saw surrounding the deceased that he had been poisoned by morphine, but he also stated that, from the appearance of the body itself, one of three things may have caused his death, viz., apoplexy, angina pectoris, and valvular disease of the heart, and further that there was nothing to indicate in the appearance of his body that he had died from morphine poisoning. In view of all the facts, the evidence being circumstantial, there was not such a clear case of suicide made out as would have justified the court in granting defendant's peremptory request to return a verdict against plaintiff.

The evidence greatly preponderated in favor of defendant that the deceased had forfeited his membership by the intemperate use of drugs and alcoholic drinks. But as there was evidence to the contrary, the matter, so far as we are concerned, was solely one for the jury.

The defendant assigns as error the action of the court in rejecting the admission of competent testimony offered on its part, and the giving of a certain instruction at the instance of plaintiff. But as the attention of the trial court was not called to these matters in defendant's motion for a new trial, they cannot be considered.

Also objection is made to certain unbe-

coming remarks of plaintiff's counsel in the presence and hearing of the jury. The words used had reference to certain testimony introduced on the trial. When objection was made to the language of the counsel, the court said: "I wish you gentlemen had moved to strike out that testimony when it was offered." Counsel for plaintiff then said: "If there is any question about that, I will withdraw everything." The court then struck out all the testimony upon which the remarks were based. Whereupon plaintiff's counsel withdrew what he had said about the matter. If there is blame to be attached to any one, it must rest with the defendant's counsel for failure to object to the testimony which instigated the plaintiff's counsel to use the objectionable language.

Finding no error in the trial, the cause is affirmed.

ABLES v. ACKLEY.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908.)

1. APPEAL AND ERROR (§ 1194*)—CONSTRUCTION OF DECISION—EFFECT IN LOWER COURT.

A former decision on appeal that defendant, by cross-examining plaintiff as to the terms of a contract between herself and her deceased husband, rendered evidence thereof by plaintiff admissible after a ruling that she was incompetent to testify to the transaction, did not decide that plaintiff was a competent witness as to such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1194.*]

2. APPEAL AND ERROR (§ 1097*)—CONSTRUCTION OF DECISION—MATTERS DECIDED.

As a general rule, a question arising on a former appeal is res judicata only when it was fairly necessary to the decision and directly decided.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4358; Dec. Dig. § 1097.*]

3. WITNESSES (§ 144*)—COMPETENCY—SURVIVING PARTY TO CONTRACT.

In an action against one claiming as beneficiary under an insurance policy, plaintiff was not competent to testify to a contract with her deceased husband, by which he agreed to transfer the policy to her in consideration of the marriage, or as to transactions between them pursuant to the contract after the marriage.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 639; Dec. Dig. § 144.*]

4. INSURANCE (§ 784*)—MUTUAL BENEFIT COMPANIES—CHANGE OF BENEFICIARIES—MODE.

The adoption, by the charter of a mutual benefit society, of a particular method of changing beneficiaries, excludes all other methods; but the society may waive compliance with its strict rules and validate attempts to change beneficiaries which would otherwise be ineffectual, in which case a substantial compliance is sufficient.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1951, 1954; Dec. Dig. § 784.*]

5. INSURANCE (§ 784*)—MUTUAL BENEFIT SOCIETIES—CHANGE OF BENEFICIARIES—MODE.

The by-laws of a mutual benefit association provided that no change of beneficiaries should

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

beneficiary "shall be effective" until the old certificate shall have been surrendered to the head clerk of the local camp and new certificate issued, until which time the old certificate shall remain in force. The finding and judgment of the court were for the defendant, from which plaintiff appealed.

We think it should be conceded that there was sufficient evidence to show that plaintiff was to have the benefit of the insurance as a consideration for her marriage to Ables, and that on her part she would make payment of all dues and other charges to keep the benefit certificate in force, and that she performed her part of the contract, but that Ables failed and neglected to have her name substituted in a new certificate as the beneficiary. It has been held that a member of a benevolent association has the power to designate his beneficiary by will, in the absence of any formalities for a change of beneficiary. *Masonic Ben. Ass'n v. Bunch*, 109 Mo. 560, 19 S. W. 25. The defendant draws the inference from the language of the opinion that, when such formalities are required by the laws of the association, a change of beneficiary could not be made by will, but the change must be made in the form prescribed, and it is held that: "The adoption of a particular method of changing a benefit certificate under the powers and within the limits of the charter of a benevolent benefit society is the exclusion of all other methods." *Coleman v. Knights of Honor*, 18 Mo. App. 190. And so it is held in *Head v. Council of Catholic Knights*, 64 Mo. App. 212, and *Grand Lodge v. Ross*, 89 Mo. App. 621. While such is the general rule, it is held that there are exceptions. For instance, anterior to the death of a member, the society, for whose benefit only the rules governing changes of beneficiaries are made, may waive compliance with such rules on the part of its members, and thus validate attempts to change beneficiaries which would be ineffectual under the strict rules of the society. *St. Louis Police Relief Ass'n v. Strode*, 103 Mo. App. 694, 77 S. W. 1091. In a recent decision of the Supreme Court, which was certified to that court by the St. Louis Court of Appeals, the opinion of the Court of Appeals was sustained, wherein it is held that, where an association's rules and regulations provide a specific method for changing beneficiaries, "they must be substantially complied with"; but "strict compliance with regulations for a change of beneficiaries, intended solely to protect the association, may be waived by it when a beneficiary has no vested right in the certificate." *Grand Lodge A. O. U. W. v. McFadden*, 111 S. W. 1172. In *Hall v. Allen*, 75 Miss. 175, 22 South. 4, 65 Am. St. Rep. 601, it is held that a payment into court of the indemnity fund by the society was a waiver by the order, so far as its rights were concerned, of conformity of the change in the benefit certificate, and it is

so held in *Manning v. O. of U. W.*, 86 Ky. 133, 5 S. W. 385, 9 Am. St. Rep. 270. In *Fuos v. Dietrich* (Tex. Civ. App.) 101 S. W. 291, it is held that a strict compliance with the rules of the order is not necessary to validate a change of beneficiaries. In that instance a change was made, but not in the exact mode prescribed; the court holding that "the instrument was, in effect, as against the old beneficiary, a substitution of a new beneficiary; the provision for a particular manner of evidencing any change in beneficiary being for the benefit of the company, which alone could claim it." It becomes us to follow the rule as announced in *Grand Lodge A. O. U. W. v. McFadden*, supra, as the latest expression of the Supreme Court, which, in effect, requires that for a change of beneficiaries the rules of the order must be substantially complied with. Tested by this rule, it cannot be said that Ables, in delivering the certificate to plaintiff and afterwards going to the clerk of the order and asking that plaintiff be substituted as the beneficiary without surrendering the certificate, in any sense complied with the regulations of the society. We can conceive of no mode for a change of beneficiary that would be effectual other than by some act at least in compliance with the rules of the order.

The plaintiff relies greatly upon the case as made out that by the terms of the marriage contract, with which she has fully complied, she was to be the beneficiary and to pay the dues and keep the certificate in force. Ordinarily, under such a state of facts, equity would be on her side and afford her redress, but it must be remembered that beneficiary certificates are not properties in the usual sense of the term. It is conceded on all sides that beneficiaries have no vested interest in such certificates until the death of the member, and, further, that the members themselves have no property rights whatever in the indemnity, but only the naked power to designate the beneficiary. *Bacon, Benefit Societies and Insurance*, vol. 1, p. 526, § 237.

The cause is affirmed. All concur.

ENGELMAN v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908.)

1. STREET RAILROADS (§ 98*)—OPERATION—INJURY TO PERSON ON TRACK—NEGLIGENCE—DUTY TO LOOK FOR CAR.

While a traveler on a street car track is not a trespasser, he must exercise care commensurate with the danger of his position, and if, by looking, he could see the approach of a car, and he fails to look, and is struck, his negligence precludes recovery.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 204-208; Dec. Dig. § 98.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Helms Electric Park; and that the car was going at the rate of from 10 to 12 miles an hour. Plaintiff's evidence tends farther to show: That Montgall avenue was the principal thoroughfare for people engaged in market gardening in going to and returning from market; that the street was unpaved and in a bad condition for travel, and in consequence thereof there was much travel along on defendant's track, which was in better condition; that this condition had existed for a long time prior to plaintiff's injury; that defendant's agents knew that persons were liable to be on the track and in danger of being struck; and that the place where the injury occurred was in a block thickly populated. A witness stated that the night was very dark, that it was snowing, raining and sleeting very fast, and that: "It was an awful bad night. You could hardly stay out in it." The cause was submitted to a jury on the theory that if the defendant was negligent in failing to give proper warning to persons of the approach of its car, or in the speed with which it was operated, the defendant was liable, unless the jury should find that plaintiff was herself guilty of contributory negligence. The finding and judgment were for plaintiff, and defendant appealed.

At the close of plaintiff's evidence and at the close of all the evidence, the defendant asked the court to instruct in its favor, which the court refused. In *McGauley v. St. Louis Transit Co.*, 179 Mo. 583, 79 S. W. 461, it is held that a motorman "is not required to sound a gong as a warning to a wagon on the track which the operators do not see, in the suburbs of a city where there are no street crossings." It does not appear that there were any unusual conditions existing in that case, such as the habitual use of the defendant's tracks by the public on account of the bad condition of the street, and that the wagon was struck in a thickly settled part of the city where there were street crossings, or that the car was operated at a dangerous rate of speed under the circumstances. It is conceded law that a traveler is not a trespasser while on a street car track, but that he must exercise care commensurate with the danger of his position, or he will be chargeable with contributory negligence. If he can by looking see the approach of a car, and fails to look, and is struck, he is not entitled to recover for any injury he may sustain thereby. *McGauley v. Transit Co.*, supra; *Buren v. St. Louis Transit Co.*, 104 Mo. App., loc. cit. 231, 78 S. W. 680.

According to all the evidence, the motorman could not have seen plaintiff's wagon on the track a greater distance than 25 feet, and it is also equally apparent, if plaintiff had been looking at the time for an approaching car, she could have seen it a greater distance on account of the headlight; but it is evident that she could not have seen it for

so great a distance as it might have been seen on an ordinarily dark night, by reason of the storm of rain and snow prevailing at the time. It was, in our opinion, a question for the jury to say, considering the conditions and the rate of speed at which the car was going, whether plaintiff exercised that degree of care required of her in looking for its approach, and what was a dangerous rate of speed also depends upon the circumstances. *Storage & Moving Co. v. Transit Co.*, 120 Mo. App. 410, 97 S. W. 184. The defendant's operators having knowledge of the condition of the street, and that people traveled on its track, and knowing that a person could not be seen on the track in time, owing to the rate of speed in which the car was going, to prevent striking him, we think tended to show negligence. There is no authority that we have seen that holds it is not the duty of the motorman, under certain conditions, to sound his gong to warn persons that may be on the company's tracks. It is a well-known fact that sometimes in cities, even during daylight, the fog is so intense that the headlights of a car can be seen but a short distance away, and that warning signals of danger are constantly given in order to prevent injury to persons who may be on the streets. The condition of rain and snow sometimes produce a similar result. In such cases it becomes the duty of every one on a public thoroughfare not only to look out for his own safety, but to proceed, not in the usual manner, but in a cautious manner, to insure the safety of others. What would be care on one occasion might be the grossest negligence on another, when the conditions were materially different. *Higgins v. St. L. Suburban Ry. Co.*, 197 Mo. 300, 95 S. W. 863.

The objection to plaintiff's instruction numbered 1 is that it does not apply to the allegation of the petition, as the jury was told that a failure upon the part of defendant's agents and servants to use ordinary skill and caution in running and operating said car, "either in the matter of giving persons that might be on the track proper warning of the approach of such car, or in the matter of the speed at which the car was operated at the time," would entitle plaintiff to recover, unless she was guilty of contributory negligence. It is true the petition charges that defendant's agents saw, or by the exercise of reasonable care and caution could or might have seen, that plaintiff was on defendant's track, in time by the use of the appliances at hand to have averted her injury, but that they were negligent in failing to use ordinary care in maintaining a proper lookout for people, teams etc., on the track, and negligently failed to ring the bell or sound the gong. It seems to us that the instruction is predicated on that part of the allegations of the petition that defendant's agents failed to use care in two respects: First, a failure to ex-

Plaintiff, knowing that defendant would not keep cars of this class at Exeter, and would have to send the car he needed from a division point, appeared at the station at Exeter on June 6, 1904, at about 7 o'clock in the morning, and requested the agent to order the car. On direct examination, he testified that the agent accepted the order and told him the car would be down on a local freight train due to arrive that morning from Monett, a division station 19 miles distant. The car did not come on that train, nor until the day following. In the meantime plaintiff brought the berries to the station and placed them on the shipping platform, where they remained for more than 24 hours. When finally loaded in the car, they were so badly damaged that they sold in Omaha for barely enough to pay freight charges. Plaintiff's statement on direct examination of the conversation he had with the agent when he gave the order was so vague and unsatisfactory that on cross-examination the court took him in hand and elicited the following testimony: "The Court: * * * Now, without any further questions, I will give you a chance once more to state just what was said by you to the agent there that morning, and just what he said to you, without any interruption, giving the conversation as near as you remember it. A. I stated what I thought it was. I asked him to order a car that morning, and he said he would, and it would probably be down on the local. Whether he said probably, or would be down, I don't just know. It had been coming down each morning on the local, and I took it for granted. The Court: What did you say? A. I said: 'Mr. Bash, I want a car this morning.' Counsel for Defendant: And he said, 'All right, I will order it,' did he? A. I suppose that is about what he said. He might have said it a little rougher, but he gave me to understand he would order it. The Court: Tell what he said. If he swore about it, tell what he said. A. If he didn't swear about it, it was an accident. He always did before. I can't remember whether he swore about it on this occasion or not. Anyway, he gave me to understand, as usual, the car would be down." The agent introduced as a witness by defendant denied he promised that the car would arrive by any particular train, and stated he told plaintiff that he would transmit the order to his superior at once, and that the car would probably come in, not on the local freight train, but on a later train due to reach Exeter at about 7 o'clock that evening. The agent and plaintiff both expected the car would be sent from Monett, but it turned out that the company could not furnish it from that point and sent it from another division station. Other facts appear

It is elemental, that to constitute a binding contract, there must be a meeting of the minds of the parties. They must assent to the same thing in the same sense. "Any words manifesting an aggregatio mentium are sufficient to constitute a contract, but the mutual consent—the aggregatio mentium—cannot be attained without the assent of both parties." *Egger v. Nesbitt*, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596. Plaintiff's own statement of the contract shows very clearly there was no consent of defendant's agent to bind it to send the car by a particular train at a particular time. The agent did agree to order the car at once, and performed that agreement. He did say, "It would probably be down on the local"; but this cannot be interpreted otherwise than as an expression of opinion, and was not a promise that the car would arrive on that train. Plaintiff does not know whether the agent said "probably," or that the car "would be down." If he does not know this, how could the jury say that the agent made an unconditional promise? Plaintiff understood that "the car would be down as usual." So did the agent, for that matter; but it is a long cry between the entertainment of this mutual belief and the existence of an unconditional promise that the car would arrive by a particular train. The burden was on plaintiff to prove that such promise was made and broken to his detriment, and this he has failed to do.

The case is analogous in essential features to that we considered in *Gann v. Railway*, 65 Mo. App. 670, and we refer to the opinion in that case for a further elucidation of the views herein expressed.

The judgment is reversed. All concur.

CROSSAN v. PENNSYLVANIA FIRE INS. CO.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908.)

1. INSURANCE (§ 500*)—VALUATION STATUTE—CONSTRUCTION.

Rev. St. 1899, § 7979 (Ann. St. 1906, p. 3794), providing that no insurer shall accept a risk on any property at a ratio greater than three-fourths of the value of the property insured, and, when taken, its value shall not be questioned in any proceedings, is a direction not to insure for more than three-fourths value, and that, when a value is fixed, it cannot be denied that the sum fixed is three-fourths of the value of the property.

[Ed. Note.—For other cases, see *Insurance*. Cent. Dig. §§ 1275, 1276; Dec. Dig. § 500.*]

2. INSURANCE (§ 179*)—STATUTORY VALUATION—POLICY—CONSTRUCTION.

Under Rev. St. 1899, § 7979 (Ann. St. 1906, p. 3794), prohibiting insurance for more than three-fourths value, where a policy insuring personal property for a gross premium in a gross sum of \$500 divided such amount into three sep-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ate classes, representing different kinds of property, the contract was severable as to each class, and should be construed as though the amount of insurance assigned to each class was three-fourths of the value of the property insured in the particular class.

[Ed. Note.—For other cases, see Insurance, Int. Dig. §§ 384-390; Dec. Dig. § 179.*]

Appeal from Circuit Court, Nodaway County; Wm. C. Ellison, Judge.

Action by George W. Crossan against the Pennsylvania Fire Insurance Company. Judgment for plaintiff, and defendant appeals reversed and remanded.

Fyke & Snider and B. R. Martin, for appellant. J. O. Growney, for respondent.

ELLISON, J. This is an action on a fire insurance policy, in which plaintiff recovered judgment in the trial court for \$500, the full amount of the policy. The policy insured the plaintiff against loss on personal property, for a gross premium, in the gross sum of \$500. That sum was the total made up by the separate insurance of three classes of property in the same building, with the amount of insurance stated on each class. Two hundred dollars was on stock of general merchandise, \$225 was on furniture and fixtures in the store, and \$75 was on household and kitchen furniture. The insurance was taken on the 3d day of July, 1907, and the fire occurred three days thereafter. The loss was not total on either of the three classes of property. Plaintiff placed the aggregate value of the property saved at \$100.

An instruction for plaintiff put the case to the jury as an insurance in solido for the gross sum of \$500, and, though there was a saving from the fire of \$100 in value, yet the theory of the instruction was that the provision of section 7979, Rev. St. 1899 (Ann. St. 1906, p. 3794), in the following words: "No company shall take a risk on any property in this state at a ratio greater than three-fourths of the value of the property insured, and when taken, its value shall not be questioned in any proceeding"—had the effect, so far as defendant was concerned in this action, of fixing the value of the property at a sum of which \$500 was three-fourths; that is to say, \$666 $\frac{2}{3}$. Therefore, when he saved \$100 in value from the fire, he yet lost more than \$500, and consequently was entitled to recover the full sum of the insurance. We have heretofore construed the foregoing statute as being a direction to insurance companies not to insure for more than three-fourths of the value of property, and that, when they did fix a value and issue insurance for the sum fixed upon, they should not be allowed to dispute that such sum was three-fourths of the value. *Gibson v. Insurance Co.*, 82 Mo. App. 515. In support of that case are the following cases: *Siegle v. Insurance Co.*, 107 Mo. App. 456, 81 S. W. 637; *Hanna v. Insurance Co.*, 109

Mo. App. 152, 82 S. W. 1115; *Stevens v. Insurance Co.*, 120 Mo. App. 88, 96 S. W. 684. See, also, on the general subject, *Daggs v. Insurance Co.*, 136 Mo. 382, 394, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638. The instruction in question embodied this view of the statute; but, when it is applied to the special provisions of the policy in suit, it cannot be approved.

As already stated, the policy, though insuring the plaintiff, for a gross premium, in the aggregate sum of \$500, this amount was divided into separate sums as insurance on the separate classes of property, and should be considered, in ascertaining the rights of the parties, as though each class of property was valued at such sum and insured in separate policies, and the recovery should be allowed on each class according to its separate valuation and loss, as though there was but one class and one valuation. In short, the contract is severable into as many contracts as there are separate classes of property insured on separate valuations. The reasons for so regarding such policies are so well and so fully stated by the Supreme Court, after a thorough examination, in *Trabue v. Insurance Co.*, 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523, that we need only refer to that case. It is true that that case, and many of the cases therein discussed, were where the contract was severable into complete and distinct parts, so as to prevent the fraud or untrue representation as to one part from affecting other parts not so contaminated or affected; but we see no reason why the principle should not apply where fraud or misrepresentation is not involved. It is sustained by the best reason, as is, we think, evidenced by the following extract from a leading case in New York (*Merrill v. Insurance Co.*, 73 N. Y. 452, 29 Am. Rep. 184), cited in the *Trabue Case*: "It is plain, from the fact of a separate valuation having been put by the parties upon the different subjects of the insurance, that they looked upon them as distinct matters of contract. The effect of the separate valuation was to make them so. No matter how much value there might have been in any one of those subjects, even to the whole amount of the policy, had it been totally destroyed, the defendants could not have been made liable to an amount greater than that named in the policy as the valuation of it. Thus it was, at the inception of the contract, distinguished from the other subjects of insurance, and the contract so made as to be capable of application to it alone. So, too, if but one of the subjects of insurance had been burned, the defendants (*certis paribus*) could not have avoided liability to pay for that, up to the value put upon it, and if not wholly destroyed, but so far damaged as to reach in deterioration the value put upon it in the policy,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and hence not a part of the continuing contract. Thus there would of necessity be a severance of the contract, worked out by the operation of its own terms."

The result is that the judgment should be reversed, and the cause remanded. All concur.

PETERS v. GILLE et al.

(Kansas City Court of Appeals. Missouri.
Oct. 5, 1908. Rehearing Denied
Nov. 16, 1908.)

1. MASTER AND SERVANT (§ 95*)—INJURIES TO SERVANT—CARE AS TO MINORS.

Rev. St. 1899, § 6434 (Ann. St. 1906, p. 3217), forbidding the employment of minors in cleaning or working between machines while in motion, does not make it unlawful to employ such persons in manufacturing establishments if the work is wholly disconnected with the machinery.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 95.*]

2. MASTER AND SERVANT (§ 95*)—INJURIES TO SERVANT—CARE AS TO MINORS.

A master is liable for an injury to a minor servant required to operate a machine contrary to Rev. St. 1899, § 6434 (Ann. St. 1906, p. 3217), though it had ceased its motion for a short time before the injury, and the motion causing the injury was erratic.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 95.*]

3. PLEADING (§ 433*)—DEFECTS AND OBJECTIONS—AIDED BY JUDGMENT.

A petition not objected to before trial, which states that plaintiff was a minor in defendant's employ, describes the machine operated by him, the manner in which he was injured, and that the injury was the result of his employment to operate the machine in violation of Rev. St. 1899, § 6434 (Ann. St. 1906, p. 3217), and states facts from which it can be inferred that defendant operated a manufacturing establishment containing machinery operated by mechanical means, is sufficient to support the judgment, though there is no express allegation as to the kind of establishment operated or as to the kind of motive power for the machinery.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1451; Dec. Dig. § 433.*]

4. APPEAL AND ERROR (§ 882*)—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR—ESTOPPEL.

A party cannot complain of an instruction assuming a fact, where a similar instruction was given at his own request.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. § 882.*]

Appeal from Circuit Court, Jackson County; Jno. G. Park, Judge.

Action by Leo P. Peters against H. S. Gille and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Warner, Dean, McLeod & Timmonds and O. C. Mossman, for appellants. R. J. Holmden and D. C. Finley, for respondent.

evidence on the first and second counts, and the cause was tried on the third count, on which plaintiff recovered judgment, and the defendants appealed.

The plaintiff was a minor 17 years of age. The defendants were engaged as a manufacturing company in the sheet-metal and tinware business in Kansas City. The plaintiff while engaged in working about a certain machine in February, 1907, was injured in his hand. A description of the machine given by the defendants is admitted to be correct, which is as follows:

"The machine in question was known as a stamp-press machine. It consisted of a heavy framework of iron. The upper part of the machine could be moved on supports which rested on the floor, and thus the machine could be used either in upright position or in an inclined position. * * * There was a fly wheel at one side of the machine which when connected with a belt and thrown in gear, caused it to operate. There was a face plate or bed about 2½ feet from the floor on which the counterpart of the die was fastened. The die was fastened to a plunger which operated by a connection on the shaft to which the fly wheel was attached. Near the floor between the legs or supports of the machine was a pedal, and attached to the end of the pedal was a rod which connected with a clutch in the inside hub of the fly wheel. By pressing the pedal, the clutch was released and the machine thrown in action. the plunger and the die descending upon the counter die regularly with every revolution of the fly wheel. This operation continued as long as the pedal was held down. When it was released, the plunger ceased to act and, if the pedal was pressed down and immediately released, the die descended but once. There were dies of various shapes and sizes that could be used on the machine."

The following statement, made by the defendants, is also admitted to be practically correct: "For 10 days, the plaintiff had been cutting small roofing caps out of pieces of scrap tin. He was perfectly familiar with the work of operating the machine, and considered himself to be an expert operator. At the time of the accident he had cut all the caps possible out of the piece of tin, and the remaining tin which he held in his hand, and which he intended to cast aside, had become entangled in the gauge attached near the lower or counter part of the die. He attempted to remove this, but, being unsuccessful, left his position in front of the machine and went to one side. The machine was at rest. In trying to remove the tin he placed his hands directly under the upper die, and for some unexplained reason, the upper die descended and cut off one of his fin-

be operated by hand, and that it must have been operated by some mechanical means. We believe the petition is sufficient to support the judgment. Such objections as are here urged should have been made before trial.

Instruction 1, given for plaintiff, is criticised by defendants for several reasons, among which is that it assumes that the machine was in motion by the action of steam, water, or other mechanical power. The objection is well founded. But it seems that the defendants fell into the same error when they got an instruction in the following language: "The court instructs the jury that, if you believe from the evidence that plaintiff was not required to work between the fixed or traversing parts of the machine in question while the same was in motion by the action of steam, water, or other mechanical power, then plaintiff was not entitled to recover, and your verdict will be for defendants." There was in fact no room for dispute that the machine was of the kind and character that was in the contemplation of the statute, and there was no kind of dispute but what plaintiff was injured as he stated. The defendants rested their case, not upon a denial of the truth of plaintiff's evidence, but upon nonliability under the facts established.

The question of plaintiff's contributory negligence was submitted to the jury by instructions, and the finding on that issue is amply supported by the evidence.

Most of the points relied on by defendants are purely technical, but we believe that the verdict was for the right party. Accordingly, the cause is affirmed. All concur.

RICHMOND v. MISSOURI PAC. RY. CO.
(Kansas City Court of Appeals, Missouri, Oct. 5, 1908. Rehearing Denied Nov. 16, 1908.)

1. RAILROADS (§ 282*)—THREATENED ACCIDENT TO TRAIN—INTERSECTING RAILROAD CROSSINGS—ACTIONS—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In an action against a railroad for injuries caused by the negligent approach of its train to an intersecting railroad crossing which caused plaintiff to jump from a train on the other road in anticipation of a collision, evidence held to show that defendant's engineer was grossly negligent in approaching the crossing without keeping a proper lookout.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 282.*]

2. RAILROADS (§ 283*)—ACCIDENTS TO TRAINS—INTERSECTING RAILROAD CROSSINGS—CARE REQUIRED IN APPROACHING.

In approaching an intersecting railroad crossing, those in charge of the train owe a duty to those on trains of the intersecting line, as well as to those on their own train, to keep the train under control, and keep a proper lookout for trains on the intersecting road, and failure to do so is gross negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 283.*]

3. NEGLIGENCE (§ 1*)—RIGHT OF ACTION—LIMITS OF ACTION—"ACTIONABLE NEGLIGENCE."

To constitute "actionable negligence," there must be a legal duty to use due care, and a breach thereof, and absence of distinct intention to produce the damage which follows.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 1, pp. 148, 149; vol. 8, p. 7563.]

4. RAILROADS (§ 296*)—ACCIDENTS TO TRAINS—PROXIMATE CAUSE OF INJURY.

Plaintiff, a shipper, was riding on a stock pass on a freight car which was being hauled through the yards in a belt line train, and in approaching defendant's track the car on which plaintiff was riding almost collided with one of defendant's engines which had negligently approached the intersection without keeping a proper lookout, and plaintiff, believing a collision imminent, became frightened and jumped from the car and was injured, but no collision in fact occurred. It was not customary for the belt line to carry passengers. Held, that defendant's engineer was not bound to anticipate that the belt line on this occasion carried passengers, and owed plaintiff no greater duty than to a trainman in the same situation, even if he should have seen him on the car, and, since a trainman in the same circumstances would not have jumped from the car, plaintiff's own inexperience was the cause of his injury, and not defendant's negligence in approaching the crossing.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 296.*]

5. RAILROADS (§ 297*)—TRAIN ACCIDENTS—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for injuries sustained by jumping from a train on another road in anticipation of a collision with defendant's train, the evidence held to show that an experienced trainman would not have become frightened and jumped under the same circumstances.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 297.*]

Appeal from Circuit Court, Jackson County; Thos. J. Seehorn, Judge.

Action by Moscow K. Richmond against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appealed. Reversed.

Elijah Robinson, for appellant. Walsh & Morrison, for respondent.

JOHNSON, J. Plaintiff brought suit against the Missouri Pacific Railway Company and the Kansas City Belt Railway Company for damages on account of personal injuries alleged to have been caused by the negligence of the defendants. He dismissed the Belt Railway Company from the action during the trial, and recovered judgment against the appealing defendant in the sum of \$2,000.

The main contention of defendant is that the court should have directed a verdict in its favor. Under the terms of a written contract, plaintiff delivered two cars of cattle to the Choctaw, Oklahoma & Gulf Railroad Company at Hartshorn, Ind. T., for shipment to the market at Kansas City. The contract was not introduced in evidence, and we

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

are not advised of its terms; but it appears from the evidence that a through shipment was contemplated by a route which required the initial carrier to deliver the cars to the Kansas City Southern Railway Company at Howe, Ind. T., for transportation to the Kansas City Terminal Yards of that company located at Sheffield, a town on the eastern border of Kansas City, and required that company to deliver them at Sheffield to the Belt Railway. A stock pass was issued to plaintiff by the Choctaw Company which entitled him to free transportation to Kansas City on the trains that carried his cattle, and he used the pass to Sheffield. The caboose in which he arrived at that point was stopped close to the tracks of the street railway company, and plaintiff could have gone to the stockyards on a street car, but he elected to ride on the Belt Line train which picked up his cars of cattle. That train carried no caboose or other passenger car, and consisted of an engine and 45 freight cars. The engine was at the east end of the train and plaintiff's two cars were at the opposite end. Plaintiff placed himself on the top of the second car from the end with the knowledge and consent of the trainmen. The foreman of the crew was on the top of the same car, or on that of the end car, and brakemen were stationed on different parts of the train. The stock cars were to be taken to the quarantine yards of the Kansas City Stockyards Company, some five or six miles westward. They had arrived at Sheffield in the middle of the afternoon of July 1, 1903, too late to reach the stockyards for that day's market. It does not appear that plaintiff could have performed any service to the cattle by riding on the top of the Belt Line train. He could have reached the stockyards as quickly or, perhaps, more quickly on the street car, and it was not necessary for him to be there at the moment of their arrival. On that subject he testified on cross-examination:

"Q. Was it necessary for some one to go with the cattle to look after them? A. Not altogether. I ship sometimes without sending any one. Q. You could have come up just as well on a passenger train? A. Yes, but it just cost me a little piece of money. * * * Q. You had shipped sufficiently to know that the cattle would be handled by the railroad company and the stockyards company and assigned to the pen for the commission man to whom they were consigned, didn't you? A. Yes, sir. Q. And that you could not help or hinder that in any way even if you were there? A. Yes, sir. I like to be there. Q. And you knew that those cattle would not be offered for sale until the next morning, didn't you, if they got in here at 4 or 5 o'clock in the evening? A. Yes, sir. Q. You knew that; so there was nothing you could do at the quarantine yards that afternoon, was there? A. I could have went over and seen them unloaded, and see what

kind of condition they were in and ordered them fed."

Shortly after the Belt Line train we have described started on its westward journey, it approached the track of defendant which runs north and south, stopped when the end car was, perhaps, 150 feet from the crossing, waited a few minutes for a clear track, and, after the engine gave the usual signal, started forward. Just before this, a switch engine of defendant which had been working in that vicinity crossed from the south to a point from 150 to 200 feet north of the crossing, stopped for some cars to be coupled, and then started back towards the crossing, pulling three cars. The engine was headed south, the engineer was seated in the west side of the cab, and the fireman was shoveling coal into the fire. The Belt Line train began moving toward the crossing after the switch engine had crossed from the south, and before it started to return, and had the right of way. It is admitted that neither the engineer nor fireman saw the Belt Line train nor knew of its presence. The engineer had his view toward the east obstructed by the boiler, and the fireman was not looking in that direction, and his attention was absorbed by the work he was doing. Neither heard the signal given by the Belt Line engine, and the switch engine did not whistle for the crossing. When the foreman of the Belt Line train first observed this situation, each train was running toward the crossing at approximately 4 or 5 miles per hour. Plaintiff fixes the rate of speed at from 10 to 12 miles per hour, but his estimate is so obviously in conflict with the plain physical facts of the situation that it possesses no evidentiary value. Fearing a collision, the foreman, who then was on the end car, began shouting and frantically making the stop signal. At the same instant, he ran to the ladder on the north side of the car and descended rapidly to the ground. At that time, he was from 50 to 75 feet from the crossing. He ran west as fast as he could to defendant's track to a point where defendant's engineer could see him, and, by vehement gestures and language, conveyed his warning. He testified that the switch engine was stopped in 20 or 25 feet after the reception of this warning, and that it was from 5 to 10 feet from the crossing when it came to a full stop. Plaintiff states that the engine was closer than that to the car on which he had been riding. No collision occurred, and no damage was done except the injuries plaintiff received in his attempt to escape from what appeared to him imminent peril. When he observed the actions of the foreman and what occasioned them, he became greatly alarmed for his own safety, and ran to the ladder at the northwest corner of his car. He descended halfway to the bottom of the ladder, when complete panic overtook him and he jumped to the ground. A severe in-

jury was the consequence. It appears from uncontradicted evidence adduced by defendant that, in switching over crossings of tracks used at freight terminals (the tracks under consideration were of this class), it is customary, in order to save time, for the engine not entitled to the right of way to approach so near to the crossing before stopping that only sufficient space is left for the free passage of the other train.

We do not hesitate in saying that, under the conceded facts in evidence, defendant's engineer was guilty of gross negligence in the manner in which he approached the crossing. It will not do to excuse his conduct on the ground that he had his engine under control and, in fact, stopped where he would have stopped had he known of the presence of the other train. His ignorance of the fact that another train had become possessed of the right of way, and was using it, stamps his action in failing to signal, and in proceeding to the crossing without any intention of stopping, with inexcusable negligence. Knowing, as he did, that his fireman was not on the lookout, and that he himself could not see toward the east, for all practical purposes, he just as well might have attempted to run the crossing blindfolded, as far as knowing of the approach of a train from the east was concerned. Nor is it any excuse for him to say that, as the other train was backing, it was the duty of a brakeman from that train to come on foot to the crossing to warn him of its approach. Plaintiff's witnesses deny the existence of such rule, but whatever the rule may have been, reasonable care would have prompted an ordinarily prudent person in the situation of the engineer to use every reasonable precaution to inform himself of the condition of the crossing before attempting to run over it. There was no obstruction to the fireman's line of vision. He had but to look to see the train, and the engineer was remiss in not using the fireman's eyes.

We give our approval to the following extract from the opinion of Judge Shiras in *Railroad v. Stoner*, 51 Fed. 649, 2 C. C. A. 437: "Aside from the provisions of any specific rule upon the subject, the law requires of parties charged with the control and management of trains moving upon intersecting lines of railway that as they approach a crossing they must exercise due care to secure the safe passage of the train over the same, and in that respect they owe this duty not only to those whose persons or property may be upon the train controlled by them, but also to those who may be upon the train of the other intersecting line. In the performance of this duty, it is incumbent upon the parties in control of the train that they shall exercise a proper lookout for the approach of another train, and they must also have their own train under proper control, so that if need arises it can be promptly

stopped. The trainmen know, and are bound to know, that all points where railway lines cross at grade are places of danger, and they must, in the handling of trains intrusted to them, exercise the care which the presence of this known danger demands of them. Certainly it would be negligence of the grossest kind to attempt to make a crossing without taking pains to see whether there was another train at or near the crossing, and without reducing the speed sufficiently to place the train under the control of the engineer, for, unless these precautions were taken, a collision would be inevitable if another train happened to be upon the crossing, even rightfully, when the other reached it."

The next question to engage our attention is whether the negligence of defendant we have just discussed constituted a breach of any duty defendant owed to plaintiff. The component parts of negligence are (1) a legal duty to use due care, (2) a breach of that duty, (3) the absence of distinct intention to produce the precise damage, if any, which actually follows. *Bindbeutel v. Railway Co.*, 43 Mo. App. 463, where Judge Smith quotes this definition from *Shearman & Redfield on Negligence*. In every negligence case, to support the cause of action, it is essential that plaintiff show that the wrongful act of the defendant was in violation of some duty owed to him by the defendant. If an ordinarily careful and prudent person in the position of defendant's engineer would have had no reason to anticipate the presence of a passenger on the top of a freight train which was not designed nor equipped for carrying passengers, it is difficult to recognize any logical ground on which to found any higher duty from the engineer to plaintiff than that of not injuring him wantonly or willfully. On the other hand, if the engineer had any reason to anticipate that a stockman might be riding on that train as a passenger, then it became his duty so to handle his engine that no negligence of his either would cause the train to collide, or would throw an ordinarily prudent person in the position of the passenger into a condition of panic from fear of injury from a threatened collision.

In *Whitehead v. Railway*, 99 Mo., loc. cit. 269, 11 S. W. 753 (6 L. R. A. 409), the Supreme Court said: "The proposition that the defendant owes no duty to one riding on a freight train, unless he is a passenger in the full sense of the term, does not meet with our approval. If one is riding on a freight train, with the consent of the agents in charge thereof, the company owes him a duty, though he is there against the rules of the company. * * * Even to a trespasser, the defendant is liable for injuries inflicted for want of ordinary care after the perilous position of the party is discovered." *Carr v. Railway*, 195 Mo. 214, 92 S. W. 874. It is not necessary for us to discuss the na-

and and wife, borrowed \$100 of plaintiff on September 23, 1901, and gave her their negotiable promissory note for that amount due on the 12th day of March, 1903, with interest from date at 6 per cent. per annum, payable semiannually. To secure the payment of the note, defendants, on the same day, executed, acknowledged, and delivered to plaintiff a chattel mortgage on a stock of groceries, store fixtures, horse and wagon, owned by them in Kansas City, and, two days later, plaintiff filed the mortgage in the office of the recorder of deeds of Jackson county. It was released of record March 28, 1903, by Anna Koffler, who had possession of the note and mortgage at that time. In March or April, 1902, plaintiff turned her valuable papers, including this note and mortgage, over to her mother for safe-keeping. She gave her mother no authority to collect either principal or interest, and at different times, when interest matured, asked her brother for payment, but was put off by him with promises that he would pay when his pecuniary situation improved. In March, 1903, plaintiff, who was a widow, intermarried with Roy Brown in opposition to the wishes of her mother, who shortly after this event released the mortgage of record and then delivered the note and mortgage to defendant John. Some time after their marriage, plaintiff and her husband went to New Mexico, where they remained until the spring of 1904, when they returned to Kansas City. Plaintiff first received information of what her mother had done with her note and mortgage after her return to Kansas City. The note, when produced at the trial, bore the endorsement, "Pay to the order of Anna Koffler," with the name of plaintiff written underneath, but plaintiff denounces this endorsement as a forgery. She has not received payment of any part of the note, either principal or interest, and did not authorize her mother to release the mortgage, to surrender the papers to defendants, or to do anything with them except to keep them safely.

Defendant John testified that his mother gave him the note and mortgage in payment of groceries and money he had given her during the preceding five years. In this statement he was corroborated by his mother, who explains her action in giving her daughter's note in payment of her own debt by saying that plaintiff owed her more than the amount of the note for a boarding house she sold plaintiff and for caring for plaintiff during sickness. Mother and son both declare that plaintiff indorsed the note at the time she delivered it to the mother. The testimony of both relative to the alleged payment of the note is so vague, indefinite, and improbable that we would have sustained the trial judge had he rejected it entirely as being too weak to raise an issue of fact. The

quote:
"Q. Now, I will ask you what, if any, transaction has taken place between you and John with reference to this note? A. Well, when I told her I was going to do that if she got married again. Q. Well, what transaction, if any, took place between you and John with reference to the note? A. When he came over one time, I told him, says I, 'John, now you have helped me along with groceries; you have given me groceries, and you have got to help me yet; I will give you the note.' * * * Q. What did John Koffler give you for this note, if anything? A. He gave me groceries and money. Q. About how much? A. I can't exactly tell you, but I told him I was satisfied. * * * Q. Now, how did it come that you got that note? A. I don't know. Q. Didn't she just leave it there with her other papers. A. No, sir; she gave me the note all alone. Q. She gave you the note all alone? A. Yes, sir; she did. Q. As a matter of fact, didn't she leave it there at the house in a prayer book? A. No, sir; she did not. Q. She didn't? A. No, sir; she didn't leave it at the house in a prayer book; she never has a prayer book. * * * Q. How did it get down there? A. She had it. Q. I thought you said you had it? A. She had it before she gave it to me, didn't she? Q. When was that? A. I don't remember the time, sir. Q. You don't remember when that was? A. No, sir. Q. Now, after you got it, what did you do with it? A. I kept it a long time. * * * Q. How much did she owe you for selling out? A. \$125. Q. She owed you \$125 for selling out what? A. Boarding house to her. Q. Where? A. In Argentine. Q. And then she owed you four or five hundred dollars for sickness? A. Yes, sir. Q. Now, which was it, four or five hundred? A. I didn't pay any attention; I paid all the bills for her. Q. Paid all the bills for her? A. Yes, sir; when she laid sick three or four months with her young one with her; I took care of it, too; I was poor and had to work for my living. Q. Didn't she send the boy up to Bill's for groceries? A. That was later on; that was after she was cured up some; this was when she ran away from home and married a man that was no man. Q. That you didn't want her to marry? A. No, I didn't; then when he had her in a pickle he left her on my hands."

The court overruled the demurrer to the evidence presented by defendants, and at their request gave the following instructions: "You are instructed that if you believe from the evidence that the plaintiff, before maturity, indorsed the note in question and delivered the same to a third person, and that thereafter and at maturity the defendants, in good faith and for value received, obtained a transfer of said note from such third person, then your verdict must be for the defendants;

pany being required to exercise the highest degree of care to avoid the collision.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1245; Dec. Dig. § 305.*]

4. CARRIERS (§ 280*)—CARRIAGE OF PASSENGERS—DUTY OF CARRIER.

A carrier of passengers must exercise the highest degree of care for their safety.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 280.*]

5. RAILROADS (§ 288*)—CROSSING ACCIDENTS—COLLISIONS—DUTY OF CARRIER TOWARDS PASSENGERS OF OTHER CARRIERS.

A railroad company owes the passengers of a street railway company only the duty of exercising reasonable or ordinary care to avoid a collision at a crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 928; Dec. Dig. § 288.*]

6. MASTER AND SERVANT (§ 301*)—RAILROADS—COLLISIONS AT CROSSINGS—ACTS OR OMISSION OF EMPLOYEES OR OTHERS.

A railroad company, operating its trains over leased tracks, was not liable for dereliction of duty on the part of a crossing watchman, in the sole control of the lessor road, in failing to shut down gates or give necessary warning of danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1213; Dec. Dig. § 301.*]

7. STREET RAILROADS (§ 74*)—REGULATION AND OPERATION—DUTY TO STOP AT RAILROAD CROSSINGS—MUNICIPAL ORDINANCES.

Since, under the "Enabling Act," Kansas City had exclusive control over its streets, etc., and exclusive power to vacate any street, etc., any law to the contrary notwithstanding, a street railway company operating in the city was not obliged to comply with Rev. St. 1890, § 1180 (Ann. St. 1906, p. 995), requiring such companies to bring their cars to a stop at a certain distance before reaching a steam railroad crossing, and to send employees forward to ascertain whether a train was approaching.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 154; Dec. Dig. § 74.*]

8. APPEAL AND ERROR (§ 1028*)—HARMLESS ERROR—THEORY OF CASE.

The trial of an action by a street railroad passenger for injuries in a collision with a railroad train, on the erroneous theory that defendant's duties were regulated by a statute prescribing its duties on approaching a railroad crossing, was not prejudicial, where the statute was not necessary to plaintiff's case, and defendant failed to show that it exercised the high degree of care imposed on it by law for the protection of its passengers.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. § 1028.*]

9. CARRIERS (§ 280*)—REGULATION AND OPERATION—COLLISIONS AT RAILROAD CROSSINGS.

The failure of a railroad company to exercise reasonable care to avoid a collision with a street car at a crossing did not excuse the street railway company's failure to exercise the highest degree of care to protect its passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1069; Dec. Dig. § 280.*]

10. CARRIERS (§ 320*)—COLLISIONS AT CROSSINGS—INJURY TO PASSENGERS—QUESTIONS FOR JURY.

In an action by a street car passenger against the street railway company and a railroad company for injuries in a collision at a crossing, the questions whether the railroad company exceeded the speed prescribed by ordinance,

or failed to give the necessary warning of its approach, were for the jury under the evidence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1315, 1321; Dec. Dig. § 320.*]

11. PLEADING (§ 64*)—PETITION—JOINDER OF CAUSES OF ACTION—DUPLICITY.

A common-law cause of action for injuries through negligence and an action for violation of a city ordinance cannot be joined in the same count of a petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

12. PLEADING (§ 187*)—MISJOINDER OF CAUSES OF ACTION—REMEDY.

Where a petition joins in one count a common-law cause of action for negligence and an action for violation of a city ordinance, defendant should take advantage of the defect by motion or demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 400; Dec. Dig. § 187.*]

13. APPEAL AND ERROR (§ 230*)—OBJECTIONS BELOW—SUFFICIENCY.

Where the objection that the petition joined in one count a common-law cause of action for negligence and an action for violation of a city ordinance was made for the first time on the introduction of evidence, the defect would not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 230.*]

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by William Wills against the Atchison, Topeka & Santa Fé Railway Company and the Metropolitan Street Railway Company. From a judgment for plaintiff, both defendants appeal. Reversed and remanded as to the former and affirmed as to the latter defendant.

Lathrop, Morrow, Fox & Moore and John H. Lucas, for appellants. Boyle, Guthrie & Smith, for respondent.

BROADDUS, P. J. The plaintiff seeks to recover damages for an injury he received while a passenger on the Metropolitan Street Railway, which he alleges was the result of the negligence of the defendants. The Metropolitan Street Railway Company is a corporation operating a street railway in Kansas City, Mo., and the Atchison, Topeka & Santa Fé Railroad Company operates a steam railroad between different points, and passes through said city. For the purpose of convenience we will call the former the Metropolitan Company and the latter the Santa Fé Company.

On August 6, 1904, the plaintiff was a passenger on one of the cars of the Metropolitan Company. At a crossing of Fifteenth street, at what was known as the "Belt Line Crossing," the car collided with a train of the Santa Fé Company which was being operated over what was known as the Belt Line Railroad tracks. The plaintiff recovered judgment from both defendants, from which each appealed.

For a proper understanding it is necessary to state the issue presented by the pleadings.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

could be seen on those tracks 1,000 feet away. Of course the crew on the steam train had the same opportunity to see the street car that the crew on the street car had to see the steam train."

The plaintiff proved that he was a passenger of the street railway company, and that he was injured by the collision, and to further maintain his case against the Metropolitan Company introduced a certain ordinance, which he claims required that company to maintain a watchman at the crossing in controversy. It was approved July 28, 1902, and accepted by the company on the same day. It appears to have been in the nature of a contract. Section 11 of said ordinance reads as follows: "At all points where said street railway tracks across the tracks of any steam railway company, watchmen shall be constantly stationed and kept to perform such duties as may be prescribed by ordinance; but the city shall pass necessary ordinances requiring the steam railway companies to join in the performance of this duty, and in the payment for the service; but if said railway companies fail to comply with the terms of such ordinances, then the street railway company shall station such watchmen as aforesaid. Watchmen shall be placed by the street railway companies at all points where their lines of track intersect, cross or form a junction and at dangerous curves between the Missouri river and Thirteenth street and between McGee street and Wyandotte street, and at such other points within the city as may be required by a reasonable ordinance. It is understood by this that the company recedes from its position that the conductors or gripmen can act as flagmen or watchmen. The street railway company shall stop its cars for the purpose of taking on and letting off passengers before it shall cross a street or intersecting line. The city reserves the right to regulate and control by reasonable ordinance all the matters mentioned in this section." The Metropolitan Company objected to the introduction of said ordinance, on the ground that it was incomplete, and that, in order to make it operative, the city was required by other ordinances, of which there was no proof, to prescribe the duties of the watchmen provided for. It is not denied but what the Metropolitan Company was obligated to keep a watchman, but the purpose for which he is to be kept is not prescribed—his duties are not defined. A watchman without any prescribed duties would be of no utility whatever. In the absence of the provision requiring that the city should by ordinance prescribe his duties, the court might, as a matter of law, assume that they were such as are usually rendered in such cases by watchmen. But, as they were to be prescribed by the city, the court was not authorized to make such an assumption. It follows that the admission of said evidence was error, and the Metropolitan Company claims

that it was harmful. But we cannot see in what manner it was harmful. It was not necessary to plaintiff's case. When he had proved that he was a passenger, and that he was injured by a collision, he had made his prima facie case. He had done all that the law required of him. This evidence did not in any way strengthen his position. It had already been assured. It was a futile attempt to improve that which was already complete.

The Metropolitan Company in order to avoid liability, introduced evidence tending to show that the collision was the result of the negligence of the Santa Fé Company, its codefendant. The evidence tended to show that the latter company was negligent in running its trains at a rate of speed in excess of six miles per hour; that the collision would not have occurred if the speed had been within the rate fixed by the ordinance, as it was shown that the street railway car had nearly passed over the Belt Line tracks when it was struck on the rear end by the locomotive, and the Santa Fé Company was negligent in not slackening the speed of its train, or stopping it altogether, when its engineer and fireman saw, or might have seen by looking, that the gates guarding the approach were not closed, as was the usual custom. The fact, however, that the Santa Fé Company's agents were negligent in the respects mentioned did not excuse the Metropolitan Company from liability, unless such negligence was the sole cause of the collision. In order to exonerate itself from the liability created by the prima facie case made by the plaintiff, the latter company was required to show that it exercised the highest degree of care to prevent such collision. The evidence in the case shows that, when its cars arrived within 30 feet of the Belt Line crossing, its motorman and conductor could have seen the Santa Fé Company's train rapidly approaching at a distance of at least several hundred feet away, but, notwithstanding, they moved the car onto the said tracks where it was struck by an approaching train. However, if it had been the duty of the Santa Fé Company to have kept a guard at the crossing, and to have had the gates lowered for its approaching train, it was still the duty of the Metropolitan Company's operators on approaching the crossing to have used the highest degree of care to secure the safety of its passengers. Ordinarily a person approaching said crossing, seeing that the gates were not closed, would be justified in assuming that it would be safe to cross, on the theory that he was only required to use ordinary care. But a higher duty was imposed upon the Metropolitan Company. The operators of its cars should, under similar conditions, have used their senses. They should have looked for approaching trains. There is no doctrine better settled than that a carrier of passengers must exercise the highest degree of care for their safety.

**DAWSON v. ASH GROVE WHITE
LIME ASS'N.**

(St. Louis Court of Appeals. Missouri. Nov. 17, 1908.)

1. APPEAL AND ERROR (§ 877*)—PARTIES ENTITLED TO ALLEGE ERROR—ERROR AFFECTING ADVERSE PARTY.

A party cannot predicate error on exceptions to the refusal to give instructions requested by the adverse party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3367; Dec. Dig. § 877.*]

2. APPEAL AND ERROR (§ 634*)—RECORD—DEFECTS—EFFECT.

Where the bill of exceptions and appellant's abstract are unintelligible because in conflict, so that, if one is true, the other is false, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2775; Dec. Dig. § 634.*]

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by Mattie Dawson against the Ash Grove White Lime Association. From a judgment for plaintiff, defendant appeals. Dismissed.

W. H. Horine and Wear & Hayden, for appellant. Wright Bros. & Blair, for respondent.

NORTON, J. This is an action for damages on account of personal injuries. Plaintiff recovered, and defendant appeals. Upon a perusal of all of the evidence contained in the bill of exceptions, it appears that the plaintiff has a meritorious cause of action which was properly referred to the jury. While passing along a road communicating with her brother-in-law's farm, her arm was broken by falling rock from defendant's quarry. At the time of her injury, she was 208 yards from the quarry. The evidence tends to prove negligence on the part of the defendant in discharging heavy blasts of dynamite, hurling particles of shattered stone a great distance without warning to plaintiff, and her consequent injury. Appellant's counsel complains that the court erred in refusing numerous instructions, which, it is said, the appellant requested the trial court to give to the jury. The instructions mentioned as having been requested by defendant's counsel on the trial are set forth in its abstract. Upon investigation of the bill of exceptions, however, these instructions seem not to have been requested by it at all. It appears they were requested by the plaintiff, refused by the court, and no exceptions were preserved to the action of the court in so doing. Whether the exceptions were saved or not, of course, appellant's counsel could not predicate error here upon exceptions preserved to the action of the court in refusing instructions asked by the plaintiff.

The court of its own motion gave two instructions, one embracing the theory of the

plaintiff's case, and one embracing the theory of the defendant's case. Counsel for appellant complain of the action of the court in this behalf, and incorporate as well in their printed abstract and brief what purports to be the two instructions mentioned. Upon a comparison of these instructions as incorporated in the abstract and brief with those given by the court and contained in the bill of exceptions, it appears no such instructions were given. In the first place, the instruction set out in the abstract and brief as given by the court on its own motion on the theory of the plaintiff contains the word "not," which does not appear in the instruction contained in the bill of exceptions. The insertion of the word "not" in the instruction entirely destroys its sense, and changes its meaning so that it is in no sense the instruction given by the court. The second instruction given by the court on its own motion and complained of by defendant, as appears from appellant's brief and abstract, is entirely dissimilar to the instruction given by the court, as appears in the bill of exceptions. In fact, there are several words different therein from those contained in the original, and 10 words in succession, constituting an entire line, are omitted therefrom, so that it appears no such instruction as the one set out in the brief appears in the bill of exceptions. The bill of exceptions and appellant's abstract appear to be a perfect jumble, and, when considered together, wholly unintelligible. If the one is true, the other is false; and vice versa. If counsel desire their cases reviewed, they should exercise a degree of diligence in preparing and presenting them to the court to the end that a complete understanding may be had from the abstracts and briefs; otherwise the appeal should be dismissed.

The appeal in this case should be dismissed. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

HOVEY et al. v. AARON.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908.)

1. BROKERS (§ 48*)—RIGHT TO COMMISSIONS—PROCURING PURCHASER.

A real estate broker, to be entitled to commissions for selling land, must have been employed by the owner to obtain a purchaser, and must have procured a purchaser ready, able, and willing to purchase on the terms upon which the broker was authorized to sell.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 63; Dec. Dig. § 48.*]

2. BROKERS (§ 55*)—RIGHT TO COMMISSIONS—SALE BY OWNER THROUGH ANOTHER BROKER.

Where a broker has procured a purchaser for land, and while his agency is unrevoked and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and asked him if he had made any decision about this. He said: 'No; I am going to look up those taxes all right.' Nothing more was said about it until Tuesday morning. I called Mr. Braley up over the telephone at his residence, and asked him if he had decided about the Belt Line 10 acres. Mr. Braley said: 'I bought it yesterday.' It appears from Braley's testimony that, when he returned from inspecting the property with Hovey, he intended to buy it on the terms offered if he could not get a better offer. He went to the City Hall, obtained the desired information relative to the taxes, and then started for plaintiff's office to close the transaction. On his way there he remembered seeing the sign of C. D. Parker & Co. on the property, and it occurred to him that Parker & Co. might be able to offer him a better price than plaintiffs had given him. Braley testified: "I went to Mr. Parker, and asked him what his price was on that 10-acre tract out there. I won't be positive whether he told me \$30,000 at first or not; but I know very soon he said, 'I can sell it for \$29,000, and I told him that a firm of real estate agents had shown me the property and they were neighbors of mine and friends, and I disliked very much to trade through anybody else, but that they had said \$30,000 was the least that would buy the property, but I said if that was so, and he could sell the property cheaper, I saw no reason why I shouldn't deal through him. And he said he could make it \$29,000 and \$6,000 cash. The question as to the second incumbrance and the interest on it was something that he couldn't decide—whether it would be 5 or 6 per cent.—that he would see the owner. At that time he didn't tell me who the owner was, but the question whether the owner would take 5 per cent. on the second incumbrance was talked of, and he said he would telephone him, and he telephoned me about 2 o'clock, and I think made an engagement for me to come down to the office at either 3 or half past 3 and close up the deal, and I came back. I don't think that I mentioned to him that day Hovey & Brown. I said: 'Real estate agents within half a block of here.' He said: 'In the first floor of the American Bank Building?' and I said, 'Yes; they are the parties.' Q. Hovey & Brown never told you the owner's name, did they? A. No; they didn't tell me the owner. They simply said he was a chicken man. Q. And you didn't know who it was from that description? A. No, sir. Q. And you never went to the owner, did you, before the deal was closed and the contract was entered into, and had never seen the owner, had you? A. No, sir." The sale was closed by Parker and defendant executed and delivered a deed to Braley. The consideration of \$29,000 was paid by Braley, assuming the payment of the debt on the property of \$17,500, paying \$6,000 in cash and giving his note to plaintiff for \$5,500 secured by a second lien on the

property. Defendant paid Parker a commission of \$600 for making the sale, refused to pay plaintiffs anything, and this suit followed.

The evidence introduced by defendant is to the effect that plaintiffs were not employed as his agents, nor did they assume to act in that capacity. It is conceded plaintiffs did not inform defendant of their negotiations with Braley, nor introduce Braley to him. Further, it appears beyond question that Parker had been employed by defendant to sell the property for \$30,000, and that Braley came to him and began by telling him that he (Braley) had been negotiating with other agents. Parker states he "made a guess" that Hovey & Brown were the agents who had been dealing with Braley, and, thinking that he had the exclusive agency, "got busy" and reduced the price \$1,000 to bring the deal to a quick conclusion.

The instructions given the jury at the request of plaintiffs are not criticised by defendant, and we find they correctly present the issues from the standpoint of plaintiffs. The first five instructions given at the request of defendant also are free from error. They tell the jury, in substance, that plaintiffs, to recover, must show to the satisfaction of the jury that they were employed by defendant and procured a purchaser "ready, able, and willing to purchase on the terms upon which the plaintiffs were authorized to sell." The instructions given at the instance of defendant, which the court, on the hearing of the motion for a new trial, concluded were erroneous, are as follows:

"(6) The court instructs the jury that any owner of real estate may employ several brokers and may authorize them to sell upon different terms, and if you find and believe from the evidence in this case that the plaintiffs were limited in their authority to \$30,000, and they were unable to procure a purchaser ready, able, and willing to purchase for said sum, and that another broker negotiated the sale of the property for \$29,000, then in the absence of collusion or bad faith on the part of the defendant, even though the sale was made to the person whose attention was first called to the property by the plaintiffs, the plaintiffs cannot recover, and your verdict should be for the defendant.

"(7) The court instructs the jury that if you find and believe from the evidence that the defendant employed plaintiffs to find a purchaser of the property in question for the sum of \$30,000, and if you further find from the evidence that the plaintiffs were not authorized to sell said property for a less sum than \$30,000, and that their authority was limited in that respect, and if you further find from the evidence that the plaintiffs did not procure a purchaser ready, able, and willing to purchase said property for \$30,000, then the plaintiffs cannot recover, and your verdict should be for the defendant.

"(8) The court instructs the jury that if

MORGAN v. MORGAN. *

(St. Louis Court of Appeals. Missouri.
Nov. 17, 1908.)

1. DIVORCE (§ 130*)—GROUNDS—SUFFICIENCY OF EVIDENCE.

Evidence considered, and held sufficient to entitle plaintiff to a divorce on the grounds of cruelty and nonsupport.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 130.*]

2. DIVORCE (§ 150*)—GROUNDS—DISCRETION OF COURT.

Where the evidence clearly shows the existence of grounds for a divorce, the granting of the divorce is not discretionary with the court, but is mandatory.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 150.*]

Appeal from St. Louis Circuit Court; Wm. E. Kinsey, Judge.

Action for divorce by Helen K. Morgan against Daniel Morgan. From a judgment dismissing the petition, plaintiff appeals. Reversed and remanded.

A. A. Paxson, for appellant.

BLAND, P. J. The action is for divorce. The petition alleges that plaintiff and defendant were married at the city of St. Louis on August 30, 1905, and continued to live together thereafter until January 8, 1908, when defendant left plaintiff, saying he could not support her. After alleging that plaintiff at all times treated defendant with kindness and affection and discharged all her marital duties, the petition alleges: "That defendant is possessed of a violent temper and jealous disposition, and very much prefers an easy, idle life to one of activity. That in consequence thereof the defendant has wholly failed to properly support plaintiff during their entire married life. That from September 17, 1906, until February 11, 1907, the defendant left plaintiff and lived apart from her because of his inability to support plaintiff, and that after he returned to plaintiff, on account of his idle and unbusinesslike habits, carelessness, and indifference, failed to support plaintiff properly, so that she was compelled to obtain means from her relatives. That in the month of June, 1907, the defendant sent for his child by a former marriage for the purpose of visiting for two weeks, and, when plaintiff requested of defendant some money with which to entertain his child and her attendant, defendant refused to comply with said request. That frequently during their married life, and more especially during the last year of same, defendant when angry would fly into a rage, and would throw himself on the floor, and cry out and beat it with his head, hands, and feet. That about December 15, 1907, on a Sunday, the defendant grasped the plaintiff's throat with both hands, and choked her, and said that he would get a gun and blow

plaintiff's brains out, and would then blow his own out. That in October, 1907, when plaintiff informed defendant that she was going to an entertainment, the defendant conducted himself in the most violent manner by striking the table violently with his fist, throwing himself on the floor, and beating it with his head, hands and feet. That in the same month of October, 1907, the defendant took a butcher knife and flourished it about plaintiff's and defendant's heads, and said that he might as well end both their lives, as he could not support plaintiff, and would not let anybody else have her. That on December 26, 1907, the defendant assaulted plaintiff with his hands in a most violent manner. That on numerous occasions the defendant has, without cause, quarreled with plaintiff, and been guilty of loud and unseemly conduct, so as to attract the attention of others. That the defendant has never adequately supported plaintiff, nor made proper efforts to do so, although he was in good health and quite able to work if so inclined. Defendant was personally served with process of summons to appear at the February term, 1908, to answer the complaint of plaintiff. He made default, and a default judgment was rendered against him, and the cause continued to the ninth day of the succeeding month. On March 9th, defendant still being in default, plaintiff's evidence was heard by the court, at the conclusion of which the court dismissed the cause. A motion for new trial proving of no avail, plaintiff appealed.

Plaintiff's evidence shows that defendant was of a jealous disposition and possessed of a violent temper, and failed to support his wife, though he was a healthy and able-bodied man; that from September 17, 1906, to February 11, 1907, defendant absented himself from plaintiff, without cause or excuse, and failed to contribute anything to her support; and that she had to rely on her people for maintenance.

Plaintiff testified as follows: "On Sunday, December 15th, I was sitting and reading, and Mr. Morgan came in and asked if I wanted him to leave me, and, when I did not answer him, he grasped me around the throat and almost choked me, and, after I had freed myself, he said he was going to get a gun and blow my brains out and then blow his own out. The people downstairs heard him. He grabbed me around the throat with his hands, almost choked me, and I had to struggle to free myself from him. We had had no difficulty that day at all. He just came up and asked if I wanted him to leave me, and he owed considerable money and had received a number of letters from his creditors the day before, and I think that upset him considerably. In October, 1907, a Miss Green, whom I had known all my life invited me to go to the matinee with her. Defendant

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had no objections to her, but said he didn't want me to go, to break the engagement, and, when I said I couldn't, he beat his hands and face and kicked over a few chairs, and beat the floor with his head, hands, and feet. In that same month I asked defendant to let me have some money to get some groceries with, and he took a butcher knife and flashed it above our heads and said he might as well end both our lives, as he couldn't support me, and wouldn't let any one else have me. He did that in such a way that I feared him. I feared him very much since that Sunday he threatened to blow my brains out. In October he was very threatening about that. In December he threatened to blow my brains out. Judge Paxson: * * * On the 26th of December what occurred? A. Mr. Morgan wanted me to arrange for a New Year's dinner, and I told him we couldn't afford to do that, and then he grasped me very violently by the shoulders and insisted on my doing it, but we couldn't do it, as we hadn't the money, and so couldn't give the dinner. He wanted to entertain friends—my people and some friends. He was and is an able-bodied man, able to work if he were willing. His health has been exceptionally good while we were married. He never complained of anything as to his health. On January 8, 1908, Mr. Morgan came to me and said he couldn't support me, and he was going away; and he telephoned for an express wagon, and assisted the man to put his trunk on the wagon, and then came upstairs and said good bye, and that he wasn't man enough to take care of me, and I said good-bye. Q. Has he ever been back since? A. He came one Sunday evening. The Court: You say he came to see you? A. Yes, sir; one Sunday evening he came to the door and knocked on the door and rang the bell. Q. You knew he was there and wouldn't attend to it? A. No; I was afraid of him. I had been afraid of him ever since that Sunday he threatened to shoot me. The Court: You were not afraid of him, were you? A. I certainly was. So much so that I had to take medicine for my nerves ever since that Sunday. Dr. Guhman is my physician. My maiden name was Deters. All these offenses were committed by defendant in St. Louis, and I am now really afraid that defendant will carry out that threat. I certainly am very much afraid of it."

Mrs. Kate Deters, plaintiff's mother, testified as follows: "I visited my daughter on St. Louis avenue and frequently since she has been living in my flat. Plaintiff properly attended to her duties as a housewife; was a nice tidy housekeeper. She attended to her household the way she ought to do, and was very saving. I frequently saw plaintiff and defendant together. She treated him kindly and affectionately as a wife ought to do, and she treated his child the same way while it was with her. His disposition was very disagreeable. He showed very bad tem-

per and a jealous disposition, and whenever anybody talked to her—my son or my niece or anybody in the house—he was so jealous he couldn't see. He showed ugly ways about it by cutting a person short. He would cut you short when you talked to him. I frequently heard him when he threw himself on the floor and pounded the floor and furniture. Often has my daughter come downstairs to me just after I heard him making those noises, and she was nervous and crying. He would make an awful noise like somebody would throw something down on the floor, turn over the chairs and things like that, and you could hear his voice all the time. I could tell that it was his voice, and she was usually crying whenever he would make such a noise. She is still living there, and I have to support her. My husband is in the grocery business on Sutherland avenue. My daughter associates with proper people, and her character is good."

Harry Meaker, a witness for plaintiff, testified as follows: "I knew Mr. Morgan. I took care of the premises. My attention has frequently been attracted by these unusual noises in Mr. Morgan's house, like something falling upstairs, and I would go up and see if anything happened and I could generally hear Mr. Morgan's voice quarrelling. The noise was made by throwing over chairs and pushing the table around, and all of a sudden heard a dead fall. I couldn't help hearing. On three or four occasions I paid particular attention to it, and could tell from the noise that it was Mr. Morgan's voice. I am in no way related to the parties."

Joseph Laudauer testified as follows: "I have known plaintiff from childhood. I do not know her husband. I know plaintiff's general reputation among those with whom she associates, and it is just as good as it can be."

That this evidence shows defendant was guilty of cruelty and intolerable indignities toward his wife admits of no doubt. It also shows that this conduct began a few months after their marriage, and grew worse until defendant abandoned his wife. It further shows defendant's frequent and unreasonable outbursts of passion were without provocation; that on account of his laziness he was unwilling to work to support his wife, and for this reason, and no other, he abandoned her. We think plaintiff's evidence shows she is entitled to the relief prayed for. Her right to a divorce did not rest in the discretion of the court, but is a statutory right which the court was bound to enforce. *Grenzebach v. Grenzebach*, 118 Mo. App. 280, 94 S. W. 567; *Ulrey v. Ulrey*, 80 Mo. App. 48.

Judgment reversed and cause remanded, with directions to the trial court to set aside its judgment dismissing plaintiff's cause of action, to enter a decree divorcing her from her husband, and to allow her such alimony as the court may deem just and proper. All concur.

CLARKSON v. LEE.

(St. Louis Court of Appeals. Missouri. Nov. 5, 1908.)

PLEADING (§ 248*)—COMPLAINT—AMENDMENT—NEW CAUSE OF ACTION.

An amended petition to recover rent under a written lease, which merely corrected the date of the contract and the per acre rental as erroneously stated in the original petition, the refusal to pay a year's rent for the same lands being complained of in both petitions, was not a substitution of a new cause of action, but an amendment to conform the allegations of the petition to the dates, etc., of the contract sued on, and was properly allowed.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 248.*]

Appeal from Circuit Court, Mississippi County; Henry C. Riley, Judge.

Action by Lota Clarkson against Walter L. Lee. Judgment for plaintiff, and defendant appeals. Affirmed.

Russell & Deal, for appellant. H. C. O'Bryan, for respondent.

BLAND, P. J. The action is to recover \$3.50 per acre as rent for 125 acres of agricultural lands (described in the petition) for one year, beginning August 1, 1905, and ending August 1, 1906. The petition states that the contract of lease was entered into on December 16, 1902, by Fannie Clarkson, the then guardian of plaintiff, and the defendant; that plaintiff attained her majority before the commencement of the suit, etc. On October 1, 1906, defendant appeared to the action by attorney, and filed a general denial. On the 3d day of April, 1907, plaintiff filed an amended petition, in which she alleged that the same lands described in the original petition were leased by Fannie Clarkson, plaintiff's then guardian, to defendant on November 10, 1900, at a rental of \$3 per acre, and that this contract was in writing; that the written contract "is lost and the dates unknown to plaintiff till yesterday, but is the same contract declared upon in the original petition." On April 4, 1907, defendant moved to strike out the amended petition on the ground that it substituted a new cause of action. In said motion defendant set forth in *hæc verba* what he alleged to be copies of two written leases entered into between himself and Fannie Clarkson as guardian of plaintiff and other minors, one of which is dated December 16, 1902, and the other November 10, 1900. The lands described in the petition are not described in the lease of December 16, 1902, but are expressly excluded from the lands described therein. They are included in the lease of November 10, 1900, which, as to the lands described in the petition, was to expire August 1, 1906. The leases were not offered in evidence on the hearing of the motion to strike out, and no offer was made to prove the copies filed with and made a

part of the motion. The court overruled the motion, whereupon defendant, after saving his exceptions, declined to plead further to the amended petition. The court heard plaintiff's evidence, and rendered judgment in her favor for \$390. In due time defendant filed a motion in arrest of judgment, which the court overruled, whereupon defendant appealed, and brings the case here on the record proper.

1. The only question for decision is whether or not the amended petition substituted a new cause of action. The action stated in the original petition is for one year's rent for 125 acres of land described in the original petition at \$3 per acre, the rent year beginning August 1, 1905, and ending August 1, 1906. The amended petition alleged that the lease was executed November 10, 1900, that it was lost and the dates were unknown to plaintiff until the day before the amended petition was filed, but that it is the same contract declared upon in the original petition. Both petitions are for the same year's rent for the use of the identical lands, and both allege the lease of this land was in writing and signed by the identical parties. To maintain her action on either petition plaintiff was bound to produce a written lease. The lease of December 16, 1902, did not correspond with the allegations in either of the petitions for the reason the lands described were not included in that lease. The amended petition states that the dates of the lease and the rent per acre upon which the suit is based are erroneously stated in the original petition, and states as an excuse for the error that the lease was lost and the knowledge of the true dates and rate of rent first came to plaintiff the day previous to filing the amended petition. We think this statement of facts clearly shows the amended petition was filed for the purpose of correcting errors as to dates, etc., contained in the original petition, and for the purpose of avoiding a like amendment at the trial on the offer of the lease of 1902 in evidence, which would likely have resulted in a continuance of the cause at plaintiff's cost. The gist of the action as stated in both petitions is to recover rent on the same lands for the same year. The same injury (refusal to pay a year's rent) is complained of in both petitions and both allege the breach of a written contract, and the mere fact that the date of this contract and the per acre rent erroneously stated in the original petition were corrected in the amended petition was not a substitution of a new cause of action, but a simple amendment to conform the allegations of the petition to the dates, etc., of the contract sued on. The amendment was permissible under the Code in furtherance of justice, and the trial court did not err in overruling defendant's motion to strike it out. *Rippee v. Railway*, 154 Mo. 358, 55

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

at his cost, and granted him ten days in which to plead. From the order of the court setting aside the judgment by default, plaintiff appealed.

1. Though Wolken could not read English, his evidence shows that his daughter, to whom the summons was delivered at his residence, could read English and that she acquainted him with its contents; that he then went to defendant Miller, who was his son-in-law, and inquired about the suit, and, on Miller's assurance that the suit did not concern him (Wolken), he paid no further attention to it until after judgment was rendered and execution issued and one of his tenants was served with process of garnishment. On this evidence the conclusion is irresistible that Wolken did not use due diligence, but, on the contrary, was grossly negligent in failing to answer the petition or to appear to the action until after final judgment had been rendered against him. In his motion to set aside the judgment, he states a good and valid defense, and in his examination he swore he did not sign the note sued on nor authorize any one to sign it for him. In these circumstances, did the trial court commit reversible error in sustaining Wolken's motion to set aside the judgment? The proceedings were not under the provisions of section 777, Rev. St. 1899 (Ann. St. 1906, p. 752), cited and relied on by plaintiff. This section provides for the filing of a petition for review after final judgment by default, in cases where the defendant was not personally served with process of summons and did not appear to the action. In such circumstances the petition may be filed at any time within three years after the judgment was rendered. Rev. St. 1899, § 779 (Ann. St. 1906, p. 753). The proceedings in the case in hand appear to have been regular and in conformity with law, but during the term at which the judgment was rendered it was within the breast of the court, and for good cause shown, or on its own motion for cause, it had the undoubted right to set aside the judgment and grant Wolken time to plead within a reasonable time. *Robyn v. Chronicle Pub. Co.*, 127 Mo. 385, 30 S. W. 130; *Rottmann v. Schmucker*, 94 Mo. 144, 7 S. W. 117; *Scott v. Smith*, 133 Mo. 618, 34 S. W. 864; *Aull v. St. Louis Trust Co.*, 149 Mo., loc. cit. 13, 14, 50 S. W. 289; *Head v. Randolph*, 83 Mo. App. 284. This power being inherent in the trial court, its discretion in setting aside its own judgment will not be reviewed, unless it affirmatively appears the court acted arbitrarily and oppressively. *Scott v. Smith*, supra; *Harkness v. Jarvis*, 182 Mo., loc. cit. 241, 242, 81 S. W. 446, and cases cited therein. Though Wolken was negligent, yet his testimony shows he has a good and valid defense to plaintiff's cause of action as against him. The cause may yet be tried and justice be done. In the circum-

stances we think the learned trial judge exercised a sound discretion in sustaining the motion to set aside the judgment by default. The judgment is affirmed. All concur.

ROBERTS v. MODERN WOODMEN OF AMERICA.

(St. Louis Court of Appeals. Missouri. Nov. 5, 1908.)

1. INSURANCE (§ 812*)—ACTIONS ON POLICIES—TIME WITHIN WHICH ACTION MUST BE BROUGHT—VALIDITY OF PROVISIONS.

Under Rev. St. 1899, § 899 (Ann. St. 1906, p. 832), making void all parts of a contract limiting the time in which an action may be instituted, the court in an action on a beneficiary certificate properly struck out an affirmative defense alleging in bar of the action that it was not commenced within one year after insured's death, as required by the certificate.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1993; Dec. Dig. § 812.*]

2. INSURANCE (§ 125*)—THE CONTRACT IN GENERAL—WHAT LAW GOVERNS—PLACE OF CONTRACT.

Where a beneficiary association and insured were both residents of the state of Illinois at the time the application for insurance was made, and the certificate was issued and delivered, the contract was an Illinois contract governed by the laws of that state.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 173, 174; Dec. Dig. § 125.*]

3. INSURANCE (§ 125*)—ACTIONS ON POLICIES—TIME WITHIN WHICH ACTION MUST BE BROUGHT.

Where, in an action on a beneficiary certificate, defendant set up that the contract was made in Illinois, and that under the laws of that state a clause in the certificate, requiring suit thereon to be brought within one year after insured's death, was valid, and that the action was not so brought, it was entitled to show in bar of the action that the stipulation, though invalid under the laws of Missouri, was valid under the laws of Illinois.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 173, 174; Dec. Dig. § 125.*]

Appeal from Circuit Court, Monroe County; David H. Eby, Judge.

Action by Matilda Roberts, etc., against the Modern Woodmen of America. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Benj. D. Smith and Tunnell & Hart, for appellant. Jas. H. Whitecotton and W. W. Barnes, for respondent.

BLAND, P. J. The defendant is a fraternal beneficiary association incorporated under the laws of the state of Illinois, and is authorized to do business as a fraternal beneficiary association in the state of Missouri. Its chief business office is at Rock Island, in the state of Illinois. On February 23, 1894, defendant issued and delivered to William White, then residing in the state of Illinois, and described as a member of Burnside Camp, No. 2163, its certificate of insurance, insuring the life of said White in a sum not to exceed \$2,000, payable on his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and to show that it had not been paid; the case not being one of confession and avoidance, so as to give defendant an absolute right to open and close.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 47, 66; Dec. Dig. § 25.*]

2. TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE.

Ordinarily, where plaintiff must introduce some evidence to recover, he may open and close; but, if the burden is slight, and the real contest is confined to the defense, the trial court has a sound discretion to permit defendant to open and close.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 47; Dec. Dig. § 25.*]

3. APPEAL AND ERROR (§ 1046*)—HARMLESS ERROR—DENIAL OF RIGHT TO OPEN AND CLOSE.

One sued on a note, who answered under oath, denying generally, and alleging that she was an indorser and not a maker, was not prejudiced by any error in denying her the right to open and close.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4130; Dec. Dig. § 1046.*]

4. BILLS AND NOTES (§ 538*)—ACTION ON NOTE—INSTRUCTIONS.

Where one sued on a note claimed to be an indorser, and not a maker, it was proper to instruct that it was not enough to defeat recovery that defendant, at or before delivery of the note, believed that she had signed as an indorser, but such must have been the payee's understanding.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 538.*]

5. BILLS AND NOTES (§ 538*)—ACTION ON NOTE—INSTRUCTIONS.

Where one sued on a note claimed to be an indorser, and not a maker, it was proper to instruct that conversations between defendant and one of the makers regarding the indorsement did not bind the payee, unless he or his representative was present when or before the note was accepted, or unless he was informed of such conversations, so that he can be said to have known thereof or to have acquiesced therein.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 538.*]

6. APPEAL AND ERROR (§ 832*)—ERRORS—ESTOPPEL.

Appellant cannot complain of an instruction conforming to her position on the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3602, 3604; Dec. Dig. § 832.*]

Appeal from St. Louis Circuit Court; Jas. E. Withrow, Judge.

Action by Michael Oexner against Fred Loehr, Jr., and others. From a judgment for plaintiff, defendant Emilie Donck appeals. Affirmed.

See, also, 117 Mo. App. 698, 93 S. W. 333.

Harlan Jeffries and Wagner & Corum, for appellant. W. F. Carter, for respondent.

BLAND, P. J. The action is on the following promissory note: "\$1000. Belleville, Ill., Jan 2, 1900. One year after date we promise to pay to the order of Michael Oexner, one thousand dollars for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of six per cent. per annum. [20

cent Revenue stamp, canceled.] Fred Loehr, Jr. Wendelin Oexner." The note was indorsed on the back as follows: "Emilie Donck. Josephin A. Loehr." The process was against Emilie Donck alone, who for answer stated, in substance, that she did not sign the note as a maker, but wrote her name across the back of it as an indorser, and that she was not notified that demand of payment had been made at the maturity of the note, and that it was not paid. The reply denied the new matter in the answer. Trial resulted in judgment for plaintiff, from which Mrs. Donck appealed.

The evidence is that Fred Loehr and Wendelin Oexner, desiring to go into the coal business, in the city of St. Louis, made application to plaintiff for a loan of \$1,000: that plaintiff agreed to let them have that sum if they would get Mrs. Donck (Loehr's mother-in-law, with whom he resided at the time) as surety on a note for that amount. Plaintiff resided in Belleville, Ill., where the note was prepared and delivered to Loehr, who took it to St. Louis, where it was indorsed by Mrs. Donck. It was then taken back to Belleville, delivered to plaintiff, and the money handed over to Loehr and Oexner. Interest was paid on the note by Loehr and Oexner to January 12, 1902. Fred Loehr testified that he agreed with Mrs. Donck that plaintiff should notify her if the note was not paid at maturity, and that at the time he delivered the note to plaintiff he told him he should notify Mrs. Donck when the note matured, if it was not paid at maturity, and plaintiff agreed to give such notice, and took the note with that understanding. Mrs. Donck testified that she was at plaintiff's house a few weeks after the note was made, and that plaintiff told her he would notify her when the note was due, if it was not paid. Plaintiff testified that he asked security on the note, and Loehr asked him how his mother-in-law (Mrs. Donck) would do; that he said, "I guess it is all right"; that the note was brought back with her name across the back of it, and he accepted it; that not a word was said about any notice to Mrs. Donck. Plaintiff also testified that he did not at any time have any conversation with Mrs. Donck about giving her notice of nonpayment of the note.

The following instructions given by the court in behalf of plaintiff were objected to, to wit: "(2) The court instructs the jury that the burden of proof is on the defendant, Emilie Donck, to establish, by a preponderance of the evidence, that there was such an agreement or understanding between her and the plaintiff that she was to be treated or held as indorser. By the term 'preponderance of evidence,' as used in this instruction, is not meant the greater number of witnesses, but the greater weight of credible testimony in the case. * * * (4) The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court further instructs you that it is not enough for you to find that said defendant, at or before the delivery of said note, understood or believed that she had signed the same as an 'indorser,' in its legal sense, but you must also find from the evidence that such was also the understanding and belief of the plaintiff at or before the delivery to him of said note; and, unless you do so find, your verdict must be for the plaintiff. * * *

(6) The court instructs you that conversations had by the defendant Emilie Donck with Fred Loehr, Jr., with reference to the indorsement of the note in question, are not binding on the plaintiff in this case, unless the plaintiff was present in person or by representative, or unless, before the note was accepted or received by him, he was informed of such conversations, so that he can be said to have acted with knowledge thereof, or to have acquiesced therein." Complaint is also made that the court refused to permit defendant to open and close the case.

1. The petition alleges that Mrs. Donck is a maker of the note sued on, and that it is overdue and unpaid. Mrs. Donck filed a verified answer, which was a general denial, and an allegation that she was not a maker of the note, but wrote her name on the back of it as an indorser. Therefore plaintiff could not recover without the introduction of essential evidence, to wit, the note, and evidence that it had not been paid. Hence, primarily, the burden of proof was on him. It is true the note itself showed prima facie that Mrs. Donck was liable as a maker, but it contained no inherent evidence of the other issue that it had not been paid. Therefore the case is not one of confession and avoidance, in which the burden in the first instance is on the defendant, and where he would have the undoubted right to open and close. Ordinarily, where the plaintiff is required to introduce some evidence to entitle him to recover, the burden of proof rests upon him, and he is entitled to open and close. But if the burden on the plaintiff is but slight, and his evidence when introduced is not controverted, and the real contest is confined to the matter set up as a defense, the trial court may, in the exercise of a sound discretion, permit the defendant to open and close, and the exercise of this discretion is not open to review on appeal. In recognition of this rule of practice the St. Louis circuit

court adopted a rule which, so far as the same is pertinent here, reads as follows: "In those cases in which the court decides that the defendant has the affirmative of the issues, he shall have the opening and closing of the argument in like manner, and under the same restrictions as above laid down for the plaintiff. The court may in its discretion change the order of argument as above prescribed, in a particular case where the circumstances in the opinion of the court require it, and where it is so ordered before the argument begins." The right of counsel to commence or conclude an argument to a jury depends upon the practice and the discretion of the trial court, and such power and discretion will not be reversed or controlled by an appellate court, unless it affirmatively appears the discretion was abused and the opposite party prejudiced thereby. *Wade v. Scott*, 7 Mo. 509; *Lucas v. Sullivan*, 33 Mo., loc. cit. 390; *Corbitt v. Mooney*, 84 Mo. App. 645. The case of *Grant Quarry Co. v. Lyons Construction Co.*, 72 Mo. App. 531, cited and relied on by defendant, was an action on a promissory note, the execution of which was admitted by the defendant. Defendant filed a counterclaim, and all the evidence and all the instructions were directed to the counterclaim. The defendant, therefore, as to the only issue of fact in the case, was, in effect, the plaintiff, and the burden of proof rested upon it. In these circumstances, it was held plaintiff had the right to open and close. And assuming, without saying so, that the defendant was prejudiced by a denial of this right, the judgment was reversed, and the cause remanded. Now, if we should concede (which we do not) that defendant had the right to open and close, there is nothing in the record to indicate that she was prejudiced by a denial of the right, and we rule this assignment of error against defendant.

2. Instructions Nos. 4 and 6, given for plaintiff, are in harmony with the opinion of this court on the second appeal. See 117 Mo. App. 698, 93 S. W. 333. Instruction No. 2 is in accord with the position taken by defendant on the trial that the burden was on her to establish her defense. Therefore she is in no position to complain of the instruction.

No reversible error appearing, the judgment is affirmed. All concur.

HEIBERGER v. MISSOURI & KANSAS TELEPHONE CO.

(Kansas City Court of Appeals. Missouri. Oct. 5, 1908. Rehearing Denied Nov. 16, 1908.)

1. EVIDENCE (§ 10*)—JUDICIAL NOTICE—NAVIGABLE RIVER.

Judicial notice will be taken that the Missouri river is a navigable stream, a public highway, which no one has the right to obstruct.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 13; Dec. Dig. § 10.*]

2. NAVIGABLE WATERS (§ 22*)—OBSTRUCTION BY TELEPHONE WIRES.

Though a telephone company maintaining a line over a navigable river is not an insurer of travelers on the river against injury from fallen wires, it is required to build the line at a height sufficient to permit the passage of boats, and to exercise reasonable care to prevent it from becoming an obstruction to navigation.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 22.*]

3. NAVIGABLE WATERS (§ 26*)—OBSTRUCTION—ACTIONS FOR INJURIES—EVIDENCE.

Evidence, in a personal injury action against a telephone company, that the injury was caused by the collision of the boat in which plaintiff was riding with a submerged wire, makes out a prima facie case of negligence against the telephone company.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 26.*]

4. NAVIGABLE WATERS (§ 26*)—OBSTRUCTION—ACTIONS FOR DAMAGES—DEFENSES.

In an action against a telephone company for injuries due to the boat in which plaintiff was riding running against a submerged telephone wire and capsizing, it is immaterial that the wire might not have formed an obstruction to a larger boat, or to one equipped with a reversible engine.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 26.*]

5. NAVIGABLE WATERS (§ 26*)—OBSTRUCTION—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

Where, in an action against a telephone company for injuries due to the boat in which plaintiff was riding running against a submerged telephone wire and capsizing, the negligence averred embraced all acts of negligence, whether of construction, repair, inspection, or diligence to discover and remedy the displacement of the wire, and did not set out any specific acts of negligence, the rule that if specific acts are averred the burden is assumed of proving them, was inapplicable, and plaintiff was not precluded by the averments of negligence in her petition from invoking the presumption of negligence arising from proof that her injury was due to a collision of the boat in which she was riding with a submerged telephone wire.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 26.*]

6. NAVIGABLE WATERS (§ 26*)—OBSTRUCTION—ACTIONS FOR INJURY—QUESTIONS FOR JURY.

In an action against a telephone company for injuries due to the boat in which plaintiff was riding running against a submerged telephone wire and capsizing, whether the telephone company was negligent held for the jury.

[Ed. Note.—For other cases, see Navigable Waters, Dec. Dig. § 26.*]

7. DAMAGES (§ 49*)—MENTAL SUFFERING—PHYSICAL INJURY TO PERSON.

Where the infliction of physical injuries of a severe nature is shown, and it would be in the

highest degree speculative to go into the question of whether a nervous shock came through the physical injuries or along with them, a recovery for the shock may be had, and it is not required to be shown that the shock was a consequence of the physical injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 100; Dec. Dig. § 49.*]

8. EVIDENCE (§ 119*)—RES GESTÆ.

In an action against a telephone company for injuries due to the boat in which plaintiff was riding running against a submerged telephone wire and capsizing, evidence of the number of persons in the boat and the number drowned was properly admitted as a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 119.*]

9. EVIDENCE (§ 127*)—EXCLAMATIONS OF PAIN.

Involuntary shrieks and exclamations of pain by an injured person while confined to her bed are competent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 381; Dec. Dig. § 127.*]

10. TRIAL (§ 105*)—ADMISSION OF EVIDENCE—ERROR—WAIVER.

Notwithstanding it was incompetent to ask plaintiff's physician whether, in his opinion, the accident caused the condition in which he found plaintiff, the error was waived where no objection was interposed or exception saved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 261, 263; Dec. Dig. § 105.*]

11. DAMAGES (§ 131*)—PERSONAL INJURIES—DAMAGES EXCESSIVE.

Where plaintiff, who was thrown into the river by the boat in which she was riding running against a submerged telephone wire and capsizing, in addition to being bruised on her arm and shoulder, took into her lungs a large quantity of muddy water which caused severe pain for several weeks, and she was unconscious for some time after her rescue, and for a long time her mental condition was most alarming, and she lost 24 pounds in weight, and for some months bore every indication of suffering severe physical as well as mental pain, a verdict for \$2,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 131.*]

Appeal from Circuit Court, Casper County; Wm. H. Martin, Judge.

Action by Katherine Heiberger against the Missouri & Kansas Telephone Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. M. Williams and Glead, Hunt, Palmer & Glead, for appellant. John & J. W. Coe-grove, for respondent.

JOHNSON, J. Action to recover damages for personal injuries alleged to have been caused by the negligence of defendant. Verdict and judgment were for plaintiff in the sum of \$2,500, and defendant appealed.

Plaintiff was injured in the evening of August 10, 1905, on the Missouri river near Boonville, where she lived. She had spent the day at Choteau Springs, and, together with nine other persons, attempted to return home in a gasoline launch of somewhat crude construction. The way pursued by the boat was downstream and along the main

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

required by the plainest principles of law, first, to build the line at a height above the water sufficient to permit the free passage under it of river boats, and then to exercise at least reasonable care to prevent it from becoming an obstruction and menace to navigation. Though not an insurer of travelers on the highway against danger of injury from fallen wires, defendant owed them the duty we have defined, and a negligent breach of such duty would afford a person injured thereby an action for the damages sustained. Webb's Pollock on Torts, 489; Omslear v. Phil. Co. (D. C.) 31 Fed. 354; Railroad v. Brooks, 39 Ark. 403, 43 Am. Rep. 277.

Though the cause of action asserted by plaintiff is grounded in negligence, and it devolved on her to prove that her injury was the direct result of the negligence averred, we think she fully discharged her burden by showing that her injury was caused by the collision of the boat, in which she was riding, with a submerged telephone wire owned by defendant which constituted an obstruction to the free passage of such small river boats.

Plaintiff is not charged in the answer with contributory negligence, nor is there anything in the evidence to accuse her of such negligence. It is immaterial that the wire might not have formed an obstruction to a larger boat, nor to one equipped with a reversible engine. Defendant was required to anticipate the presence of small craft on the river, and plaintiff was justified in relying on the presumption that defendant would throw no dangerous obstacle in the way of her boat, however small or crude it might be. Therefore, in showing that a wire owned by defendant did obstruct the passage of the boat and injured her without any fault on her part, she made out a prima facie case of negligence against defendant which, if not rebutted, would raise a conclusive presumption of negligence. The burden of proof shifted to defendant to explain the presence of the wire at that place. The very fact that it was there bespoke want of care either in the construction of the line, its repair, or in the discovery and correction of an accidental displacement of the wire. Since defendant had exclusive control of the wire, and, in the ordinary course of things, an accident such as this could not happen if proper care were exercised, it accords better with the dictates of reason and justice to require defendant to exculpate itself from the imputation of negligence than to require plaintiff in her pleading and proof to put her finger on the specific act of negligence that caused her injury. Gannon v. Gas Light Co., 145 Mo. 502, 48 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; Mowry v. Norman, 204 Mo. 191, 103 S. W. 15; Redmond v. Railroad, 185 Mo. 13, 84 S. W. 26, 105 Am. St. Rep. 558; Young v. Oil Co., 185 Mo. 634,

84 S. W. 929; Brown v. Consolidated Co. (Mo. App.) 109 S. W. 1032.

Plaintiff did not disable herself from invoking the presumption under discussion by the allegation of negligence in her petition. In Hamilton v. Railroad, 114 Mo. App., loc. cit. 509, 89 S. W. 893, where plaintiff was a passenger of defendant carrier, and was injured in a collision, we held that it would have been sufficient for him to allege in his petition, in general terms, that he was injured while being carried as a passenger as a result of the negligence of the carrier; "but when the plaintiff chooses to allege in his petition the specific acts of negligence of which he complains, he assumes the burden of proving them, and, as in other cases, must recover, if at all, upon the negligence pleaded."

In the petition before us the negligence averred covers the widest possible scope. It embraces any and all acts of negligence, whether of construction, repair, inspection, or diligence to discover and remedy a fortuitous displacement of the wire. Obviously, the rule followed in the Hamilton Case is without application to a cause thus pleaded, and the conclusion necessarily follows that the facts adduced by plaintiff placed upon defendant the burden of rebutting the presumption that the obstruction caused by the wire was not due to its negligence. This presumption might be overcome by the showing that the falling of the wire was not the result of negligence in the construction and maintenance of the line, and that defendant had neither actual nor implied notice of the fact that it had fallen in time to have removed the obstruction by the exercise of reasonable care. The most that might be said in favor of defendant is that the facts and circumstances in evidence present the issue of its negligence as one of fact for the solution of the jury. On the hypothesis presented by the testimony of the construction foreman that the wires all were tightly strung and in good condition when he left the work at 4:30 o'clock, and conceding, arguendo, that the message sent to the telephone office at 6 o'clock was not given in time for defendant to remove the obstruction, nor to a proper agent or servant of defendant, still the conclusion is most reasonable that defendant has failed completely to exculpate itself from the charge of negligence, because it has failed to furnish any reasonable evidentiary explanation of the cause of the fall of the wire. Its foreman had notice that morning that the wires were out of order. He did not know, nor does defendant attempt to show, what the workmen did to them after he departed. It was within the power of defendant in discharging its burden of proof to show by evidence the condition in which the workmen left the wires, and, in the absence of a showing to the contrary, the jury were

entitled to the inference, either that the wire was down in the water when the work was stopped that evening, or that it fell afterwards on account of negligence in repair work done that day. It goes without saying that the jury was not bound to believe the testimony of the foreman, but had a right to reject his statement that the wires had been properly repaired before he left, and to infer, from the physical fact that the wire was down, the further fact that the repair work had not been properly done. It follows from what has been said that no error was committed in overruling the demurrer to the evidence, nor is error to be found in the instructions relating to the issue of negligence. They submitted that issue in substantial conformity to the views of the law just expressed.

Objection is made to the following portion of the first instruction given at the instance of plaintiff: "And that plaintiff was thereby physically injured, bruised, and made sore, and her nervous system greatly shocked and impaired, and that such physical injuries and nervous shock, if any, caused plaintiff bodily suffering and mental pain and anguish," etc. The point advanced is that, as the evidence does not show any relation between the nervous shock suffered by plaintiff and any physical injury received, she is not entitled to recover damages on account of such shock. The evidence shows the infliction of physical injuries of a severe nature. In addition to being bruised on her arm and shoulder, plaintiff took into her lungs a large quantity of muddy water which caused her to have severe pain in her lungs for several weeks. She was unconscious for some time after her rescue, and for a long time her mental condition was most alarming. She lost 24 pounds in weight, and for months bore every indication of suffering severe physical as well as mental pain. The rule is well settled in this state that there can be no recovery for nervous shock, fright, terror, alarm, anxiety, or distress of mind if these are unaccompanied by some physical injury. *Crutcher v. Railroad* (not yet officially reported) 111 S. W. 891, and cases cited. But as was said by the Supreme Judicial Court of Massachusetts in *Homan v. Railway*, 180 Mass. 456, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324, the rule is an "arbitrary exception based upon a notion of what is practicable, and should not obtain in cases where physical injuries and nervous shock concurrently result from the same battery." In most cases, as in the one before us, it would be in the highest degree speculative to go into the question of whether the nervous shock came through the battery or along with it, and we agree with the Massachusetts court that, "when the reality of the cause is guaranteed by proof of a substantial battery of

the person, there is no occasion to press further the exception to the general rule."

Objections are made to rulings of the court on the admission of evidence, but they are not well founded. The number of persons in the boat and the number drowned were facts belonging to the *res gestæ*, and to admit proof of them was not reversible error. *Estes v. Railway*, 110 Mo. App. 731, 85 S. W. 627. The testimony relating to the involuntary shrieks and exclamations of pain and suffering emitted by plaintiff while confined to her bed also was competent. *Estes v. Railway*, *supra*.

It was incompetent to ask plaintiff's physician to state whether, in his opinion, the accident caused the condition in which he found plaintiff, but as no objection was interposed by defendant nor exception saved, the error was waived. We do not regard the verdict as excessive. The record shows the cause was fairly tried and properly submitted in the instructions given to the jury, and, in our opinion, the verdict was for the right party.

The judgment is affirmed. All concur.

ANDERSON v. NORVELL-SHAPLEIGH HARDWARE CO. et al.

(St. Louis Court of Appeals. Missouri. Nov. 17, 1908.)

1. DIVORCE (§ 231*)—"ALIMONY."

Alimony in its origin was the method whereby the spiritual courts of England enforced the duty of maintenance owed by husband to wife during their legal separation, and, in modern jurisprudence, is the allowance made to a woman on divorce for support out of her husband's estate.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 658; Dec. Dig. § 231.*]

For other definitions, see Words and Phrases, vol. 1, pp. 307-311; vol. 8, pp. 7571, 7572.]

2. EXEMPTIONS (§ 76*) — JUDGMENTS — ALIMONY.

Under Rev. St. 1899, § 3162, as amended in 1903 (Laws 1903, p. 195 [Ann. St. 1906, p. 1797]), a head of a family may hold certain wages exempt from execution. Section 4327a, enacted in 1903 (Laws 1903, p. 240 [Ann. St. 1906, p. 2376]), provides that no property shall be exempt from attachment or execution in a proceeding by a married woman for maintenance or upon a judgment or order to enforce a decree for alimony, and makes all wages due defendant subject to garnishment or execution in any proceeding mentioned in the section. *Held*, that section 4327a takes away the exemption right granted by section 3162 as against an execution for alimony.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 100; Dec. Dig. § 76.*]

3. STATUTES (§ 159*)—IMPLIED REPEAL—CONSISTENCY—EXEMPTIONS.

The statutes are not inconsistent, and hence Rev. St. 1899, § 4327a, enacted in 1903 (Laws 1903, p. 240 [Ann. St. 1906, p. 2376]), was not impliedly repealed by section 3162 (Ann. St.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1906, p. 1797), because its enactment was approved at a prior date.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229, Dec. Dig. § 159.*]

4. EXEMPTIONS (§ 76*)—WAGES—ALIMONY.

The hardship imposed by Rev. St. 1899, § 4327a, enacted in 1903 (Laws 1903, p. 240 [Ann. St. 1906, p. 2376]), upon one remarrying after a divorce and award of alimony in requiring him to support two families, is immaterial on a judicial construction of the section, being self-invited by breach of his obligation to support his first wife and by remarriage.

[Ed. Note.—For other cases, see Exemptions, Dec. Dig. § 76.*]

Appeal from St. Louis Circuit Court; Jas. E. Withrow, Judge.

Garnishment proceeding by Hulda Schilling Anderson against the Norvell-Shapleigh Hardware Company, garnishee; Miles M. Anderson interpleading. From a judgment for plaintiff, intervener appeals. Affirmed.

W. G. Schofield, for appellant. Erwin Osing, for respondent.

BLAND, P. J. On June 21, 1906, plaintiff obtained a decree divorcing her from the bonds of matrimony theretofore contracted with defendant, Miles M. Anderson, custody of their minor child, and on allowance of \$25 per month as alimony, payable on the 15th day of each and every month thereafter. Defendant defaulted in the payment of alimony for the months of February and March, 1907, and execution was issued. The Norvell-Shapleigh Hardware Company was summoned as garnishee. The garnishee appeared and in answer to interrogatories stated defendant was in its employ at a wage of \$75 per month, and that it was indebted to him as follows: "\$37.50 on April 15th for wages or salary due him from April 1st to April 15th, 1907; \$37.50 due him on April 30, 1907; for wages or salary due him from April 15th to April 30, 1907; \$37.50 due him May 15th, for wages or salary due him from May 1, 1907, to May 15, 1907; \$37.50 due him on May 31, 1907, for wages or salary due him from May 15th to May 31st; and \$16.32 due him from June 1st to and including June 7, 1907." And then set up that defendant was a married man, the head of a family, and a resident of the state of Missouri, and that the wages due him, except 10 per cent. thereof, were exempt from execution. The court on the answer ordered the garnishee to pay into court \$100, installments of alimony due plaintiff for the months of February, March, April, and May, 1907, and \$6.75 costs. The garnishee complied with the order of the court, wherefore Miles M. Anderson interpleaded for the sum, less \$16.73, 10 per cent. of the amount of wages owing him by the garnishee, alleging that he was a resident of the state of Missouri, a married man, and the head of a family. A verbal demurrer was interposed to the interplea which was sustained, and

judgment entered that defendant take nothing by his interplea, from which judgment he appealed.

On the record as thus presented the sole question for decision is whether a married man, the head of a family, and a resident of this state is entitled to claim exemptions allowed under the provisions of section 3162, Rev. St. 1899, as amended in 1903 (Laws 1903, p. 195 [Ann. St. 1906, p. 1797]), against an execution issued on a judgment for alimony. The section as amended reads as follows: "Each head of a family, at his election, in lieu of the property mentioned in the first and second subdivision of section 3159, may select and hold, exempt from execution, any other property, real, personal or mixed, or debts and wages, not exceeding in value the amount of \$300, except 10 per cent. of any debt, income, salary or wages due such head of a family." The section is general and contains no exceptions. But section 4327a, enacted in 1903 (Laws 1903, p. 240 [Ann. St. 1906, p. 2376]), as a new section to chapter 51 (entitled "Married Women"), provides as follows: "No property shall be exempt from attachment or execution in a proceeding instituted by a married woman for maintenance, nor from attachment or execution upon a judgment or order issued to enforce a decree for alimony. And all wages due to the defendant shall be subject to garnishment on attachment or execution in any proceedings mentioned in this section, whether said wages are due from the garnishee to the defendant for the last thirty days' service or not."

1. It is conceded by defendant that this section takes away the exemption right as granted by section 3162 (Ann. St. 1906, p. 1797), where the proceedings are brought under the provisions of section 4327, c. 51, Rev. St. 1899 (Ann. St. 1906, p. 2375), and the wife has recovered a judgment against her husband for support. But defendant contends that the section does not extend the exception to an execution for alimony allowed in a divorce suit. The first clause of the section is sufficient to enact the exception to exemptions on any attachment or execution on an order or judgment against the husband for the maintenance of his wife: hence the second clause is redundant and is surplus matter, unless it was the intention of the lawmakers to embrace in the exception executions on orders and judgments for alimony. Alimony, in its origin, was the method by which the spiritual courts of England forced the duty of maintenance owed by the husband to the wife during such time as they were legally separated. *Manby v. Scott*, 2 Sm. Lead. Cas. 502. In modern jurisprudence it is that allowance which is made to a woman on a decree of divorce for her support out of the estate of her husband. *Adams v. Storey*, 135 Ill. 448, 26 N.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

E. 582, 11 L. R. A. 790, 25 Am. St. Rep. 392; *In re Le Claire*, 124 Fed. 654; *Sheafe v. Sheafe*, 24 N. H. 564. Under the Missouri statute alimony may also be awarded the wife pending the suit for divorce. Mo. Ann. St. 1906, § 2926. Nowhere in the chapter (51) providing for and regulating the proceedings by a wife for support against her husband who has abandoned her without good cause and refused to support her is the order or judgment designated as alimony, nor is the term used anywhere in our statutes, except in chapter 20, entitled "Divorce, Alimony and Custody of Children." There is therefore no room to otherwise construe the second clause of the section than as applying to attachments and executions on orders and judgments for alimony in divorce suits. In the case of *Long v. Long*, 78 Mo. App. 32, cited and relied on by defendant, it was held that in a suit by the wife against the husband for maintenance it was proper to allow the wife a sum for temporary maintenance pending the suit, and, quoting from *Harding v. Harding*, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310, the court said: "To refuse to allow her (the wife) a reasonable support pendente lite would in many cases be to deny her the right to prosecute her suit altogether." Further on, at page 37 of 78 Mo. App., the court said: "The cases uniformly hold that temporary support will be provided whether the action be for separate maintenance or for absolute divorce." Nowhere in the opinion is a temporary allowance in a suit for maintenance called or designated as alimony, and, we repeat, to give the second clause of the statute any force or effect, it must be construed as excepting the operation of the general statute of exemptions on attachments, or executions for alimony in a divorce suit.

2. The exemption statute was approved April 6, 1903. Section 4327a was approved on a prior date, to wit, March 24, 1903. For the reason the exemption statute was approved at a date subsequent to the approval of section 4327a, it is contended that this section was repealed by the subsequent act. Under the Constitution (article 4, § 36) both acts took effect at the same time, to wit, 90 days after the day on which the General Assembly that enacted them finally adjourned. Whether this has any bearing on the question or not, the fact remains that the two acts are not repugnant. The one is not inconsistent with the other and both may therefore stand, and should stand. *State ex rel. v. Stratton*, 136 Mo. 423, 38 S. W. 83; *Manker v. Faulhaber*, 94 Mo. 430, 6 S. W. 372; *Curtwright v. Crow*, 44 Mo. App. 563.

3. The argument of the hardship that section 4327a imposes upon defendant and others similarly situated might be of some force, if addressed to the legislative department. It is of no persuasive force when ad-

dressed to a court called upon to construe the statute of which he complains. The hardship, if any, was not created by the law, but was brought upon defendant by his own voluntary acts and conduct, and the conduct which brought about the decree of divorce and judgment for alimony against him was wrongful. For this reason he is in no position to complain that the law denies him the exemptions accorded to ordinary debtors. Nor ought he be heard to complain of the burden he has brought upon himself by his misconduct—a violation of his marriage vows. His marital pledge to his wife was that he would support and maintain her so long as they both should live. Why should he be relieved of that burden when his wife has been guilty of no misconduct? His answer is because he has married another woman, and ought not be required to support two families. Why assume the burden of supporting two families, if he was not able or was unwilling to discharge it? To use a homely phrase, "he has made his bed[s] and on it he must lie."

The judgment is affirmed. All concur.

YOUNG v. GAUS et al.

(St. Louis Court of Appeals. Missouri. Nov. 17, 1908. Rehearing Denied Dec. 1, 1908.)

CORPORATIONS (§ 659*)—FOREIGN CORPORATIONS—CONTRACTS—ACTIONS ON NOTES—DEFENSES.

Where officers and stockholders of a foreign corporation, doing business in the state in violation of Rev. St. 1899, § 1025, as amended by Laws 1903, p. 121 (Ann. St. 1906, p. 888), requiring certain steps to be taken by such corporations, precedent to obtaining a license to do business, made a note to the corporation, and then, acting as officers and agents of the corporation, assigned the note to an innocent holder for value in the name of the corporation, they were estopped, when sued on the note, to assert as a defense, their violation of section 1025 and the consequent invalidity of the note, or the corporation's lack of legal right to assign it to an innocent holder for value, both at common law and under Laws 1903, p. 250, § 60 (Ann. St. 1906, § 463-60) declaratory of the law of negotiable paper, which provides that the maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2561, 2562; Dec. Dig. § 659.*]

Appeal from St. Louis Circuit Court; Jas. E. Withrow, Judge.

Action by Fred Young against H. Gaus and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

Harlan, Jeffries & Wagner, for appellants.
A. A. Paxson, for respondent.

BLAND, P. J. The action is on the following promissory note: "\$1000. St. Louis,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Mo., April 15, 1907. Four months after date we promise to pay to the order of the Rio Grande Land, Water & Power Company one thousand and 00/100 ——— dollars. Payable at the office of the Rio Grande Land, Water & Power Co. For value received negotiable and payable without defalcation or discount and with interest from date at the rate of six per cent. per annum. No. ———. Due Aug. 15th. E. M. Shutt, John Sehrt, A. W. Hoffman, H. S. Whitener, H. Gaus." The note was indorsed as follows: "The Rio Grande Land, Water & Power Co., per B. W. Magin, Asst. Treas.," and before maturity, for a valuable consideration, was indorsed and delivered by the payee therein to plaintiff. It was admitted on the trial "that E. M. Shutt was president, and A. W. Hoffman vice president and treasurer, of defendant corporation, the Rio Grande Land, Water & Power Company, and that the defendants John Sehrt and H. Gaus were directors of the company at that time, and are yet, and that H. S. Whitener was a stockholder in the company, but not a director, and is yet." The evidence further shows that the appellants, other than the corporation, made and delivered the note to the corporation for its accommodation. At maturity the note was protested for non-payment, and notice thereof was duly served on all the defendants. On the trial the following stipulation was filed: "It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that for the purposes of this cause it is admitted that the defendant the Rio Grande Land, Water & Power Company, payee in the note sued on in this cause, is a corporation organized for the purpose of gain, and existing under and by virtue of the laws of the territory of New Mexico: that at the time the note sued on in this cause was made and delivered to the defendant the Rio Grande Land, Water & Power Company, and at the time of its indorsement and delivery to plaintiff, the defendant the Rio Grande Land, Water & Power Company had not filed in the office of the Secretary of State of the state of Missouri, a copy of its charter or articles of association, and had not in any respect complied with section 1025 of the Revised Statutes of Missouri of 1899, enacted in 1903 (Laws 1903, p. 121 [Ann. St. 1906, p. 888]), relating to foreign corporations doing business in this state. It is further admitted that the note sued on in this case was made, executed, and delivered in the city of St. Louis, Mo., and that the defendant the Rio Grande Land, Water & Power Company was, at the time of the execution and delivery of said note, and at the time of its indorsement and delivery to plaintiff, doing and carrying on within this state the business for which it was organized, and that said Rio Grande Land, Water & Power Company took out a license to do business in this state on August 15, 1907 Plaintiff, how-

ever, reserves the right to object, and does hereby object, to the facts above mentioned, as not being relative to the issues in this cause, and as not constituting a defense to plaintiff's cause of action." It was also admitted that the makers of the note did not receive anything for signing it. The defense pleaded and relied upon is that the payee of the note, the Rio Grande Land, Water & Power Company, is a foreign corporation, and had not at the time the note was made, or at the time it was assigned to plaintiff, complied with section 1025, Rev. St. 1899, as amended in 1903 (Laws 1903, p. 121), and therefore was unauthorized to do business in this state. The issues were submitted to the court without the intervention of a jury. No declarations of law were asked or given. The court found the issues for plaintiff, and rendered judgment in his favor for the face of the note with interest. After an unsuccessful motion for new trial, defendants Gaus, Sehrt, and Whitener appealed.

The question presented by the record for decision is this: Can appellants, who are officers and stockholders of a foreign corporation, doing business in this state in violation of section 1025 (Laws 1903, p. 121), make a negotiable promissory note to the corporation, and then, acting as officers and agents of the corporation, assign the note to an innocent holder for value, in the name of the corporation, and, when sued on the note, set up their own wrong and fraud as a defense thereto? We unhesitatingly answer this question in the negative. A corporation can only act by and through its officers and agents, and the business done by the Rio Grande Land, Water & Power Company in this state was through the agency of at least two of these appellants. It would be a travesty upon justice and a reproach to the law of the state if, in these circumstances, the appellants could shelter themselves behind the unlawful act of the corporation, and thus indirectly set up their own wrong and fraud to escape a liability they voluntarily contracted. It has never been held in this state that a foreign corporation, unlawfully doing business herein, by failing to comply with section 1025, supra, may set up its own wrong as a defense when sued by a citizen of the state, in the courts of this state, to recover an honest debt due him from the corporation. To hold that the statute was enacted for the purpose of enabling foreign corporations, unlawfully doing business in this state, to shelter themselves behind it for the purpose of evading their honest debts to citizens of this state, contracted in good faith, and in ignorance of the fact that the corporation was a foreign one, or, if foreign, that it had failed to comply with the requirements of the statute, would be to stultify the Legislature that enacted it. The Legislature had no such purpose in view. One purpose of the statute is to bring revenue

into the treasury of the state; the other is to protect citizens of the state dealing with foreign corporations by compelling them, as a condition to the right to do business in the state, to submit to the jurisdiction of the courts of the state.

It is held in the following cases that all contracts, made in this state by foreign corporations doing business in violation of section 1025, are void: *Tri-State Amus. Co. v. Amusement Co.*, 192 Mo. 404, 90 S. W. 1020, 4 L. R. A. (N. S.) 668, 111 Am. St. Rep. 511; *Mill & Lumber Co. v. Sims*, 197 Mo. 507, 95 S. W. 344; *Roeder v. Robertson*, 202 Mo. 522, 100 S. W. 1088; *United Shoe Machinery Co. v. Ramlose (Mo.)* 109 S. W. 567; *Ehrhardt v. Robertson Bros.*, 78 Mo. App. 404. In the cases of *Tri-State Amus. Co. v. Amusement Co.*, *Mill & Lumber Co. v. Sims*, and *United Shoe Machinery Co. v. Ramlose*, the suits were by foreign corporations to enforce their void contracts. In *Ehrhardt v. Robertson Bros.* the Kansas City Court of Appeals held that the indorsee of a note, made to a foreign corporation unauthorized to do business in this state, was a mere transferee of a void contract, and could no more maintain an action thereon than could the corporation. In this case the note sued on expressed upon its face that it was payable to a New York corporation, and was indorsed to plaintiff without recourse. Therefore, plaintiff took the note as dishonored paper, and with knowledge of facts that would have prompted a reasonably prudent person to make inquiries as to whether or not the corporation payee in the note had complied with the laws of this state. Plaintiff was therefore not an innocent holder of the note for value, and the question of estoppel was not in the case. Briefly stated, the facts in the case of *Roeder v. Robertson* are as follows: A New York corporation, which had not complied with section 1025, sold defendant a threshing outfit for \$2,500, upon which defendant had paid about \$900. The balance of the purchase price was represented by his notes, one of which was the note sued on in the case of *Ehrhardt v. Robertson Bros.*, *supra*. After the decision in this case the corporation, learning that it could not recover upon the other notes, made a bill of sale of the threshing outfit to Roeder, its agent, who had sold the outfit to the defendant. Roeder sued to recover the value of the threshing outfit, alleging that it belonged to him, and that defendant had wrongfully converted it to his own use. The judgment was for defendant in the circuit court, which on appeal was affirmed by the Supreme Court. In discussing the case *Woodson, J.*, writing the opinion for the court, at page 533 of 202 Mo., at page 1088 of 100 S. W., said: "He [the plaintiff] cannot successfully contend that he was a bona fide purchaser of the property. He acquired just such title and

interest in and to the property as his vendor had, and nothing more. We do not decide what would have been the effect had the appellant been an innocent purchaser." Further on (at pages 534, 535 of 202 Mo., at pages 1088, 1089 of 100 S. W.) the court said: "No corporation or citizen of this state would be permitted to repudiate a void contract of sale of merchandise, and, while retaining the purchase price, come into court, and recover the possession of the property sold, or recover the value thereof. Upon the broad principles of equity and justice restitution of the ill-gotten gains should be made before the unjust prayer for relief should be granted. The other party to the transaction should, according to natural justice, be restored to his 'status quo' before he should be commanded by the court to return the property which had been partially or fully paid for. Otherwise the vendor would have both the property sold and the purchase price, while the vendee would have only a doubtful cause of action against a foreign corporation, perhaps far away. Such a condition should not, and does not, exist under the laws of this state. Appellant cannot maintain this action without first returning, or offering to return, the payments received by A. W. Stevens & Son. *Vanstandt v. Hobbs*, 84 Mo. App. 633; *Chemical Co. v. Nickells*, 66 Mo. App. 690; *Poplin v. Clausen*, 1 Ind. T. 157, 38 S. W. 974; *Mechem on Sales*, §§ 912, 914, 1063; *Daniels v. Tearney*, 102 U. S. 415, 26 L. Ed. 187; *City of St. Louis v. Davidson*, 102 Mo., loc. cit. 155, 14 S. W. 825, 22 Am. St. Rep. 764; *O'Brien v. Wheelock*, 184 U. S. 450, 22 Sup. Ct. 354, 46 L. Ed. 636."

These principles of equity and justice apply to the facts of the case at bar. The corporation could not retain plaintiff's money and successfully assert a violation of the laws of the state as a defense against the note. By its conduct it is estopped to make such a defense against an innocent holder of the note for value, though the note be void as a contract. By assigning the note, and delivering it to the corporation to be negotiated, the appellants represented to any one to whom the note might be offered for sale that it was a valid obligation, and the corporation was the legal holder thereof, and authorized to negotiate it. It is admitted that plaintiff was an innocent purchaser of the note for value, and the record shows conclusively that that was done which the appellants expected would be done, namely, that the corporation would sell the note for a valuable consideration to an innocent purchaser. On this state of facts it would be grossly inequitable, and a gross perversion of the purpose of section 1025, to permit appellants to avail themselves of the provisions of said section as a defense to the suit; and the law is that they are estopped by their

conduct to deny the validity of the note, or the legal right of the corporation to assign it to an innocent holder for value. *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303; *Acton v. Dooley*, 74 Mo. 63; *State Bank of St. Louis v. Frame*, 112 Mo. 502, 20 S. W. 620; *Johnson-Brinkman Com. Co. v. Railway*, 128 Mo., loc. cit. 353, 28 S. W. 870, 28 L. R. A. 840, 47 Am. St. Rep. 675; *De Berry v. Wheeler*, 128 Mo. 84, 30 S. W. 338, 49 Am. St. Rep. 538; *Reynolds v. Kroff*, 144 Mo. 433, 46 S. W. 424; *State ex rel. v. Branch*, 151 Mo. 622, 52 S. W. 390; *Layson v. Cooper*, 174 Mo. 211, 78 S. W. 472, 97 Am. St. Rep. 545; *Henderson v. Koenig*, 192 Mo. 690, 91 S. W. 88; *Evans v. Evans*, 196 Mo. 1, 93 S. W. 969; *Midland Lumber Co. v. Kreeger*, 52 Mo. App. 418; *Cornwall v. Ganser*, 85 Mo. App. 678; *Fowler v. Carr*, 63 Mo. App. 486; *Dry Goods Co. v. Bank*, 81 Mo. App. 46. The statute (section 60, p. 250, Laws, 1905 [Ann. St. 1903, § 463-60]) declaratory of the law of negotiable paper clearly estops appellants from pleading section 1025 as a defense to the action. This section reads as follows: "The maker of an negotiable instrument by making it engages that he will pay it according to its tenor, and admits the

existence of the payee and his then capacity to indorse." See, also, *First National Bank of Trenton v. Gillian*, 72 Mo. 77; *St. Joseph Fire & Marine Ins. Co. v. Hauck*, 71 Mo. 465; *Higginbotham v. McGready*, 183 Mo. 96, 81 S. W. 883, 105 Am. St. Rep. 461; *Mayer v. Old*, 57 Mo. App. 639.

The judgment is clearly for the right party, and is affirmed. All concur.

THOMSON v. GAUS et al.

(St. Louis Court of Appeals. Missouri. Nov. 17, 1908. Rehearing Denied Dec. 1, 1908.)

Appeal from St. Louis Circuit Court; Jas. E. Withrow, Judge.

Action by John Thomson against Henry Gaus and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Harlan, Jeffries & Wagner, for appellants. Wm. F. Smith, for respondent.

BLAND, P. J. This case is on all fours with the case of *Young v. Gaus et al.*, 113 S. W. 735, and for the reasons stated in the opinion in that case, the judgment herein is affirmed. All concur.

MOSS & RALEY v. WREN.

(Supreme Court of Texas. Dec. 2, 1908.)

1. SPECIFIC PERFORMANCE (§ 58*)—CONTRACTS ENFORCEABLE.

A vendor may enforce specific performance of a contract for the purchase of real estate, though it stipulates that the purchaser, failing to comply with the terms thereof as to payment and as to securing the price, shall forfeit the amount paid, and the vendor shall accept the same for liquidated damages for nonperformance by the purchaser.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 179, 180; Dec. Dig. § 58.*]

2. BROKERS (§ 54*)—COMMISSIONS—WHEN EARNED.

A broker, employed to procure a purchaser of real estate, who procures a purchaser, who enters into a contract for the purchase with the vendor, which contract the vendor may specifically enforce, is entitled to his commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75-81; Dec. Dig. § 54.*]

Certified Questions from Court of Civil Appeals of Second Supreme Judicial District.

Action by D. T. Wren against Moss & Raley. From a judgment for plaintiff, defendants appeal to the Court of Civil Appeals, which certifies a question to the Supreme Court. Question answered.

C. C. Fredericks, for appellants. F. P. Powell, for appellee.

GAINES, C. J. This is a certified question from the Court of Civil Appeals of the Second District, and, in order to save copying a long statement, we undertake to state the point in the case.

The appellee, D. T. Wren, was employed as a real estate broker to make sale of certain land belonging to appellants, and, having effected, as he claimed, a sale to one Clark, brought suit for his commission. In the contract for the conveyance of the land, after specifying the price, consideration, etc., the following stipulation was inserted: "And it is further mutually agreed, in case purchaser fails to comply with the terms hereof relating to the payment and securing of the purchase price as above mentioned and by the time herein designated, purchaser shall forfeit the amount paid hereon to seller, and the same shall be paid to seller by said trustees and accepted by said seller as and for liquidated damages for such injury and damage as the seller may suffer by reason of the nonperformance of this contract on the part of the purchaser." The question certified for our determination is whether upon this contract a sale was effected, so as to entitle the appellee to his commission.

We have numerous decisions holding that, although there is a stipulation in the contract of this character, payment of a fixed sum of money as liquidated damages does not affect the contract for sale of the land, but that the seller can enforce specific per-

formance. *Hemming v. Zimmerschitte*, 4 Tex. 159; *Williams v. Talbot*, 16 Tex. 1; *Vardeman v. Lawson*, 17 Tex. 11; *Bullion v. Campbell*, 27 Tex. 653; *Gregory v. Hughes*, 20 Tex. 345. It seems to us that these decisions are decisive of the case. If the vendor of the land can enforce a specific performance of the contract to pay for it, then the broker has effected a sale, valid in law, and is entitled to his compensation. We have also examined the authorities cited in the certificate upon the same proposition and find it is amply supported by them. *Lyman v. Gedney*, 29 N. E. 282; *Hull v. Sturdivant*, 46 Me. 84; *Hooker v. Pyncheon*, 74 Mass. 550; *Ewins v. Gordon*, 49 N. H. 444; *O'Connor v. Tyrrell*, 53 N. J. Eq. 15, 30 Atl. 1061; *Palmer v. Bowen*, 138 N. Y. 608, 34 N. E. 291, affirming 63 Hun, 636, 18 N. Y. Supp. 638; *Ketterling v. Eastlack*, 130 Iowa, 498, 107 N. W. 177.

We therefore answer the question submitted in the affirmative, and say that the contract is such that appellants are entitled to have it specifically enforced, and that therefore the appellee is entitled to his commission for making the sale.

P. E. SCHOW & BROS. v. McCLOSKEY.

(Supreme Court of Texas. Dec. 2, 1908.)

1. TRIAL (§ 260*)—INSTRUCTIONS—INSTRUCTIONS ALREADY GIVEN—ISSUES.

A party is not entitled to the further submission of an issue already distinctly submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

2. MASTER AND SERVANT (§ 295*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In an action for injuries to an employé, based on defendant's negligence in failing to provide a safe machine and to warn plaintiff of the danger of operating it, an instruction that, if the room in which plaintiff was working was dark, that if the injuries were the direct result of handling the shucks in such dark room, and that if plaintiff knew of the danger of handling the shucks in such dark room, he assumed the risk of injury was properly refused as misleading, and as making the case depend wholly on the darkness of the room.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 295.*]

3. TRIAL (§ 260*)—INSTRUCTIONS ALREADY GIVEN.

In an action for injuries to an employé, the court having instructed that, if plaintiff was injured by the breaking of the belt of a cornshucking machine, and he did not know of the danger resulting from such accident, he could recover, an instruction that, if plaintiff knew that the belt had slipped or become broken, and continued thereafter to pull out the shucks, and if a person of ordinary prudence would not have done as plaintiff did, and his action was the proximate cause of his injury, he could not recover was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Error to Court of Civil Appeals of Second Supreme Judicial District.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by John McCloskey against P. E. Schow & Bros. A judgment for plaintiff was affirmed on defendants' appeal by the Court of Civil Appeals, and defendants bring error. Judgments of district court and of the Court of Civil Appeals both affirmed.

For prior report, see 109 S. W. 386.

Baker & Thomas and Jas. M. Robertson, for plaintiffs in error. Cureton & Cureton and E. B. Robertson, for defendant in error.

GAINES, C. J. This was an action for damages for personal injuries, alleged to have been received by the defendant in error by reason of the negligence of the plaintiffs in error. Plaintiffs were large mill owners in the town of Clifton, engaged, among other things, in crushing corn cobs into meal. The apparatus for this purpose was situated in a large building four stories in height and 75 feet wide by 100 feet in length. The machine which the defendant in error was working was on the second story of the building, and he was injured in attempting to remove the shucks from the machine by having his hand drawn between the coupler of the roller, and having his right hand crushed so that it had to be amputated above the wrist. He had been employed about two months by the plaintiffs in error, but it was not his business, as a rule, to run the machine by which he was injured. The machine consisted of two rollers operating very near each other, one revolving at a speed of about 450 revolutions to the minute, and the other, when properly adjusted, at a speed of about 150 revolutions to the minute. Each of said rollers, when properly in operation, turned toward the other. They were both run by bands, but when the band of the lower roller became loose, so as not to perform its office, that roller ran about the same speed as the other. When the rollers were running at their properly designated speed, they would cut up the cobs and shucks and grind them up so that there was no trouble, but if they ran at the same speed, the shucks would accumulate in there, and it would become necessary to remove them. The defendant in error testified that he had never run the machine, except for about half an hour on three or four occasions, and, on the day on which the accident happened he was called by the foreman to take his place and run the machine while he went to dinner. As the foreman was leaving for dinner, the plaintiff discovered that the belt on the lower roller was broken, and called to the foreman and notified him of it. The foreman not coming immediately to his assistance, he went ahead with the machine, and saw some shucks collecting in it, and thought it was necessary to taken them out, as he had been instructed to do, and put his hand in for that purpose, and it was drawn in between the rollers and crushed, as before stated. When he went to work for plaintiffs

in error the foreman took him all over the house in which this machine was situated, and instructed him as to the dangers of the work. The only danger he pointed out was a screw on a shaft. He told him, when they came to the machine in question, that it was a perfectly safe machine to operate, and there was no danger in it; that he was advised of no danger, neither did he apprehend any. A careful reading of the statement of facts indicates that there is no conflict in the evidence upon these matters. The place where the injury was inflicted was dark, especially if the day was at all cloudy, and the plaintiff so pleaded in his petition. He also testified: "During the different times I attended the rolls I always found it dark. Yes, I knew that it was dark. I should think that the darkness had something to do with my getting caught." The case having been submitted to the jury, they found a verdict in favor of the plaintiff for \$5,100, which was affirmed by the Court of Civil Appeals.

When we granted the writ of error in this case we were under the impression that there was error pointed out in the fifth and sixth specifications in the application for the writ. These specifications complain, respectively, of the refusal of the court to grant a special instruction in reference to the darkness of the building, and also in regard to his knowledge that the belt was broken, and sought to deny to plaintiff a right of recovery in the event that he knew of the danger of either defect and assumed the risk resulting from it. The charge in the fifth assignment of error, the refusal of which is complained of by the defendants, reads as follows: "If you believe from the undisputed evidence that the room in which the plaintiff, McCloskey, was at work was dark, as you may find from the evidence, and you believe that the injuries received by him were the direct result of handling the shucks in question in said dark room, and that a person of ordinary prudence, of the experience and discretion of the plaintiff, would not have so handled said shucks in said dark room, as you may find from the evidence, and that the plaintiff knew, or must necessarily have known, of the danger, if any, of handling said shucks in said dark room, as you may find it, you are instructed that the plaintiff assumed the risk of injury while working in a dark room, and you will find for the defendants." We incline to think that the defendants were entitled to have the issue of the risk arising from the darkness of the room submitted to the jury, but we think it was submitted in more than one paragraph of the court's charge, and a further submission of the issue was unnecessary. A defendant is never entitled to have the court argue his case for him, and when the issue is once distinctly submitted upon a question, it is all he has a right to demand in regard thereto. Be-

sides, we think that the charge refused was calculated to mislead the jury, and to make the case depend wholly upon the question of the darkness of the room in which the plaintiff was working when he was injured. The charge in the sixth assignment of error, the refusal of which is complained of by the defendants, is as follows: "If you believe from the evidence in this case that the plaintiff knew that the belt that operated one of the rolls in question had slipped off or become broken, and you believe that the plaintiff, John McCloskey, continued to pull said shucks out after he discovered the condition of said belt, and you believe that a person of ordinary prudence, of the plaintiff's discretion, must necessarily have known of the danger, if any, incident thereto, and you believe that a person of ordinary prudence, under the same or similar circumstances, would not have done as did John McCloskey in this, and it was the proximate cause of his injury, you will find for the defendants." We think the same remarks are applicable to this charge as was to the foregoing. The jury were distinctly told that, if the plaintiff was injured by the breaking of the belt, and he didn't know of the danger resulting from such accident, he could recover.

We find no other error pointed out in the application for the writ of error. Therefore the judgments of the district court and Court of Civil Appeals are both affirmed.

GULF, C. & S. F. RY. CO. et al. v. RAILROAD COMMISSION OF TEXAS.

(Supreme Court of Texas. Dec. 2, 1908.)

1. CARRIERS (§ 18*)—REGULATION—RAILROAD COMMISSION—FIXING RATES—REMEDY OF RAILROAD COMPANY—STATUTORY PROVISIONS.

Rev. St. 1895, art. 4565, provides that a railroad company dissatisfied with the decision of any rate, etc., adopted by the Railroad Commission, may file a petition setting forth the particular cause of objection to the decision, rate, etc., or to either or all of them, in certain courts. *Held*, that a railroad company in such an action is not required to attack all the rates prescribed, but may attack one rate only.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

2. CARRIERS (§ 18*)—REGULATION—RAILROAD COMMISSION—FIXING RATES—REMEDY OF RAILROAD COMPANY—STATUTORY PROVISIONS.

Rev. St. 1895, art. 4566, provides that, in actions by railroad companies to test the reasonableness and justice of rates prescribed by the Railroad Commission, the burden is on plaintiff to show by clear and satisfactory evidence that the rates complained of are unreasonable and unjust. *Held*, that it is not necessary, to show the unreasonableness or injustice of a rate attacked, to prove that the operation of the road under the rates prescribed would not produce a reasonable and just compensation for services rendered and a reasonable return upon

the investment made and money expended in carrying on the business.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

3. CARRIERS (§ 18*)—REGULATION—RAILROAD COMMISSION—FIXING RATES—ACTION TO TEST REASONABLENESS—SUFFICIENCY OF PETITION.

The company attacking the reasonableness and justice of a prescribed rate being required to show by clear and satisfactory proof that the rate is "unjust and unreasonable," the petition must allege facts and circumstances that would, if true, authorize the court to adjudge the rate unjust and unreasonable as matter of law.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

4. CARRIERS (§ 18*)—REGULATION—RAILROAD COMMISSION—FIXING RATES—ACTION TO TEST REASONABLENESS—SUFFICIENCY OF PETITION.

A petition which alleged that the hauling of lumber over the portion of the complaining company's road designated in the petition at the rate specified by the Railroad Commission would not yield sufficient revenue to pay cost of transportation, but did not state the earnings of the railroad in hauling lumber over the remainder of its road nor the amount of lumber traffic from points beyond the stations from which the objectionable traffics were prescribed, was insufficient, since the company could not select one rate and a particular part of its road for the application of the rate, and establish therefrom that the rate was not reasonable, as the rate, when applied to hauls over the entire road, might afford a profit.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 18.*]

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Suit by the Gulf, Colorado & Santa Fé Railway Company and others against the Railroad Commission of Texas to set aside certain orders of the commission establishing lumber rates. A demurrer to the amended petition was sustained, and plaintiffs appealed to the Court of Civil Appeals which certified questions to the Supreme Court. Questions answered.

Terry, Cavin & Mills, for appellants. R. V. Davidson, Atty. Gen., Claude Pollard, Asst. Atty. Gen., and Andrews, Ball & Streetman, for appellee.

BROWN, J. Certified question from the Court of Civil Appeals for the Third Supreme Judicial District as follows:

"The above styled and numbered cause is now pending in the Court of Civil Appeals of the Third Supreme Judicial District, and, as preliminary to certifying the questions hereinafter propounded, we make the following statement:

"This is a suit filed by the Gulf, Colorado & Santa Fé Railway Company, the Gulf, Beaumont & Kansas City Railway Company and the Gulf, Beaumont & Great Northern Railway Company in the district court of Travis county to set aside certain orders of the Railroad Commission of Texas concerning lumber rates to Port Arthur and Sabine

Pass, Tex. The district court sustained a general demurrer to plaintiff's amended petition, and, they declining to amend, judgment was entered for the defendant, and from this judgment the appellants have perfected an appeal to this court. The amended petition to which the general demurrer was sustained is as follows:

"The State of Texas, County of Travis.

"In the District Court of Travis County, Texas, 26th Judicial District.

"To the Honorable Chas. A. Wilcox, Judge of said Court:

"Your petitioners, the Gulf, Colorado & Santa Fé Railway Company, the Gulf, Beaumont & Kansas City Railway Company, and the Gulf, Beaumont & Great Northern Railway Company, with leave of the court first had, file this their first amended original petition, in lieu of their original petition, filed on May 24th, 1906, and, complaining of the Railroad Commission of Texas, as defendant, respectfully aver:

"(1) That your petitioners, hereinafter called the plaintiffs, are each railroad corporations, duly incorporated and organized under the laws of the state of Texas, and were such at all times hereinafter mentioned. That plaintiff the Gulf, Colorado & Santa Fé Railway Company is the lessee of and operating the railroad lines of the other plaintiffs under leases executed on or about the 1st day of December, 1903, there being a separate lease between the Gulf, Colorado & Santa Fé Railway Company and each of the other plaintiffs. That each of said leases are for a term beginning December 1, 1903, and ending the 30th day of June, 1913, subject, however, to the tenth paragraph of each of said leases, which reads: "Tenth. If either of the parties hereto at any time during the continuance of the term of this lease shall give to the other party written notice that it, the party giving such notice, elects to terminate this lease on the last day of the third month after the month during which such notice shall be given, then this lease shall terminate on the last day of such third month after the month in which such written notice shall be given, anything herein contained to the contrary notwithstanding."

"That under the terms of said leases the said Gulf, Colorado & Santa Fé Railway Company is entitled to operate the railroads and exercise all of the franchises and rights of each of the other plaintiffs. That a copy of one of said leases is filed herewith, marked "Exhibit B" and made a part hereof. That the other lease is in identically the same language, except the description of the property leased. That the Gulf, Beaumont & Kansas City Railway Company and the Gulf, Beaumont & Great Northern Railway Company join as plaintiffs herein, because the rates and orders of the said Railroad Commission of Texas hereinafter complained of affect the value of their respective properties.

That the railroad of the said Gulf, Beaumont & Kansas City Railway Company extends from Beaumont, in Jefferson county, Tex., to Rogan, in Jasper county, Tex., and that the railroad of the Gulf, Beaumont & Great Northern Railway Company extends from said Rogan, in Jasper county, to Center, in Shelby county, state of Texas. That the distance from Beaumont to said Rogan is 62.44 miles, and the distance from said Rogan to Center is 77.7 miles. That there is a spur track of the Gulf, Beaumont & Kansas City Railway extending from Call Junction, in Jasper county, Tex., to Call, in Newton county, Tex. That Kirbyville, a station on the Gulf, Beaumont & Kansas City Railway, is 52.4 miles from Beaumont. That the distance from Beaumont to Port Arthur, via the Texarkana & Ft. Smith Railway, is 19.9 miles. That the distance from Beaumont to Sabine Pass, via the Texas & New Orleans Railroad, formerly the Sabine & East Texas Railroad, is 30 miles. That on April 1, 1899, or some time prior thereto, the plaintiff the Gulf, Beaumont & Kansas City Railway Company and the Texarkana & Ft. Smith Railway Company, acting together, established a through rate of four cents per 100 pounds on lumber from Kirbyville and points between Kirbyville and Beaumont to Port Arthur, said rate, however, applying only to lumber in car loaded to a minimum of 50,000 pounds. That in the division of said rate between the Gulf, Beaumont & Kansas City Railway Company and the Texarkana & Ft. Smith Railway Company each company was allowed or was entitled to two cents. That the said rate was improvidently established in the nature of an experiment by the said Gulf, Beaumont & Kansas City Railway Company, and turned out, as hereinafter more specifically alleged, to be wholly unremunerative, unreasonable, and unjust to it, the said Gulf, Beaumont & Kansas City Railway Company. That thereafter, on or about the 18th day of March, 1900, the said Railroad Commission made an order putting in effect said rate of four cents per 100 pounds from Rogan and points between Rogan and Beaumont to Sabine Pass, with a minimum weight of only 30,000 pounds of lumber to the car, and that said order was so made against the protest and without the consent of your petitioners or any of them. That on or before the 28th day of February, 1903, the said Railroad Commission, without the consent of any of your petitioners, and over their objection and protest, made an order applying said four-cent rate to Port Arthur on car loads of lumber with a minimum weight of only 30,000 pounds to the car. That at all times herein mentioned the cars used by your petitioners and by the other railroads mentioned herein could have been safely loaded with 50,000 pounds of lumber to the car, and can be so loaded hereafter. That your petitioner, the Gulf, Beaumont & Kansas City Railway Company, applied to the said Railroad Commis-

sion for permission and authority to cancel said four-cent rate, both to Port Arthur and Sabine Pass, and that such petition to cancel such rate was denied by said Commission on April 7, 1900, and that another petition of said Gulf, Beaumont & Kansas City Railway Company to cancel said rate was denied on December 27, 1900. That on May 16, 1903, the said Railroad Commission, by its chairman, advised in writing the general freight agent of the Gulf, Beaumont & Kansas City Railway Company that no specific authority was granted by the said Railroad Commission for said rate of four cents per 100 pounds from Kirbyville and points south thereof to Port Arthur, but that, as it was applied, the said Railroad Commission had declined to authorize its cancellation, the position of the said Railroad Commission apparently being that because the railroad company had once made a mistake in putting in a rate which was too low and unremunerative that it should be compelled to continue such rate in effect unto the end of time. That on or about the 8th day of April, 1904, the said Railroad Commission, without the consent of any of your petitioners, and over their objection and protest, by an order made on the 18th day of March, 1904, put said rate of four cents per 100 pounds in effect from Rogan and points between Rogan and Kirbyville to Sabine Pass and Port Arthur. That Rogan is distant from Beaumont 62.44 miles. That on March 18, 1904, the said Railroad Commission made and served on your petitioner the following order:

““Office of Railroad Commission of Texas.

““Circular No. 2028.

““Amending Commodity Tariff No. 34.

““Rates on Lumber from G., C. & S. F. Points North of Beaumont to Sabine Pass and Port Arthur.

““(Notice, Circular No. 2015. Hearing No. 462, March 15, 1904.)

““Austin, Texas, March 18, 1904.

““It is hereby ordered by the Railroad Commission of Texas that Commodity Tariff No. 34, issued by this Commission to apply on lumber and articles taking lumber rates, in car loads, transported by railroads between points in Texas and effective May 24th, 1901, be amended by adding thereto the following item:

““Effective April 8, 1904. Rates on lumber and articles taking same rates, in car loads, from stations on the Gulf, Colorado & Santa Fé Railway north of Beaumont to Sabine Pass and Port Arthur, shall be as follows:

From Rogan and south.....4 cents
From North of Rogan to Center, inclusive 6 cents

““L. J. Storey, Chairman,

““Allison Mayfield,

““O. B. Colquitt,

““Commissioners.

““Attest: E. R. McLean, Secretary.”

““Said order was so made by said Railroad Commission without the consent and against the objection and protest of your petitioners. That on September 16, 1904, your petitioners filed with said Railroad Commission a petition protesting against the continuance of said rate of four cents per 100 pounds from Rogan and points south thereof to Sabine Pass and Port Arthur, and of said rate of six cents per 100 pounds from points north of Rogan to Sabine Pass and Port Arthur, which said petition concluded with the following prayer:

““Premises considered, your petitioners pray they be allowed to establish rates on lumber and other forest products from points of origin hereinabove referred to, to Port Arthur and Sabine Pass, which will yield your petitioners, the Gulf, Colorado & Santa Fé Railway Company, to Beaumont, not less than the Kansas City Southern Railway realizes for equal distances, viz.:

5	cents	per	hundred	pounds	for	45	to	67	miles.
6	"	"	"	"	"	67	to	110	"
7	"	"	"	"	"	110	to	153	"
8½	"	"	"	"	"	153	to	182	"

—a true copy of which petition is hereto annexed, marked “Exhibit A” and made a part hereof. That after due notice given by the said Railroad Commission a hearing was had upon said petition by said Railroad Commission, and, after having heard evidence and argument, the said Commission on May 13, 1905, made the following order:

““Hearing No. 521.

““Austin, Texas, May 13, 1905.

““Application of GC&SF Ry. Co. for increase in rates on lumber from points north of Beaumont to Sabine Pass and Port Arthur.

““The above numbered and entitled cause having been called for trial in its regular order at the February term, and the applicant and other interested parties appearing before the Commission, and the Commission having heard the evidence offered, and upon the conclusion thereof, and in pursuance of request of the parties, decision was postponed until filing of written argument upon the subject-matter of said application, and said written argument of the application having now been filed herein, and the Commission having given said application due consideration, it is of the opinion that the same should be refused.

““It is therefore hereby ordered that said application be, and the same is hereby refused and this cause dismissed.

““[Signed] L. J. Storey, Chairman,

““Allison Mayfield,

““O. B. Colquitt,

““Commissioners.

““Attest: E. R. McLean, Secretary.”

““That after due notice on January 16, 1906, the said Railroad Commission had a hearing at its office in the city of Austin

on all lumber rates prevailing in Texas, and at said hearing your petitioners again protested against the continuance of said rates hereinbefore described to Port Arthur and Sabine Pass. That on February 12, 1906, the said Railroad Commission again refused to cancel, amend, or increase the said rates, but continued the same in full force and effect. That said rates and each and all of them are unreasonable and unjust to your petitioners, and to each of your petitioners. That as aforesaid, the division of said four-cent rate only allows to your petitioners the sum of two cents per 100 pounds with a minimum of only 30,000 pounds to the car for the haul from Rogan and points south of Rogan to Beaumont, and that the division of said six-cent rate only allows to your petitioner for the haul from points north of Rogan to and including Center to Beaumont the sum of four cents per 100 pounds. That the said two and four cents per 100 pounds, respectively, are wholly insufficient to compensate your petitioners for the service performed. That the same, not only do not adequately compensate your petitioners for the service rendered in the transportation of such lumber, but that the said rates are insufficient to pay the actual expense of performing the service, and that the services under such rates are rendered by your petitioners at an actual loss. That the said rates are wholly insufficient to compensate your petitioners for the cost of the service, and the same do not enable your petitioners to earn enough for the transportation of lumber under such rates to contribute anything towards the payment of the value of the use of the said railroads, or to contribute anything towards a fair return on the value of the said railroads or the cost thereof, and are not, have not been, and will not be sufficient to pay the actual cost of transporting the lumber, without contributing anything towards the expense of the repair or maintenance of said railroads, the taxes thereon, or the interest on the value thereof, but that the effect of the said rates is, has been, and will be, to require your petitioners to give the use of the said railroads to shippers of lumber on said rates free and without any compensation, and without reasonable compensation, or any compensation whatever for the use of said railroads, either to the owners thereof or to the said lessee thereof, and at an actual loss on each car of lumber shipped on such rates, and your petitioners aver that the earnings remaining after paying operating expenses (not including in operating spurs, taxes, rentals, interest on bonds, or other indebtedness or dividend on capital stock) of said railroads at the end of each week, month, and year would have been greater during all the times mentioned herein had the lumber shipped to Port Arthur and Sabine Pass on such rates never been shipped at all, and that such will continue to be the case as long as such rates are in effect.

"That the rates herein complained of are, have been, and will be in the future, much lower than necessary to freely move the shipments of lumber. That under the rates which your petitioners so requested the Railroad Commission of Texas to permit them to charge the manufacturers of lumber and the shippers of lumber could have in the past freely shipped their lumber, and can in the future freely ship their lumber, from all stations on said lines of railroad from Center to and inclusive of the first station north of Beaumont to Sabine Pass and Port Arthur, and there sold the same heretofore shipped and can sell the same hereafter shipped at a profit of more than 25 per cent., being a much higher profit than they obtained in the past on lumber shipped to and sold at any other place or places in the state of Texas or elsewhere, and can obtain in the future by shipping lumber to and selling lumber at any other place or places in the state of Texas or elsewhere. That the manufacturers of lumber in the territory north of Beaumont to Center, inclusive of the latter place, adjacent to and tributary to said lines of railroad, could have in the past, and can in the future, manufacture and ship lumber, paying the rates thereon which your petitioners asked the Railroad Commission of Texas to establish to Sabine Pass and Port Arthur, and there have sold or sell the said lumber at a profit of at least 25 per cent., being a much higher profit than they could have realized in the past or can realize in the future by shipping lumber to and selling lumber at any other place or places in the state of Texas or elsewhere. That the effect of the unreasonably low rates complained of herein was, and is, to enable the manufacturers of lumber in said territory to ship lumber therefrom to Sabine Pass and Port Arthur, and there sell lumber at a higher rate of profit than can be obtained by shipping lumber (from the same places) to and selling lumber at any other place or places in the state of Texas or elsewhere, and have sold and to hereafter sell said lumber at Port Arthur and Sabine Pass for less prices than they sold or hereafter can sell similar lumber for at any other place or places in the state of Texas or elsewhere. That the towns or cities of Port Arthur and Sabine Pass, and the citizens thereof have been in the past, are now, and will be in the future, more wealthy, owners of more property in value per capita, and have enjoyed and will enjoy larger profits from their respective occupations and greater prosperity than any other towns or cities or the citizens thereof of similar population in the state of Texas; that is, not now and has not been since the low rates herein complained of were in effect, any pestilence, flood, storm, fire, or other calamity in said towns or cities or either of them or any fact which would justify, call for, or even suggest lower rates on lumber or other freights for the same service or dis-

tances to such towns or either of them than to other places in the state of Texas.

"That the distance between stations north of Beaumont on said lines of railroad and Beaumont are as follows; the distance set opposite each station being the distance from said station to Beaumont:

Stations.	No. of Miles.
Helbig	4
Treadway	7
Funston	8.2
Loeb	9.3
Lumberton	13.8
Fletcher	15.8
Silsbee	21
Lillard	23.8
Fords Bluff	26.7
Quinn	30.3
Buna	36.1
Bessmay	38.4
Call Junction	48
Kirbyville	52.5
Leeton	56.1
Zierath	60
Rogan	62.5
Heywood	65.5
Jasper	73.6
Horton	84.3
Browndell	87.4
Brookeland	90.7
Bronson	104.8
Venable	115
San Augustine	120.5
Duff	128.5
Neuville	131.4
Center	139.9

"That the rates on lumber established by the Railroad Commission of Texas from the above-named stations to Beaumont are as follows; said rates being in cents per 100 pounds, and the number of cents or cents and fractions thereof stated opposite each station being the rate from said station to Beaumont:

Station.	Rate.
Helbig	2 1/2
Treadway	3 1/2
Funston	3 1/2
Loeb	3 7/8
Lumberton	3 7/8
Fletcher	5
Silsbee	6
Lillard	6
Fords Bluff	7
Quinn	7 1/2
Buna	7 1/2
Bessmay	7 1/2
Call Junction	7 1/2
Kirbyville	8
Leeton	8 3/4
Zierath	8 3/4
Rogan	8 3/4
Heywood	8 3/4
Jasper	8 3/4
Horton	8 3/4
Browndell	8 3/4
Brookeland	8 3/4
Bronson	8 3/4
Venable	8 3/4
San Augustine	8 3/4
Duff	10
Neuville	11 1/4
Center	11 1/4

"That said rates so shown from said stations to Beaumont, or higher rates, have been established by the Railroad Commission of Texas and in effect during all the times

mentioned herein. That all shipments of lumber to which the rates herein last above stated are applicable are hauled by your petitioners from point of origin at Center or south thereof to Beaumont, and that the service performed by your petitioners in hauling such shipments is exactly the same as the service performed by them in hauling shipments to Beaumont that are destined to Port Arthur and Sabine Pass, and that the cost of such service is the same; that is to say, that from a given station north of Beaumont it costs your petitioners the same to haul a given quantity of lumber to Beaumont, to be delivered there to consignee, as it does to haul the same quantity of lumber from the same station to Beaumont, to be delivered to the connecting line for transportation from Beaumont to Sabine Pass or Port Arthur.

"That the said rates to Port Arthur and Sabine Pass are greatly lower than the rates established by the said Railroad Commission for similar service in the transportation of lumber in other directions and to and between other parts of the state, except the rate established by said Railroad Commission to Port Bolivar, which rate was established over the protest of your petitioners, but, as no considerable business has moved thereunder, your petitioners have not been very materially injured thereby to date. That under such low, unreasonable, and unjust rates to Port Arthur and Beaumont numerous shipments have been made in the past and are continuing to be made, and that the loss resulting to your petitioners, particularly to your petitioner the Gulf, Colorado & Santa Fé Railway Company, from having to haul lumber on such rates, amounts and will amount to at least the sum of \$1,000 per month. That if said low rates to Port Arthur and Beaumont, which are in the nature of special rates, are canceled, that the following rates established by the Railroad Commission of Texas for transportation for similar distances over two or more lines of railroad will apply, to wit:

"Through joint rates on lumber to Port Arthur and Sabine Pass:

Distance.	Rates.
24 miles and less.....	8 cents
30 " " and over 24 miles.....	9 "
36 " " " 30 "	10 "
42 " " " 36 "	11 "
48 " " " 42 "	12 "
54 " " " 48 "	13 "
60 " " " 54 "	14 "
72 " " " 60 "	15 "
84 " " " 72 "	16 "
90 " " " 84 "	17 "
Over	17 1/2 "

"That the distance from the stations on the said Gulf, Beaumont & Kansas City Railway and the said Gulf, Beaumont & Great Northern Railway to Port Arthur and Sabine Pass are as follows:

Station.	Miles to Port Arthur.	Sabine Pass.
Center	160.6.....	170.7
Neuville	152.1.....	162.2
Duff	149.2.....	159.3
San Augustine	141.2.....	151.3
Bronson	124.5.....	134.6
Brookeland	113.....	123.1
Browndell	110.4.....	120.5
Horton	104.2.....	114.3
Jasper	93.4.....	103.3
Rogan	82.3.....	92.4
Leeton	78.....	86.1
Kirbyville	72.3.....	82.4
Call Junction	67.7.....	77.8
Bessmay	58.2.....	68.3
Buna	55.9.....	66
Quinn	49.5.....	59.6
Fords Bluffs	46.3.....	56.4
Lillard	43.5.....	53.6
Silsbee	43.5.....	53.6
Silsbee Junction	40.8.....	50.9
Fletcher	35.7.....	45.7
Lumberton	33.6.....	43.7
Funston	27.9.....	38
Beaumont	19.9.....	30

"That out of said rates, if so applied, your petitioner, the Gulf, Colorado & Santa Fé Railway Company, would receive as a division or as its rate for the haul to Beaumont, to wit, 50 per cent. to 75 per cent. of said rates.

"That, under such division of rates to Beaumont which it will so receive if said low rates now in effect, are canceled, your petitioner, the Gulf, Colorado & Santa Fé Railway Company, will earn at least the sum of \$3,000 per month on shipments of lumber to Port Arthur and Sabine Pass more than it will earn if said present low rates are continued in effect. That all of the places hereinbefore mentioned are in the state of Texas.

"That the enforcement of said low rates to Beaumont and Port Arthur has pro tanto taken the property of your petitioners, said railroads, and donated or devoted the same to the use of the shippers of said lumber or Beaumont and Port Arthur without compensation, contrary to the Constitution of the United States and of the state of Texas, and the enforcement thereof in the future will have like effect, and the enforcement thereof has pro tanto deprived your petitioners of their property without due process of law, contrary to the Constitution of the state of Texas, and contrary to section 1 of the fourteenth amendment to the Constitution of the United States, and the enforcement thereof in the future will pro tanto deprive your petitioners of their said property without due process of law, contrary to the Constitution of the state of Texas and to section 1 of the fourteenth amendment to the Constitution of the United States.

"That all of the facts herein alleged were proven by evidence properly submitted to the said Railroad Commission in the hearings before said Railroad Commission hereinbefore mentioned.

"Premises considered, your petitioners pray that the Railroad Commission of Texas be cited in accordance with law to ap-

pear and answer herein, and that on a hearing of this cause judgment be entered annulling and canceling each and all of the rates to Port Arthur and Beaumont hereinbefore described and complained of, and each and all of the orders of said Railroad Commission of Texas hereinbefore described and complained of, and annulling and canceling any and all action of the said Railroad Commission of Texas hereinbefore complained of, and that your petitioners have judgment for their costs in this behalf expended, and for such other and further relief as they may be entitled to in law and in equity."

"In view of the importance to the public and the railway companies of this state of the questions certified, and on account of the importance of determining the jurisdiction and authority of the Railroad Commission in such matters, and on account of the fact that we have not fully agreed as to a determination of the questions certified, we certify to your honorable court the following questions:

"(1) Did the trial court err in sustaining the general demurrer to plaintiffs' petition? To reduce this general question to those that we especially desire the court to answer, we propound the following additional questions:

"(2) Was it necessary for the plaintiffs, in attacking the order of the Railroad Commission fixing the rates in question on lumber between the points named in the petition, as unjust and unreasonable, to allege that the entire body of rates on other commodities was unjust and unreasonable? Or, in other words, that the rates on other commodities transported would not furnish the railway companies a reasonable earning or profit on the investment, considering as embraced in the term 'investment' all matters upon and for which the railroads would be entitled to an earning or profit?

"(3) Repeating this last question in a different form, we suggest that as the plaintiffs' petition alleges that, by reason of the order of the Commission, the railway companies were required to transport lumber under the rates in question without some compensation for such services, or at a loss of \$1,000 a month, was it necessary, in order to show that such order was unreasonable and unjust, to further allege and show that from other commodities transported by the railroads there would not result a reasonable profit or earning?

"(4) Would an order of the Railroad Commission fixing rates for transportation of a commodity which would result in a loss for such services to the railway companies of a sum alleged in plaintiffs' petition, or that would not furnish the railway companies for such services performed some compensation therefor, have the effect of depriving the railway companies of their property without due process of law?

"(5) Would it be just and reasonable to the

railway companies, or would it be a fair and just discrimination, or would it be in effect class legislation, to require the railway companies to transport commodities of a certain class of shippers at a loss to the railway companies, or at a fixed rate that would not furnish to the railway companies some compensation for the services rendered?

"(6) Would it be lawful, just, and reasonable for the Railroad Commission by its order to permit a shipper or class of shippers to have his or their traffic transported for less than the cost of carriage, and without any compensation to the carrier for the services performed, or the value of the property devoted to the use thereof, expecting the carrier to obtain a fair compensation for the general use of its property from other shippers?

"We desire to explain that, in using the expressions 'traffic,' 'commodity,' and 'shipment' in the foregoing questions, we merely intend to apply these terms to domestic shipments within this state, and do not intend that they shall be considered in connection with interstate traffic. The court's attention is called to this in view of the rule announced in *Smyth v. Ames*, 169 U. S. 66, 18 Sup. Ct. 418 42 L. Ed. 819, and *Minneapolis & St. Louis R. R. Co. v. Minnesota Railroad & Warehouse Commission*, 186 U. S. 260, 22 Sup. Ct. 900, 46 L. Ed. 1155.

"These questions, in our opinion, are all raised by the appellants in their briefs."

The first question propounded presents the whole case, to which we answer, the court did not err in sustaining the general demurrer to plaintiff's petition.

This action is authorized by the following sections of the Revised Statutes of 1895:

"Art. 4565. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the Commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification or order, or to either or all of them, in a court of competent jurisdiction in Travis county, Texas, against said Commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending; provided, that if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice.

"Art. 4566. In all trials under the foregoing article the burden of proof shall rest up-

on the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them."

It will be observed that the railroad company under these sections had the right to attack any rate, or it might have attacked any number or all of the rates prescribed for it by the Railroad Commission as being unreasonable and unjust. It is plain from the terms of the law that the railroad company was not required to attack all of the rates prescribed, nor it is necessary in order to show the unreasonableness or injustice of the rate attacked to prove that the operation of the road under the rates prescribed will not produce a reasonable and just compensation for services rendered by the company to shippers and a reasonable return upon the investment made and the money expended in carrying on the business. *R. R. Commission v. H. & T. C. Ry. Co.*, 90 Tex. 352, 38 S. W. 750; *Same v. Weld & Neville*, 96 Tex. 403, 73 S. W. 529. While the railroad company had the right to call in question the one rate, it was required to show by clear and satisfactory evidence that the rate so attacked was "unjust and unreasonable." It follows that the petition must contain allegations of such facts and circumstances as would, if true, authorize the court to adjudge the rate to be unjust and unreasonable as a matter of law. The petition in this case alleges that in hauling lumber over that portion of its road, designated in the petition, at the rate specified by the Commission, will not yield a sufficient revenue to pay the cost of transportation. There is nothing in the petition to show what were the earnings of the railroad in hauling lumber over the remainder of its said railroad. It does not show the amount of lumber traffic carried over that road from points beyond the stations designated from which the objectionable tariffs are prescribed. It may be, and doubtless is a fact, that trains which start from points beyond the specified stations take up and carry as a part thereof cars loaded with lumber destined to Beaumont or Port Arthur, thus the operation of that train may yield a sufficient profit to make the rates reasonable, whereas, taken separately, the rate from any one of the points, if carried by separate trains, would not be reasonable. It may be true that such freight, though not remunerative, considered alone, would, when thus carried, contribute to the cost of such train to a degree that would be reasonable compensation. Therefore it cannot be held upon the facts stated unreasonable and unjust as a matter of law. The railroad company cannot select one rate and a particular part of its road for the application of that rate, showing thereby the deficiency in profit, and from that establish that the rate is not reasonable. *St. L. & San Francisco Ry. Co. v. Gill*, 156 U. S. 665, 15 Sup. Ct. 484, 39 L. Ed. 567. In the case cited

the court said: "The company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated."

We think it unnecessary to discuss the other questions submitted.

AUTRY et al. v. REASOR et al.

(Supreme Court of Texas. Dec. 2, 1908.)

1. APPEAL AND ERROR (§ 1012*)—REVIEW—FINDINGS OF FACT—CONCLUSIVENESS.

Where evidence on a question was such that the trial court was not bound to give it credence, its finding of fact thereon is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8990-8992; Dec. Dig. § 1012.*]

2. HOMESTEAD (§ 60*)—PROPERTY CONSTITUTION—USE AS HOME.

Under Const. art. 16, § 51, providing that a rural homestead may be one or more parcels, but that it shall be used for a home, or as a place to exercise the calling or business of the head of a family, to constitute rural land a homestead it must be used for some one purpose of a home, either by cultivating it, using it directly for raising family supplies, or for cutting firewood and the like.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 88; Dec. Dig. § 60.*]

3. HOMESTEAD (§ 168*)—FORFEITURE—RENTING PREMISES.

The renting of a portion of a rural homestead deprives the rented part of its homestead character.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 333, 334; Dec. Dig. § 168.*]

On rehearing. Former opinion reversed, judgments of lower courts reversed, and cause remanded for a new trial.

For former opinion, see 108 S. W. 1162.

GAINES, C. J. At the last term of this court opinion was rendered in this case, affirming the judgments of the lower courts. A motion for a rehearing has since been filed, in which it is pointed out that we overlooked the findings of fact as found by the trial court and Court of Civil Appeals. The criticism of the opinion is correct. The trial court distinctly found that "John J. Reasor never cultivated the 39 acres of land, or any part of it, by himself or through any one else, but rented the same from time of the purchase to the time of his death to yearly tenants, who paid for the use of the same the usual rental of one-third and one-fourth of the crop. John J. Reasor occasionally hauled his part of the crop to his residence on 90 acres, and he used the same for the support of his family. This use of the 39 acres by John J. Reasor, renting it and

using the rents for the support of himself and family, made it a part of the homestead." There was, however, evidence in the record that Reasor was seen cultivating the land, and following this, and not having in mind the finding of the trial judge, we so stated the facts in our opinion. The evidence to which we refer, while undisputed in a certain sense, is of such a character that we do not feel that the trial judge was bound to give it credence. Therefore his finding upon the facts must be conclusive upon us, and the circumstances of cultivation by the defendant upon which the former opinion relied in part cannot be considered. Under these circumstances we are of opinion that the facts established by the evidence are not sufficient to show that the 39 acres of land was a part of the homestead of the father of the defendants in error.

In defining what shall constitute a homestead, section 51 of article 16 of the Constitution expressly provides that the rural homestead may be one or more parcels, but at the same time provides "that the same shall be used for the purposes of a home, or as a place to exercise the calling or business of the head of a family." It is clear, therefore, we think, before a homestead can be claimed upon land, it must be used for some one purpose of a home, either by cultivating it, using it directly for the purpose of raising family supplies, or for cutting firewood and such like. The alleged fact that the father of the defendants in error cultivated the tract in question, having been found against the defendants in error by the trial judge, we find no evidence that the land was used for the purpose of a home, other than that the proceeds were probably used in support of the family. In the case of Blum v. Rogers, 78 Tex. 530, 15 S. W. 115, we held that the building of a house within a town on a certain lot and renting it deprives it of its homestead character. We see no reason why the same rule should not apply to a rural homestead. Any expressions in our former opinion to the contrary are now withdrawn.

We accordingly reverse the judgment, and remand the cause for a new trial.

HONAKER et al. v. JONES.

(Supreme Court of Texas. Dec. 2, 1908.)

1. VENDOR AND PURCHASER (§ 253*) — VENDOR'S LIEN—EFFECT OF INCLUSION OF PERSONAL PROPERTY.

Where land and chattels are sold for a gross amount, the reservation of a vendor's lien in the deed and purchase-money notes for the entire amount creates a contract lien, which binds the land for the whole amount of the notes, with interest and attorney's fees provided for therein.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 253.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. VENDOR AND PURCHASER (§ 257*) — VENDOR'S LIEN—ABSOLUTE DEED AS MORTGAGE.

A deed reserving a vendor's lien has the effect of a mortgage, and renders the transaction executory.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 257.*]

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. E. Jones against J. N. Shelton and others. From a judgment for plaintiff, defendants W. B. Honaker and another appeal to the Court of Civil Appeals. On certified questions from the Court of Civil Appeals.

Garnett & Hughston, Smith & Wilcox, and D. P. Johnson, for appellants. Wm. M. Jones, for appellee.

BROWN, J. This is on certified questions from the Court of Civil Appeals of the Fifth Supreme Judicial District. The statement and questions are as follows:

"This suit was instituted by the appellee, Jones, to recover of J. N. Shelton the amount of three promissory notes, and to foreclose as against the said Shelton and the appellants, Honaker and Herrin, the vendor's lien, claimed as security for the payment of said notes, upon two lots of land situated in Farmersville, Collin county, Tex. Two of said notes bore date December 14, 1893. They were for the sum of \$1,000 each, and payable, respectively, on the 14th day of December, 1895 and 1896, with interest at the rate of 10 per cent, per annum, payable annually, and provided for 10 per cent. thereof additional as attorney's fees, if placed in the hands of an attorney for collection. Each of said notes recited that it was for purchase money of a 'livery stable and outfit with two lots of land situated in Farmersville, Collin county, * * * upon which the vendor's lien is expressly retained to secure the payment hereof.' The other of said notes is for the sum of \$260.75, bears date June 10, 1903, and was given for a balance of interest that was due and payable on said first-named notes, on the 10th day of June, 1903. This note also bore interest at the rate of 10 per cent. per annum, and provided for 10 per cent. as attorney's fees if placed in the hands of an attorney for collection, but it did not expressly give or recite any lien on the 'livery stable and outfit' or upon the lots of land mentioned in the other notes. Upon the back of each of the two first notes referred to above was the following indorsement: 'I hereby acknowledge that there is due on this note the sum of one thousand (\$1,000.00) dollars, and I agree to pay the same, together with 10 per cent. interest per annum from this, the 10th day of June, 1903. J. N. Shelton.' In their amended answer, filed in lieu of the original answer, and upon which the case went to trial, the defendants did not plead the statute of lim-

itations. It also appears that a deed was executed by appellee, Jones, on the 14th day of December, 1893, by which the two lots mentioned in the \$1,000 notes described were conveyed to J. N. Shelton. This deed recites said two notes as a part of its consideration and that a vendor's lien is expressly reserved to secure their payment. In the notes sued on, as stated, it appears upon the face of each of the \$1,000 notes, that it was given for a 'livery stable outfit' and two lots of land, and by parol evidence it was shown without contradiction that the 'livery stable outfit' consisted of horses, harness, buggies, and other vehicles. The whole property, real and personal, was sold for the aggregate sum of \$6,500, and it does not appear what proportion of said sum was for the land; nor was the reasonable value of the land, or of the personal property, at the time of the sale or at the time of the trial, shown. In other words, the evidence simply shows that the land and the 'livery stable outfit,' consisting of horses, harness, buggies, and other personal property, were sold for the lump sum of \$6,500, and the notes sued on taken as a part of the consideration therefor. The trial court instructed the jury to return a verdict in favor of the plaintiff for the amount of the notes (less the attorney's fees claimed on the two \$1,000 notes), together with a foreclosure of the vendor's lien on the land, and the appellants have appealed. The record shows that the court correctly directed the verdict of foreclosure if the lien existed upon the land for the full amount due on the notes.

"Question 1. Did the trial court, under the facts stated, err in directing a foreclosure of the vendor's lien on the land?"

"Question 2. When a vendor seeks to enforce his lien for the collection of a note, which was given in part for land and in part for chattels or personal property, where such lien is expressly reserved in the note and the deed conveying the land, is it incumbent upon him, in order to have a foreclosure of such lien upon the land, to show how much of the note was given for the land?"

"Question 3. If in such case there was no agreement between the parties, at the time of the sale, fixing the value of the land or of the personal property, will the vendor be allowed to show by proper evidence what proportion the value of the land bore to the whole value of the property sold, and have his foreclosure on the land, for such proportionate amount?"

"Question 4. Does the transaction constitute a contract lien upon the real estate for the payment of the full amount due on the notes?"

To the first and fourth questions we answer: The reservation of the lien upon the land in the deed and notes constituted a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

contract lien, which is equivalent in its effect to a mortgage upon the land, and binds the land for the whole amount of the two notes, with interest and attorney's fees. 3 Pomeroy's Eq. Jur. §§ 1256, 1257; Helm v. Weaver, 69 Tex. 143, 6 S. W. 420; Bergman v. Blackwell (Tex. Civ. App.) 23 S. W. 243; Baker v. Collins, 4 Tex. Civ. App. 520, 23 S. W. 493; Lippencott v. York, 86 Tex. 276, 24 S. W. 275. In section 1257 of Pomeroy's Equity, above cited, this language is used: "This peculiar species of lien differs essentially from that which equity raises by implication in favor of the grantor, since it is based upon and created by express contract. It is in all essential elements a mortgage. The deed is made to embody an informal mortgage or defeasance, and is thus prevented from being absolute so long as the price remains unpaid." This principle has been recognized and enforced by a long line of decisions of this court, wherein it has been held that the reservation of a lien on the face of the deed or notes has the effect of a mortgage and makes the transaction executory. In Lippencott v. York, cited above, a husband and wife entered into a written contract for improvements to be made upon their homestead, which was executed according to the statute, and fixed a mechanic's lien on the homestead. The contractor transferred that contract to another, and the owners of the homestead took up the mechanic's lien contract and executed in lieu thereof new notes and a deed of trust on the homestead. The statute then in force required suit to enforce the mechanic's lien to be instituted within one year, which was not done in this case, and it was claimed that the lien was discharged. This court held that, although the mechanic's lien could not be enforced, the notes and deed of trust constituted a contract lien on the homestead that was valid. This is analogous to the question we have. The notes, as a whole, may not have been for the purchase money of the land, and therefore would not have a vendor's lien, strictly speaking, except for a portion; yet the contract lien is valid for the entire amount. Helm v. Weaver, cited above.

The lien being reserved in the deed and notes, and all of the other facts being established necessary to entitle the plaintiff to a foreclosure, the court did not err in instructing the jury to return a verdict in favor of the plaintiff for a foreclosure of the lien.

LINDLY v. LINDLY et al.

(Supreme Court of Texas. Dec. 2, 1908.)

1. INSANE PERSONS (§ 94*)—ACTIONS—APPOINTMENT OF GUARDIAN AD LITEM.

Independent of Rev. St. 1895, art. 1211, requiring the appointment of guardians ad litem for defendants who are minors, lunatics, idiots,

or persons non compos mentis, the court may permit a next friend to file an answer for a defendant who, by reason of mental or bodily infirmity, is incapable of caring for his interests in the litigation.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 164; Dec. Dig. § 94.*]

2. APPEAL AND ERROR (§ 919*)—REVIEW—PRESUMPTIONS.

Where S., a defendant in partition, answered disclaiming interest in the land to be partitioned, and thereafter another of the defendants filed an answer as next friend for S., alleging that she had an interest in the property, that she was 88 years of age, and was infirm in mind and body, and that her disclaimer was procured by plaintiff by fraud and undue influence, the action of the court in denying plaintiff's motion to strike the answer of the next friend will not be reversed on appeal by plaintiff, where the record fails to show that the ruling of the court was not based on evidence adduced on such motion, since it will be presumed that the court made proper inquiry.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3713; Dec. Dig. § 919.*]

3. APPEAL AND ERROR (§ 900*)—REVIEW—BURDEN OF SHOWING ERROR.

All presumptions consistent with the record are in favor of conclusions of the trial court, and parties claiming error must make it appear by the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3667; Dec. Dig. § 900.*]

4. APPEAL AND ERROR (§ 1042*)—REVIEW—HARMLESS ERROR—PARTIES.

S., a defendant in partition, answered, disclaiming interest in the property, whereupon another defendant filed an answer as next friend for S., alleging that S. was old and infirm, and that plaintiff had procured the disclaimer by fraud and undue influence. Held, that the action of the court in overruling plaintiff's motion to strike the answer of the next friend will not be reviewed on appeal, on the ground that the interests of the next friend, according to the pleadings, were adverse to those of S., where the record shows that the next friend in fact had no interest in the property, and so admitted on the trial, and it does not appear that such admission was not brought to the attention of the court on the hearing of such motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4112; Dec. Dig. § 1042.*]

5. APPEAL AND ERROR (§ 877*)—REVIEW—PERSONS ENTITLED TO ALLEGE ERROR.

Where S., a defendant in partition, answered, disclaiming interest in the property, and another defendant, as next friend, filed an answer on behalf of S., alleging that S. was old and infirm, and that such disclaimer was procured by plaintiff by fraud and undue influence, plaintiff could not complain, on appeal, of the denial of his motion to strike the answer filed by such friend.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8560; Dec. Dig. § 877.*]

6. HUSBAND AND WIFE (§ 266*)—COMMUNITY PROPERTY—CONVEYANCE BY HUSBAND.

A husband may convey a life estate in community property to his wife, with remainder to their children.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 926; Dec. Dig. § 266.*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Suit for partition by J. M. Lindly against Harlin Lindly and others. From a judgment

for defendants (109 S. W. 407), plaintiff brings error. Affirmed.

H. C. Connor, Bennett & Jones and Thompson & Manning, for plaintiff in error. Looney & Clark, T. D. Starnes, and Mulkey & Hamilton, for defendants in error.

WILLIAMS, J. This suit was brought by plaintiff in error for partition of several tracts of land, of which he alleged he was the owner of one half and the defendants of the other half. The defendants were his mother, Mrs. Sallie Lindly, and other children and descendants of herself and Jahu Lindly, her deceased husband. An answer was filed in the name of Mrs. Sallie Lindly on February 4, 1907, alleging that she had conveyed all her interest in the land to plaintiff, reserving only the rent for the year 1906; that she did not claim any part of her deceased husband's interest therein; that her husband had died in 1906, leaving her in possession of all of the land, and that she had collected the rents for that year, for the balance of which, after deducting expenses, debts, and taxes, she offered to account. She also asked that the lands be partitioned between plaintiff and her codefendants, and that she be relieved of further responsibility, claiming nothing for herself. This answer was signed by Mrs. Lindly in person. Among the defendants were Mrs. Mellie Jernigan, a daughter of Jahu and Sallie Lindly, and her husband, Asa Jernigan. On February 12, 1907, an answer was filed for Mrs. Sallie Lindly by Asa Jernigan, as her next friend, seeking, upon allegations which would be sufficient, if properly set up by Mrs. Lindly or in her behalf, to authorize the cancellation of deeds executed by her to plaintiff on the 6th day of April, 1906, purporting to convey her community interest in the property in controversy, on the ground that they were procured by fraud and undue influence on the part of plaintiff. It was also alleged in the answer that Mrs. Lindly was entitled to a life estate in the property, the reason for which is not given, but appears from the answers of the defendants other than Mrs. Lindly. As the reason for the appearance of the next friend, it was alleged that Mrs. Lindly was 88 years of age, and so weak and infirm in mind and body that she was unable to comprehend her rights of property or to manage her affairs, and that the answer previously filed in her name had been procured by fraud and undue influence of plaintiff. The answer prayed for the cancellation of the deeds and for the appointment of a receiver to take charge of and manage the farms. On the 6th day of May, 1907, two motions were filed to strike out the answer just stated, one by the plaintiff, and one in the name of Mrs. Sallie Lindly, signed by an attorney for her. The ground stated in the motion of plaintiff is that "neither Jernigan nor any one has authority on his

own motion to represent her as next friend," if she is of weak mind, which is denied. The reasons assigned in Mrs. Lindly's motion are that Jernigan had no authority to act as her next friend; that she was in court by herself and by counsel of her own choice, and was able and competent to look after her own interests, and Jernigan was not authorized by her to file the answer. On the same day the defendants other than Mrs. Lindly, including Jernigan and wife, filed answers, in which they alleged, in substance, that prior to January 28, 1899, Jahu Lindly and wife had conveyed to plaintiff, as gifts, lands out of their community estate, and that on that day Jahu Lindly executed and delivered a deed, which was accepted by Mrs. Sallie Lindly and the other grantees, by which he conveyed, in consideration of love and affection, a life estate in the lands in controversy to Mrs. Sallie Lindly, and the remainder in fee to be equally divided between them at her death to those of their children to whom land had not previously been conveyed as gifts; that Mrs. Lindly had claimed the land under this deed until her husband's death, which occurred March 19, 1906, and for some time thereafter; that these defendants had never received any gifts as referred to in the deed, and that therefore the land belonged to Mrs. Lindly for life, and to them in fee after her death, and plaintiff had no interest in it. On the same day Mrs. Lindly, by attorney, filed a supplemental answer, in which she excepted to the answer filed by Jernigan as next friend because it showed no authority in him so to act, and in which she denied the allegations of that answer, and specially alleged that, while she is aged and infirm in body, she is, and has at all times been, of strong mind and memory, competent to transact business, and capable of understanding her property rights and of dealing with reference thereto; that she understood the answer filed by her and the deed which she made to her son which was done of her free will and accord without undue influence or persuasion on part of plaintiff or any one else; and that it was and is her desire that he have her undivided interest in the land. At the same time the plaintiff filed a reply to the plea of Jernigan as next friend, denying all of its allegations, and also filed a reply to the answer of the defendants, setting up the deed from Jahu Lindly, and alleging that it conveyed only his half of the land, but that, if it purported to convey all, Mrs. Lindly understood it to convey only her husband's half, and, if she ever accepted or acted on it, she did so in that belief, and in ignorance of the fact that it affected her interest, and without any intention of giving up her interest; that she and her husband at the date of the deed were over 80 years of age, and her life expectancy so short that a life interest was of but little value, while her community interest

was worth \$15,000, and that Jahu Lindly and his wife continued thereafter to live together as husband and wife in the possession and use of the land for 6 or 7 years, and until his death. On the 7th day of May, 1907, the motions to strike out the answer of Jernigan as next friend were overruled, and exceptions were reserved. The record contains nothing showing affirmatively what was or was not done by the court, in acting on the motion, to ascertain the facts upon which might depend the propriety of allowing Jernigan to act in the capacity of next friend for Mrs. Lindly. The cause was tried by jury, and was submitted to them upon special issues, one of which directed them to find whether or not, at the date of the deed from her to plaintiff, April 6, 1906, she was incapable of understanding and appreciating her property rights to such an extent as to render her unable to exercise her free and unbiassed will with respect to same, and another of which stated this question: "At the time of the execution of the deeds by Sallie Lindly to John Lindly, on the 6th day of April, 1906, did Sallie Lindly have sufficient mental capacity to understand and appreciate her property rights and the nature and effect of said deeds"—both of which were answered by the jury in the negative. Issues were also submitted intended to determine the effect of the deed of Jahu Lindly to Sallie Lindly and certain of their children. The facts found by the jury concerning that deed were, in substance, that it was delivered and assented to by all of the grantees, and that Mrs. Lindly accepted it and claimed the land under it, but that she did not know or believe that the acceptance of it would in any way affect her community interest in the land.

The plaintiff in error complains of the overruling of his motion to strike out the plea of Asa Jernigan wherein, as next friend, he attempted to represent Mrs. Lindly. The facts set up in the plea undoubtedly were such as to make it proper for the court, if it found them to be true, to see that her interests were properly protected by some fit person. Article 1211, Rev. St. 1895, requires the appointment of guardians ad litem for minors, lunatics, idiots, or persons non compos mentis where they are defendants. Mrs. Lindly was neither, unless, by a liberal interpretation of the words "non compos mentis," they could be held to embrace a person whose mental condition is such as hers was alleged to be. It is unnecessary that this be definitely determined, for reasons which will be stated later. But we may say that the rules of practice in courts of equity permit the representation by next friend of parties to suits who, though not non compos mentis, are, by reason of mental or bodily infirmity, incapable of properly caring for their own interests in the litigation (*Lamb v. Lamb* [N. J.] 23 Atl. 1009; *Owings' Case*, 1 Bland [Md.] 370, 17 Am. Dec. 311; *Howard v. How-*

ard, 87 Ky. 616, 9 S. W. 411, 1 L. R. A. 610; *Isle v. Cranby*, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513, and authorities cited in note to last case); and it would seem that, where the court permits this to be done, and there is no other objection to the proceeding but that the representative was not expressly appointed as guardian ad litem, this ought not to furnish sufficient reason for disturbing the judgment.

It is urged that it was not competent for the court, upon the mere allegation of the incapacity of Mrs. Lindly, which was controverted by her, to take from her the management of her own affairs without inquiry into the truth of the allegation. If she were the party complaining, and the record showed that which is assumed in the contention, that the court made no such inquiry, it may be that it would have to be sustained. In the cases of *Howard v. Howard* and *Isle v. Cranby*, supra, conditions very similar to those in this record were presented. In the first case *Mat Howard*, as next friend of *Elijah Howard*, brought suit against *John Howard* for the purpose of setting aside a deed executed to him by *Elijah Howard*, on the ground that the latter when he made it was, from age and disease, too weak in mind to understand its nature and to resist the arts of the grantee, who exercised them for the purpose of defrauding the grantor into making it. *Elijah Howard* filed an affidavit that he was not of weak or unsound mind; that he understood the nature of the deed; that it was for a valuable consideration, and he wished it to stand; that the suit was instituted without his authority, and he wished it dismissed. He accordingly moved the court to dismiss it, but the court overruled his motion. He then tendered and asked leave to file an answer, in which he set up the same facts, but the court overruled the motion to file it. In the other case *Isle*, as next friend of *Henrietta Sackman*, presented a bill against *Cranby* to compel the latter to account for property in her possession belonging to *Sackman*, which bill was accompanied by a motion for the appointment of *Isle* as next friend to represent *Sackman*, on the ground that the latter, because of unsoundness of mind, was incapable of caring for her estate. The appointment was made and the bill was filed, and thereupon *Sackman* appeared by solicitor and moved the court to dismiss it. *Isle*, the next friend, then moved the court to set the motion to dismiss down for a hearing, for the purpose of determining the mental condition of *Sackman*. The court refused to do this, and dismissed the bill. Upon appeal the action taken in each case was held to be erroneous. In the first case by the Court of Appeals of Kentucky, and in the second by the Supreme Court of Illinois. Each court held that the jurisdiction of the trial court to entertain the suit by next friend was not ousted by the objection of the person represented, and both

held that inquiry into the mental condition of that party should have been made in order to determine the propriety of allowing the next friend, rather than the person he assumed to represent, to control the proceeding. The Kentucky court used this language, which, in most part, was quoted with approval by the Illinois court: "The law presumes an adult person to be of sound mind and capable of managing his own affairs; and the mere fact that it is alleged, in a petition by a person styling himself 'next friend,' that a particular individual, who is an adult, is of weak or unsound mind, and not capable of taking care of his own affairs, does not destroy that presumption. Such petitions are brought in the name of the person alleged to be of weak or unsound mind, by his next friend; and it is to be presumed, in the absence of anything appearing to the contrary, that whatever consent to the bringing of the suit such person is capable of giving has been obtained, and that it is in fact his suit—for it is really in his name—and that he has obtained the consent of a friend as the most competent person, by whom he wishes his case to be conducted in order that his rights may be the better protected. But he makes known to the court that it is not his suit; that he is competent to take care of his own affairs; that the supposed friend is in fact an intermeddler. The court, in such a state of the case, is presented with the question, What is the proper course to pursue? The individual liberty of the person is involved. His right to dispose, by himself (provided he does not interfere with the rights of others), of his property, by sale, gift, or otherwise, as he pleases is at once recognized as an absolute right, which he cannot be deprived of by any court of the land—not even the highest—unless it be made to appear that he by age, disease, or other cause has ceased to be a man, by so far losing his mind as to be incapable of taking care of his property, and has become the victim of shrewd and designing persons. But when he puts in issue the fact that he has thus ceased to be a man, and has become a mere hulk, how is the fact to be determined? It seems to us that the issue which thus involves his personal liberty should be settled by his peers—a jury of his country, or for that purpose the chancellor should issue his writ out of chancery, directing an inquiry by a jury into the fact as to whether the mind of the person was so impaired by age, disease, or otherwise as to render him incapable of understanding and appreciating his property rights to such an extent as to render him unable to protect himself against designing persons; and, upon the verdict of the jury if in the affirmative, the chancellor should appoint a committee for the person, and allow him to prosecute the suit in his name; but, if the verdict should be in the negative, then the suit should be dismissed, unless the court, from the evidence before

the jury, should deem it proper to take other steps in reference to the matter. It will be readily seen from what has been said that the chancellor erred in not, upon the issue raised by Elijah Howard, taking the course above indicated." The Illinois court reached the same conclusion as to the necessity of an inquiry, but held that it was permissible, either for the judge, acting as chancellor, to make it, or for the question as to mental capacity to be submitted to a jury. This would seem to be correct under the equity practice (*Smith v. Carll*, 5 Johns. Ch. [N. Y.] 118), but whether the right of trial by jury upon such an issue would exist under our law is a question of importance which we are not now called upon to decide.

If Mrs. Lindly herself were now before this court complaining of the action taken below, we should have difficulty in finding in the record affirmative evidence of error. All presumptions consistent with the record are in favor of right action on the part of the trial court, and parties claiming error must make it appear by the record. It does not appear that other action was invoked upon the question of Mrs. Lindly's mental condition, than that taken upon the motions to strike out Jernigan's plea, and, as to them, it only appears that they were overruled. It might be presumed that the court sufficiently inquired to inform itself of Mrs. Lindly's ability to act for herself. It is said that Jernigan was adversely interested, and it is true that, as the pleadings stood, he appeared to have interests through his wife adverse to the claims of Mrs. Lindly, and it is also true that courts should not allow the representation of parties to suits by those adversely interested, but should see that such representatives are not only disinterested, but are fit and competent. But it appears that Mrs. Jernigan in fact had no interest in the property in litigation, and admitted the fact in the course of the trial, having received her portion of her parents' estate before any of these controversies arose; and, for all the record discloses, this may have been brought to the attention of the court before it acted on the motions. But we are of the opinion that the plaintiff in error has no right to complain of the action taken in reference to Mrs. Lindly. This question also was decided in *Howard v. Howard*, before referred to. In that case Elijah Howard appealed, but died, and his heirs became parties in his stead before the appeal was decided, and asked that the judgment setting his deed aside be affirmed. The court held that John Howard, the grantee in the deed, could not complain of the error committed against Elijah, and that the only question remaining was as to the sufficiency of the evidence to sustain the judgment annulling the deed. Since Mrs. Lindly did not appeal in this case, it may be assumed that she is satisfied with the judgment, and we cannot agree with the conten-

tion that there was no evidence to justify the cancellation of the deed from her to plaintiff in error. There was evidence to justify the submission of all of the special issues passed upon by the jury involving the validity of that deed.

The remaining contentions of plaintiff in error raise questions affecting the validity of the deed from Jahu Lindly to Sallie Lindly and others. The mere reading of the deed makes it evident, that it undertook to convey the entire title to the several tracts of land, and not merely the half interest of Jahu Lindly therein. It speaks for itself, and must operate according to its terms. There being no pleadings or evidence that it was executed in fraud of the rights of Mrs. Lindly, or that she was incapable of understanding its terms when it was delivered to and accepted by her, her testimony and the finding of the jury that she did not understand that it affected her community interest cannot be allowed to limit its effect.

It is further contended that such a deed between husband and wife is invalid in law. To this we do not assent. It must be admitted that the husband has power to convey to the wife community property and thereby make it her separate property. It must likewise be admitted that parents have power to make advancements or gifts to their children out of their community estate. When the property so advanced or given is land, the only person who can convey it is the husband. Hence, if Jahu Lindly had conveyed the entire estate in these lands to either the wife or the children, the deed could not be questioned on the ground merely of want of power in him to convey. In what way does the fact that with the consent of all parties such estate was divided into a particular estate for life and a remainder affect his power to convey it? It may be answered that, while the wife, because of her capacity to acquire and hold property in her separate right, has capacity to accept a deed from her husband which merely conveys to her, she has not capacity to agree to one by which the husband undertakes to convert her half interest in community property into a life estate in the whole and to convey the remainder to others. But this leaves out of sight the unquestioned power of the husband to convey to the children. Certainly that power includes the one to limit the grant to the children so that it will vest in them only the remainder preceded by the particular life estate vested in the wife. This power of conveyance in the husband is, of course, subject to a limitation that will restrain him from defrauding the wife of her rights in the community estate, but no case is made to defeat this deed upon such a ground. If there is any limitation but this upon his power to dispose of community lands, it is not found in the principle which

denies the capacity of the wife to contract generally. The capacity which she has to take title through conveyances from the husband, which capacity is fully established by the decisions of this court, includes that to contract with him so far as it is involved in consenting to and accepting the deeds. We have no question in this case as to the power of the husband to divest her interest in community lands otherwise than by deed consented to and accepted by her, through which they have exercised their right to make provision for her and at the same time for their children. We can entertain no doubt of the existence of that power.

Finding no error which entitles plaintiff in error to a reversal, the judgment will be affirmed.

Affirmed.

HOLCOMB v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. HOMICIDE (§ 49*)—"MANSLAUGHTER"—ACTS CONSTITUTING.

If, when he killed decedent, accused was incapable of cool reflection because of decedent's insulting language and conduct toward accused's wife, knowledge of which had just come to him, or if the unwarranted ejection of accused from decedent's house, accompanied by kicks from decedent, infuriated accused beyond cool reflection, resulting in the killing, the killing was "manslaughter."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 73; Dec. Dig. § 49.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4338-4342; vol. 8, p. 7715.]

2. HOMICIDE (§ 116*)—SELF-DEFENSE—FACTS CONSTITUTING.

If, in addition to unwarrantedly ejecting accused from decedent's house, accompanied by kicks, decedent made a movement to draw a pistol just before accused killed him, the killing was in self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-162; Dec. Dig. § 116.*]

3. HOMICIDE (§ 300*)—INSTRUCTIONS.

In a trial for homicide, committed while decedent was ejecting accused from decedent's home, to which he had been invited, it was improper, after instructing that decedent could eject accused, using only such force as was reasonably necessary, to fail to submit the law applicable, if the ejection was unwarranted, where accused merely said to his wife, when she desired to go home, that he was not going away, whereupon decedent, without requesting accused to leave, told him he must not raise any trouble, and then immediately ejected him violently.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 628; Dec. Dig. § 300.*]

4. HOMICIDE (§ 49*)—MANSLAUGHTER—COMMUNICATED INSULTS.

One accused of homicide could rely upon decedent's insults to accused's wife, communicated to accused just before the homicide, as showing that the killing was only manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 73; Dec. Dig. § 49.*]

5. HOMICIDE (§ 40*)—DEFENSES—INSULTS.

One relying upon decedent's insulting conduct to mitigate a homicide charge, must show

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the killing happened immediately upon the giving of the insults, or as soon as accused met decedent after being informed of his conduct.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 73; Dec. Dig. § 40.*]

6. HOMICIDE (§ 295*)—INSTRUCTIONS—INSULTS TO WIFE.

In a prosecution for murder, where the defense was insulting remarks to defendant's wife, an instruction that any testimony as to statements or insinuations as to defendant's wife, by witnesses named, as to what deceased said to them, which were not communicated to defendant, was admissible only to show the credibility of the statement of defendant that his wife informed him that she had been insulted by decedent; and that defendant cannot predicate a defense of manslaughter on communicated insults is erroneous in limiting the purpose of this testimony, and as depriving defendant of his defense of manslaughter on communicated insults.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 609; Dec. Dig. § 295.*]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

J. H. Holcomb was convicted of manslaughter, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter, his punishment being assessed at three years and six months confinement in the penitentiary.

In substance, the facts disclose that appellant and deceased lived neighbors within 300 or 400 yards of each other, that their families were on very friendly and rather intimate terms, and visited each other almost daily. The day preceding the homicide at night defendant and his wife took dinner with the family of deceased, and were at the residence of the deceased on the night of the homicide, in pursuance of an invitation to attend a social function at the residence of deceased, and that it was during this social gathering the homicide occurred. Prior to the homicide, for some time, the deceased had been making remarks of a very insulting nature in regard to appellant's wife, to the effect that he had been having carnal intercourse with her. These remarks had not been brought to the attention of appellant prior to the homicide. On the night of the homicide, shortly before it occurred, the wife of the deceased called appellant off in one of the rooms of the house, and informed him of the fact that there was something wrong between her husband and his (appellant's) wife; that she had written evidence of that fact, in the form of a note or letter written by deceased to appellant's wife, or by appellant's wife to the deceased. The record does not seem very clear which wrote the note or letter. Appellant refused to believe this, and informed the wife of the deceased that he would have to be shown evidence of this fact, and turned away and

left her. After leaving the wife of deceased he went into the room north of where the dancing was in progress. The deceased came into the room where appellant was, or at least they seemed to have entered the room about the same time, the deceased having just finished dancing a set with appellant's wife in the adjoining room. Appellant's wife came to him while he was standing in the room a few feet away from the deceased, and insisted on their going home. He declined, saying he was not in a hurry about it; that they would go after a while. She made a statement to appellant to the effect that deceased had insulted her. The deceased was sitting on the bed, noticing the fact that appellant and his wife were talking. Then came up a conversation between appellant and deceased. Several witnesses testified to this conversation. They did not altogether present it in the same language. We will take the following evidence as fairly illustrative of this conversation: One of the witnesses, while on the stand, after going over this matter a time or two, in examination and cross-examination, was asked by the county attorney this question: "Now, I want to get it clear before this jury, what was the first word that was spoken by Mrs. Holcomb, the defendant, or the deceased that you heard that began this conversation? A. Well, I can commence and tell you just like I heard it, and just like they spoke it. Mr. Holcomb's wife came up to him and said, 'Let's go home,' and Jim said, 'Don't be in any hurry; it is early yet.' She said something else that I cannot recall right now what it was. He said, 'I never come here, and I hain't going away,' and Mr. Williams (deceased) said to him, 'Jim, you are welcome here.' Jim said, 'I know it, if I had not known it, I would not have been here,' and then something else was said. His wife said something else to him, and he made this remark that he never come here, and was not going away, the second time, and Ben said to him, 'Jim, you hain't going to start anything here,' and Jim said, 'No; I don't know that I am. I could if I wanted to,' and Williams (deceased) looked up at him, and got up and started over to him, and said, 'I will show you what you can do,' and took hold of him (appellant) and put him out of the house." Some of this conversation between appellant, who was called Jim, and his wife is not narrated by this witness, but was brought out by the defendant. It shows his (appellant's) wife, at the time deceased interfered with their conversation, or rather began his conversation with appellant, had just told her husband of the insult by deceased to her. The deceased put appellant out of the house, kicking him, perhaps, as many as three times as he put him out. The evidence seems to indicate that appellant did not resist. Upon reaching

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the door, deceased shoved appellant out, and kicked him again, whereupon appellant fired at deceased, which resulted fatally. There were two shots fired, the second shot striking deceased in the right shoulder. There are quite a number of facts and circumstances in the case which show there had never been any previous difficulty between the parties, but on the contrary the families had been on very intimate terms, which we deem unnecessary now to recapitulate. Appellant's testimony goes further, in regard to the transaction occurring at the door at the time the shot was fired, and is to the effect that, when deceased pushed him out of the door and kicked him, he (deceased) threw his right hand to his side as if to get a pistol, stating that he intended to kill him, and that it was then he (appellant) fired the shot at deceased. Appellant testified that he had the utmost confidence in his wife and in her loyalty to him, as well as in her chastity, and that the communication from Mrs. Williams, wife of deceased, worried him, and while thinking over this, his wife came to him in a few moments with the statement that deceased had just insulted her, with language which we deem unnecessary here to state. This is a sufficient statement of the case.

The evidence, as we understand it, presents manslaughter from two standpoints, and self-defense. If appellant's mind was agitated so that it was incapable of cool reflection on account of the insulting language, conduct, etc., that had just been communicated to him by Mrs. Williams and his wife, and this was the cause of the killing, it would be manslaughter, or if, under the circumstances, the seizure of appellant by deceased and putting him out of his house and inflicting the kicks upon him infuriated his mind beyond cool reflection, and the killing occurred, it would be manslaughter. If, in addition to the ejection from the house, accompanied with the kicks, and followed by a demonstration or movement to draw a pistol, appellant fired, it would be self-defense. The two issues in regard to manslaughter should have been affirmatively presented to the jury. The court instructed the jury that an assault and battery causing pain or insulting words, etc., would constitute manslaughter, with the other elements being present. The charge, then, is fairly full in regard to insulting conduct, and the court, in further charging on the question of manslaughter, said that any other and all other circumstances, etc., might be taken into consideration in arriving at the condition of defendant's mind, in connection with all the facts and circumstances, etc. We think upon another trial the court should affirmatively present these matters to the jury, to the effect that they may understand that either provocation was sufficient to reduce to manslaughter, the sudden passion being present in appellant's mind.

The court charged the jury as follows: "You are further instructed that the deceased would have the right to put the defendant out of his (deceased's) house, but he would have the right to use only such force, and no more, as was reasonably necessary in doing so, and in this connection you are instructed that, if the deceased used more force than was reasonably necessary in putting the defendant out of the house, if he did put him out, then the defendant would have the right to defend himself, and to use whatever force was necessary to prevent such ejection." The testimony, if any there be, that a condition had arisen that justified deceased in putting appellant out of his house, was very slender. We have stated practically the matter as it arose, and the provocation, if any there was, arousing the deceased's anger and upon which he acted in ejecting appellant. Appellant and appellant's wife were invited guests of deceased and his wife to enjoy the festivity of the evening and the little dance. Appellant himself did not dance, but his wife did, and she had danced that evening in one or two sets with deceased, and had just finished dancing a set with deceased only a moment or two before the fatal transaction. On this close line of testimony it may be doubted whether appellant had done anything which justified or authorized deceased in becoming angry and ejecting appellant from the house, yet the court informs the jury that deceased had the right to put appellant out of his house, and could use legitimate or necessary force to do so. If appellant had done nothing that would authorize or justify the deceased in making the attack upon him and ejecting him from the house, then deceased would not be justified in his course of conduct, but the court instructs the jury that deceased had the right, and of course this means the legal right. This is predicated upon the fact that appellant was doing something that authorized the deceased to demand and require that he vacate his (deceased's) residence. Now this is assuming a fact against appellant, and basing a charge upon it detrimental to him before the jury, and this is emphasized especially, we think, in this case by reason of the fact that it is exceedingly doubtful if appellant had done anything which justified deceased in his attack upon him. As the court has seen proper to submit this issue to the jury, then he should have gone further, and submitted the law of the case where deceased was in the wrong in regard to the matter, on the theory if they should find appellant had not done anything justifying such assault and ejection. Appellant certainly was not an intruder. He was the guest of the deceased, and had done nothing, up to the very moment of the difficulty, and not even then, unless it be the statement to his wife that he did not come there, and he was not going away. De-

ceased had not requested appellant to leave, but said to him, "You must not raise any trouble here," and then immediately got up, making a remark indicating his purpose to do so, and ejected appellant violently from the house. Appellant seems not to have resisted. We think upon another trial, if this phase of the case is given in charge to the jury, then appellant's side of it, as made by the facts should also be submitted. Exception was reserved to the charge we have been discussing as being erroneous, and we are of opinion, under the facts, that it was, and hurtful. If deceased had the right to put appellant out of the house and use more force than was necessary, and hurt him, as appellant says, by kicking him in the stomach and knocking the breath out of him, this bore sharply, under this particular charge, on the issue of manslaughter; and the assumption on the part of the court that deceased had the right to eject appellant may, to some extent, account for the fact that the punishment is a year and a half in excess of the minimum punishment for manslaughter.

Another charge was given to which exception was reserved, which is as follows: "If you believe there is any testimony before you as to any declarations, statements, or insinuations about the infidelity or unchastity of the defendant's wife, by the witnesses John Littrell, Tom Berryhill, R. J. Harroll, J. N. McFarland, and Chris Roberts, as to what the deceased said to them, or either of them, and the same was not communicated to the defendant, then if you so believe, I instruct you that the only purpose for which such testimony was allowed to go before you was to show the credibility of the statement of the defendant, and to indicate the probable truth of the defendant's statement wherein he says that his wife informed him that she had been insulted by the deceased, and you are further instructed that the defendant cannot predicate a defense of manslaughter upon communicated insults." We are of opinion this charge was erroneous, first in limiting the purpose of this testimony, as was done; and, second, that it deprived appellant of his defense, or sought to do so, of manslaughter on "communicated insults." The court in the latter clause expressly instructed the jury that defendant could not predicate a defense of manslaughter upon communicated insults. The insults testified by these witnesses had not been communicated to appellant prior to the homicide. He knew nothing of them; had never heard of them. The only communicated insult of which appellant was aware at the time of the homicide was conveyed to his mind a few moments before the killing, first, by the wife of deceased; and, second, by his own wife. If appellant had any reason to be enraged on account of de-

ceased's conduct towards and about his wife, it was upon communicated insults as above stated, first, by Mrs. Williams, wife of deceased, and, second, by his own wife. Motive could not be imputed to appellant on account of facts of which he was ignorant. The communication from his wife occurred at the very inception of the difficulty that terminated fatally, that with Mrs. Williams only a few moments before. Now, the court instructs the jury that appellant cannot defend for manslaughter on the ground of communicated insults. On the contrary, the statute expressly provides that he can kill under those circumstances, and be guilty of no higher offense than manslaughter. Where insulting conduct is relied upon by the accused, the evidence must show that the killing happened immediately upon giving the insults, or as soon as the accused meets with the slain party after he is informed of the conduct of the deceased. In the first instance, he may have heard the insulting words or witnessed the insulting conduct; in the second, which provides for the killing upon the first meeting, it would necessarily be on communicated insults. There is no contention in the case that the remarks made by deceased to Littrell and others were ever communicated to appellant until after the death of deceased. This charge is erroneous, first, in limiting the purpose of the testimony, as was done; and, second, in informing the jury that appellant could not rely upon communicated insults.

The judgment is reversed, and the cause is remanded.

PATE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. FENCES (§ 28*)—INDICTMENT—VARIANCE BETWEEN ALLEGATION AND PROOF.

Where a widow has legally qualified as the survivor in the community estate, she has absolute management thereof, under Sayles' Ann. Civ. St. 1897, art. 2227, relating to the control of community property by the survivor; and hence, under Code Cr. Proc. 1896, art. 445, providing that, when property belongs to a decedent's estate, the ownership in a criminal action may be alleged in the executor, administrator, or heirs, in a prosecution for breaking and injuring a fence on the community property, there was no variance between an allegation of ownership in the widow and proof that the fence belonged to her jointly with children and grandchildren of decedent.

[Ed. Note.—For other cases, see Fences, Dec. Dig. § 28.*]

2. FENCES (§ 28*)—BREAKING AND INJURING—EVIDENCE—CONSENT OF OWNER.

Evidence in a prosecution for breaking and injuring a fence held to show lack of consent of the owners.

[Ed. Note.—For other cases, see Fences, Dec. Dig. § 28.*]

Appeal from Williamson County Court; Chas. A. Wilcox, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

M. Pate was convicted of unlawfully breaking and injuring a fence, and appeals. Affirmed.

Dan S. Chessher, D. W. Wilcox, John Dowell, and J. F. Taulbee, for appellant. F. J. McCord, Asst. Atty. Gen., and J. E. Neal, Co. Atty., for the State.

RAMSEY, J. Appellant was charged by information in the county court of Williamson county with unlawfully breaking and injuring the fence of one Mrs. M. L. Dimmitt, which was averred to be under the management and control of Wm. Wood under a lease contract, without the consent of Mrs. Dimmitt or of Wood, or either of them. On trial he was convicted, and his punishment assessed at a fine of \$10. The opinion of the court on a former appeal will be found in 46 Tex. Cr. R. 483, 81 S. W. 787. There are a number of questions raised on the appeal; but only two are treated in appellant's brief, and these are the only substantial issues arising in the case.

1. It is claimed that the verdict of the jury was contrary to the law and the evidence, in that the fence in controversy was alleged to be the property of Mrs. M. L. Dimmitt, while from the statement of facts it appears that the fence in question belonged to her and other parties jointly, and that before a conviction could be had it was necessary to allege all the owners of the property and their lack of consent to the breaking. To sustain this proposition, the following authorities are submitted: *Tanner v. State* (Tex. Cr. App.) 50 S. W. 347; *Keizewether v. State*, 34 Tex. Cr. R. 513, 81 S. W. 395; *Anderson v. State* (Tex. Cr. App.) 29 S. W. 786; *Govitt v. State*, 25 Tex. App. 420, 8 S. W. 478; *Brumley v. State*, 12 Tex. Cr. App. 609. The testimony shows that on November 27, 1879, a tract of land on which the fence in controversy stood, consisting of 532 acres, was conveyed by L. D. Puckett and wife to John J. Dimmitt, who was the husband of Mrs. M. L. Dimmitt, and who had died many years before the commission of the offense alleged in this case. It was further shown by the testimony of Mrs. Dimmitt that at the date of her husband's death he left surviving him seven children, two of whom were alive at the date of the trial, as well as several grandchildren. There are many authorities sustaining the general proposition contended for by appellant, and the authorities cited by him and above referred to undoubtedly do sustain his position in respect to the general rule that, where an offense such as this is charged, the ownership of the property must be accurately alleged and the want of consent of all the owners negatived in the indictment. We do not believe, however, as applied to the facts in this case, that there was any error in the action of the court in holding the proof suffi-

cient. Article 445 of the Code of Criminal Procedure of 1895, among other things, contains the following provision: "When the property belongs to the estate of a deceased person, the ownership may be alleged to be in the executor, administrator or heirs of such deceased person, or in any one of such heirs." In this case the record showed that Mrs. Dimmitt had in due time and in accordance with law qualified as the survivor in the community estate of herself and husband. This, therefore, clothed her with absolute management of the estate as fully and completely as she would have been if made by will the independent executor of her husband's estate, with full power and management. She was, so far as control, management, lease, or sale, the sole owner of the estate, and no one, not even the heirs of the deceased husband, could control or affect her acts of ownership over the property. See *Sayles' Ann. Civ. St.* 1897, art. 2227; *Watkins v. Hall*, 57 Tex. 3. We think, on reason and authority, that the ownership in Mrs. Dimmitt was properly alleged, and that there was no such variance as to affect the validity of the judgment of conviction.

2. It is urged that the proof did not show the lack of consent of the breaking on the part of Wood. In this counsel for appellant are in error. Among other things, Mr. Wood, in his testimony, says: "The west string of the fence of the pasture which I have leased, which is the fence that separates this pasture from defendant's pasture, has been cut or pulled down a number of times since I first leased this pasture, and without my consent." There are other facts testified to by him, such as a conference and a protest to appellant, from which a lack of consent is a necessary and inevitable inference.

There are no other questions arising on the appeal requiring discussion.

Finding no error in the judgment of conviction, it is ordered that the judgment of the court be, and the same is hereby, in all things affirmed.

WHEELER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1908.)

CRIMINAL LAW (§ 1182*)—APPEAL—RECORD—REVIEW.

Where no error is presented by the record containing no statement of facts or bill of exceptions, the judgment will be affirmed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3205; Dec. Dig. § 1182.*]

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

Kid Wheeler, alias Black Chalk, was convicted of theft, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

BROOKS, J. Appellant was convicted of theft, and his punishment assessed at two years' confinement in the penitentiary.

The record before us contains neither statement of facts nor bill of exceptions. No error is presented by the record, and the judgment is affirmed.

PATE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. STATUTES (§ 93*)—LOCAL LAWS—"GENERAL LAW."

Acts 30th Leg. (Laws 1907) p. 269, c. 139, providing for the drawing of jurors in counties having a city or cities of 20,000 population according to a certain census in a manner different from that provided for drawing jurors in other counties not similarly situated, was a general law, within the constitutional prohibition against the passage of any local or special law regulating the summoning of jurors.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 93.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3065-3071; vol. 8, pp. 7609, 7670.]

2. HOMICIDE (§ 190*)—EVIDENCE—THREATS.

In general, in every case of homicide, threats, whether communicated or uncommunicated, are admissible; and this is especially true where the issue is self-defense and the testimony leaves it doubtful as to who began the difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 399-413; Dec. Dig. § 190.*]

3. CRIMINAL LAW (§ 940*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where, in a prosecution for homicide, the evidence was sharply conflicting as to how the difficulty originated, defendant claiming that he shot deceased as he was advancing with a knife, and a state's witness testified that deceased's knife was in her trunk at the time, newly discovered evidence of uncommunicated threats by deceased against defendant two days prior to the killing, and of a statement of the state's witness that as soon as defendant shot deceased she picked up the knife, was sufficient to entitle defendant to a new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 940.*]

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

E. C. Pate was convicted of manslaughter, and he appeals. Reversed and remanded.

Thomas & Sewell and Crawford & Crawford, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant filed a motion to quash the special venire, alleging that the law under which it was drawn was unconstitutional. The law referred to is the act of the Thirtieth Legislature (Laws 1907, p. 269, c. 139), which provides that those counties containing a city or cities having 20,000 inhabitants or more should draw grand and petit jurors differently from the manner of drawing them in other counties not similarly situated, to be determined by the census of 1900. This contention was held to be not

well taken in the opinion of the majority of the court in the Bob Smith Case, 113 S. W. 289, decided at our recent Austin term, and in which a motion for rehearing was overruled at the present term. The writer dissented in that case, and is of the opinion still that this point is well taken; but, under the opinion of the majority of the court in the Bob Smith Case, the question must be decided adversely to appellant.

One of the grounds of the motion for a new trial is newly discovered testimony. Without going into a detailed statement of the evidence, the issue was sharply drawn on the trial as to who brought about or began the difficulty which ended in the death of the deceased. The witness Nettle Young fairly puts appellant in the wrong. The testimony of Hill and appellant makes it a case of self-defense on the part of appellant. We make this brief statement without going into the details of the testimony, because the evidence does present the issue sharply as to how the difficulty originated; that is, whether appellant was to blame for it, or the deceased, Lonnie Hall. The court charged murder in the first and second degree and manslaughter and self-defense. The jury convicted of manslaughter, allotting five years as a punishment. Among other affidavits setting up the newly discovered evidence is that of Sam Young, who states that he was acquainted with the deceased in his lifetime, and also knew appellant prior to the date of the homicide. The killing occurred on the 25th of April. On the previous 23d day of the same month, this witness swears, he overheard a conversation between the deceased and a person unknown to the affiant; that this happened on the corner of Main and Ervay streets, in the city of Dallas, Tex., and while Hall was talking he exhibited a knife, stating at the time, "There are two here against me, and, by God, I will get one or the other of them before Saturday night;" that the deceased further stated, in answer to a question addressed to him by his companion, that these two parties were Sam Young and E. C. Pate, appellant. Proper affidavits are also in the record showing that Sam Young did not communicate these statements and threats to the accused, and that, so far as he was concerned, neither appellant nor his counsel knew of these facts; and proper affidavits are presented in the record by the accused and his counsel that they knew nothing of these facts until after the conviction. There are affidavits of newly discovered testimony in the record from Mrs. Susan Tally, which is brought squarely within the rule of newly discovered evidence so far as diligence is concerned and want of knowledge on the part of appellant and his counsel. There may be some objection, perhaps, to the testimony of Mrs. Tally upon the ground that it would be impeaching in its nature. It is in respect

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to statements made by Nettie Young, the principal state's witness, to Mrs. Tally, a day or two after the killing. However, under the view we take of the case, it will be unnecessary to discuss this phase of the case, and the presence of Mrs. Tally can be secured upon another trial.

We are of opinion that the motion for a new trial should have been granted upon the newly discovered testimony of Sam Young. These threats were uncommunicated. If they had been communicated prior to the homicide of course, it would not be newly discovered evidence; but it is shown by the affidavits to be newly discovered clearly and unequivocally. The rule is well settled that threats made by an injured party, accompanied by an act showing intent to execute them, will justify all necessary resistance by the party threatened. "Where the issue is of self-defense, and the testimony leaves it doubtful as to who began the difficulty, threats of the alleged injured party, made against the accused, are legitimate evidence, and may become of a most material character in assisting the jury to arrive at a correct conclusion as to who in fact did begin the difficulty, 'because the fact that such threats had been made would tend to show an attempt to execute them probable if the opportunity was offered,' 'and the more ready belief of the accused would be justified to the precise extent of this probability.'" *Tankersley v. State*, 31 Tex. Cr. R. 505, 21 S. W. 767; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Campbell v. State*, 16 Ill. 17, 61 Am. Dec. 49; *Cornellus v. Commonwealth*, 15 B. Mon. (Ky.) 539. It is also stated as a general proposition, with but few exceptions, in every case of homicide, threats, communicated or uncommunicated, are admissible in evidence, though in certain character of cases, where their exclusion could not possibly injure the rights of the defendant, it would not be error for the court to reject them. *Stewart v. State*, 36 Tex. Cr. R. 130, 35 S. W. 985. The same case lays down the proposition that in a case of homicide, whenever the evidence leaves it doubtful as to who began the difficulty or made the first hostile demonstration, evidence of uncommunicated threats, made by the deceased, is relevant as evidence tending to show which of the parties most likely began the difficulty. It was also further held in the same case that on a trial for homicide, where the testimony of the eyewitnesses was conflicting as to which of the parties, deceased or defendant, made the first hostile demonstration, it would be error to exclude evidence of uncommunicated threats made by the deceased. This rule seems to be practically universal. At least it is supported by an unbroken array of authorities in Texas. In addition to the authorities already cited, see *Reeves v. State*, 84 Tex. Cr. R. 488, 31 S. W. 382; *Pitts v.*

State, 29 Tex. App. 374, 16 S. W. 189; *Stapp v. State*, 1 Tex. App. 734. In his notes Judge White, in his Annotated Penal Code, thus states the rule: "When the evidence leaves it in doubt as to who began the difficulty, threats, whether communicated or not, may become evidence of the most material character, because the fact that they had been made would tend to show an intent to execute them probable, if opportunity offered."

Meeting another emergency or contention that might arise upon the trial, where there are two theories, the rule is again thus stated: "Where the case presented two theories—one of unprovoked murder; the other, self-defense—a second application for continuance to prove communicated threats made by the deceased should have been granted on the motion for new trial, though the evidence sought by the continuance was somewhat cumulative." *Gilcrease v. State*, 33 Tex. Cr. R. 619, 28 S. W. 531. So, from the rules enunciated under the decisions, we are of opinion that the court should have granted a new trial on account of the newly discovered evidence. The reasons in the case suggested by the testimony are cogent why this should have occurred. The state's witness Nettie Young makes it apparent that the deceased was her lover; that she had separated from more than one husband while she was yet under 20 years of age; that the last one from whom she had separated was Sam Young; that the deceased was her lover, to whom she would be married as soon as a divorce could be obtained from Sam Young; that the deceased had bought the dirk knife mentioned by her and other witnesses shortly before the homicide; and some of the facts go to show, in our judgment, that some of the animosity of the deceased was directed pointedly at the appellant. They were boarding at the same house; appellant taking his meals there and sleeping at another place, and the deceased taking his meals and sleeping in the house where the homicide occurred. The contention in the difficulty was in regard to the woman Nettie Young. Nettie Young makes a case that would have justified the jury in finding that appellant was in the wrong, while the testimony of Hill and appellant makes it clear that the deceased was in the wrong, and that he had drawn a dirk and was approaching appellant with the view of killing him at the time appellant fired the fatal shot, there being but one shot fired. Nettie Young testifies that appellant's knife was in her trunk at the time of the difficulty. Appellant testified that the deceased was approaching him with the knife at the time he shot. The witness Hill testified in substance that the deceased provoked the difficulty, or was in the wrong in bringing it on, and that when the shot was fired he heard something drop on the floor. The newly discovered testimony of Mrs. Tally is to the effect that Nettie Young told her in substance, as soon as appellant

shot deceased, she picked up the knife. So under all the circumstances, under our authorities, we are of opinion that the newly discovered evidence of Sam Young was very material and was sufficient to require the award of the motion for a new trial.

There is another question presented for reversal that will not require discussion; that is, in regard to the misconduct of the jury in discussing the frequency of homicide cases in Dallas county, as well as reference to the Brown homicide case, and what ought to or would be done with him. This will not arise upon another trial, as it occurred in this case, and therefore a discussion of that question is pretermitted.

The judgment is reversed, and the cause remanded.

JONES v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. CRIMINAL LAW (§ 889*)—TRIAL—VERDICT.
Code Cr. Proc. 1895, art. 753, provides that, if a verdict is informal, with the consent of the jury the verdict may be reduced to proper form; and article 754 provides that, if the jury refuse to have the verdict altered, they shall retire and deliberate, unless the verdict is intended as an acquittal. The jury returned a verdict of guilty of murder in the first degree, assessing the punishment at 99 years in the penitentiary, and the court instructed that, there being no such punishment for murder in the first degree, they should further consider the verdict, after which they returned a verdict assessing the punishment at life imprisonment. *Held* no error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2109-2112; Dec. Dig. § 889.*]

2. CRIMINAL LAW (§ 730*)—TRIAL—ARGUMENT.

The state's attorney in argument stated that defendant not only murdered decedent, but also his wife, and the court instructed the jury not to consider the remarks, to which the state's attorney replied that he thought the state had proved that she also was killed, to which accused also objected. Defendant never asked that the matter be further withdrawn from the jury. *Held*, that the statements, under the circumstances, were not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

3. CRIMINAL LAW (§ 1059*)—APPEAL AND ERROR—EXCEPTIONS—SUFFICIENCY.

Exceptions which are stated generally, so that it would be necessary to go through the entire statement of facts to ascertain their relation to any supposed error, need not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.*]

Appeal from Criminal District Court, Dallas County; A. S. Baskett, Special Judge.

Jim Jones was convicted of murder in the first degree, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. A report of the former appeal of this case will be found in 51 Tex. Cr. R. 472, 101 S. W. 993. The punishment is the same, as shown by this record, as in the former appeal. Appellant reserved three bills of exceptions.

Contention is made in the first bill of exceptions that the court erred in overruling his challenge to the array in the special venire. The proceedings with reference to the selection of this jury were had in accordance with the act of the Thirtieth Legislature (Laws 1907, p. 289, c. 139). Practically the same contentions are made here as in Bob Smith's Case (recently decided by this court) 113 S. W. 289. On the authority of the opinion in that case, appellant's challenge to the array is not well taken.

The jury agreed upon and returned the following verdict: "We, the jury, find the defendant, Jim Jones, guilty of murder in the first degree as charged in the indictment, and assess his punishment at 99 years in the state penitentiary. W. L. Arant, Foreman." The court on his own motion instructed the jury that their verdict did not conform to the charge of the court, there being no such punishment, as found by them, for murder in the first degree, and directed their retirement and further consideration of the verdict. Appellant urged several objections to this: (1) That the court should have received the verdict as returned; (2) that he had no authority to further instruct the jury; (3) that he had no authority to retire the jury to further consider of their verdict, as they had already returned one; (4) that the verdict as returned was a legal finding of murder in the second degree, and was an acquittal of murder in the first degree; (5) that the said verdict constituted former jeopardy as against any subsequent or further verdict. It is further recited in the bill that a short time after the jury had retired, as directed by the court, they again returned into court with the following verdict: "We, the jury, find the defendant, Jim Jones, guilty of murder in the first degree as charged in the indictment, and assess his punishment at life imprisonment in the state penitentiary. W. L. Arant, Foreman." Subsequently the bill shows that appellant filed a motion in arrest of judgment as follows: (1) That the verdict of the jury originally and as first returned by the jury should be made the basis of the judgment in this cause; (2) that the last verdict of the jury returned assesses against the defendant a punishment unknown to the law. This was overruled by the court.

The action of the court was in compliance with the statute and decisions in this state. Article 753, Code Cr. Proc. 1895, reads as follows: "If the jury find a verdict which is informal, their attention shall be called

to it, and with their consent the verdict may, under the direction of the court, be reduced to the proper form." Article 754 provides: "If the jury refuse to have the verdict altered, they shall again retire to their room to deliberate, unless it manifestly appear that the verdict is intended as an acquittal, and in that case the judgment shall be rendered accordingly, discharging the defendant." So it will be seen by the reading of these statutes that express authority is conferred upon the court to call the attention of the jury to any informality in the verdict, and have it, with their consent, reduced to the proper form. Such has been the ruling of the courts in Texas from the beginning in construing these statutes. It has been held that it is within the power of the court to have even a second verdict corrected by the insertion of a proper word; the jury of course, consenting. *Taylor v. State*, 14 Tex. App. 340. In *Taylor's Case*, which was a conviction of murder, the verdict found the accused guilty of murder in the first degree and assessed his punishment at 99 years in the penitentiary. The court in that instance had, with the consent of the jury, the verdict corrected, and the court upon appeal held that the verdict, being informal as to punishment, but contrary to the charge of the court, and not such finding as the court could receive, it was not only proper, but it was the duty of the court, to reject their verdict, call the attention of the jury to the charge, and send them out to consider again of their verdict. For a collation of authorities, see *White's Ann. Code Cr. Proc.* § 913. Without discussing this question further, we hold that there was not only no error, and the court was not only justified in ruling as he did, but it was proper and right that he should have done so.

Another bill recites that one of the state's attorneys in argument stated to the jury that defendant not only murdered Bob Lyles, but that he at the same time murdered Bob Lyles' wife, an innocent woman. The court instructed the jury that there was no evidence that defendant killed deceased's wife, and not to consider said remarks of counsel, to which counsel for the state replied that he thought the state had proved that she was killed. Appellant also objected to this. The court explains this bill by stating that, "when the remarks complained of were made and objected to by defendant's counsel, the court instructed the jury orally that they should pay no attention to the remarks, as there was no evidence before them that Bob Lyles' wife had been killed. The defendant never presented any written charge asking that the matter be any further withdrawn from the consideration of the jury." As we recall this record, there was no evidence before the jury that Mrs. Lyles was in fact killed. There is some evidence to the effect that she was

shot at the same time and by the same discharge of the gun that killed her husband; but the record does not show that she died from it. Be this as it may, as the matter is presented, we are of opinion that it is not of sufficient importance to require a reversal of the judgment.

We have reviewed the bills presented by the record. There are some exceptions in a general way stated in the statement of facts, but in such a manner that the court is not called upon to go through the entire statement of facts and ascertain their relation to or bearing upon any supposed error. We have not reviewed the facts, or made a statement of the case, deeming it unnecessary. So far as the statement of the case is concerned, it is sufficiently stated in the report of the former appeal.

As the record is presented, we find no such error as requires a reversal of the judgment. It is therefore ordered that it be affirmed.

LARD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1908.)

1. CRIMINAL LAW (§ 686*) — TRIAL — RECEPTION OF EVIDENCE — COMPELLING CALLING OF EYEWITNESSES.

It was not error to refuse to force the prosecution to call eyewitnesses to testify, since it cannot be forced to call any particular witnesses in proving its case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1570; Dec. Dig. § 686.*]

2. CRIMINAL LAW (§ 1170½*) — APPEAL — HARMLESS ERROR.

The admission of testimony to impeach a witness, even if it were incompetent, because too remote, was not reversible error, where the witness' testimony was immaterial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3137; Dec. Dig. § 1170½*]

Appeal from District Court, Falls County; Richard I. Munroe, Judge.

Tom Jack Lard was convicted of manslaughter, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at two years' confinement in the state penitentiary.

Bill of exceptions No. 1 shows that after the state placed various witnesses on the stand it rested its case. Appellant complains, however, that none of the witnesses were present at the scene of the shooting, nor where they could have seen the shooting or could have heard what was said, and refers to the statement of facts for full testimony of these witnesses, and complains that the court erred in not forcing the state to put Robert Travis and Harry Miles, two eyewitnesses, upon the stand, who had seen all

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that occurred. There was no error in the ruling of the court. The state cannot be forced to introduce any particular witnesses in the proof of its case. The proof shows that appellant placed these same witnesses upon the stand himself.

Bill of exceptions No. 2 shows that when Oscar Wright, a witness for appellant, was on the stand, the state sought to prove, and did prove, that the said Oscar Wright had been in the penitentiary for murder, sent from Van Zandt county. Appellant objected to the introduction of said testimony on the ground that the same had been more than 18 years ago, when the witness was a mere boy, and that since said time he had lived a blameless life, and the state had no right to go into this old offense for the purpose of impeaching the witness. The bill shows, however, that witness was released from the penitentiary in February following the flood, in 1899 or 1900. The trial took place in August, 1908. Even conceding, which we do not, that the testimony was too remote, yet the record shows that the testimony of the witness Wright was of such an immaterial character as not to constitute reversible error.

The charge, taken as a whole, is a proper presentation of the law applicable to the facts of this case. The evidence, though quite conflicting, justifies the verdict of the jury.

Finding no error in the record, the judgment is affirmed.

ROBINSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1908.)

1. CRIMINAL LAW (§ 1181*)—APPEAL—DISMISSAL—LACK OF SENTENCE.

An appeal from a conviction will be dismissed, where there was no sentence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1181.*]

2. CRIMINAL LAW (§ 1023*)—APPEAL—DECISIONS REVIEWABLE.

Under the statute the Court of Criminal Appeals is not authorized to affirm or reverse a judgment in a criminal case, except in death penalties, without sentence having been passed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2596; Dec. Dig. § 1023.*]

3. CRIMINAL LAW (§ 979*)—TRIAL—SENTENCE—JURISDICTION.

Where, on conviction for an offense, no sentence was pronounced, the court could pronounce sentence at a subsequent term, notwithstanding an affirmance of the judgment on an intervening appeal; such affirmance being illegal for want of sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2490; Dec. Dig. § 979.*]

Appeal from District Court, Brazos County; J. C. Scott, Judge.

Jim Robinson was convicted of an offense, and he appeals. Affirmed.

See, also, 105 S. W. 500.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. During the Tyler term, 1907, the judgment in this case was affirmed. 105 S. W. 500. The mandate was issued on the 29th of November, 1907. It was subsequently discovered that there had not been a sentence. At the next term of the district court of Brazos county this was called to the attention of the court, and appellant was sentenced.

There are several contentions by appellant that this could not be done. The judgment had been affirmed by this court. It was not discovered or noticed on the former appeal that sentence had not been included in the transcript of the record, and the judgment was affirmed. Had the want of sentence been called to the attention of the court, or if it had been discovered, the appeal would have been dismissed for want of sentence. An inspection of the record on the former appeal discloses that the index shows that the sentence had been entered. No point having been made at the time in regard to the matter, it was not noticed. However, inasmuch as the jurisdiction of the court had not attached on former appeal, that affirmance is not legal. Under this state of case appellant could not complain. As we understand our statutes, this court would not be authorized to affirm or reverse a judgment, except in death penalties, without the sentence having been passed upon appellant. We are therefore of opinion that the trial court was correct under our statute in passing the sentence at the subsequent term. The statute expressly authorizes this character of proceeding, where sentence has for any reason not been pronounced at the term of conviction.

So far as the merits of the case are concerned, and the questions involved, we are of opinion that, as stated in the former opinion, there are no errors requiring a reversal of the judgment, and adopt now what we said in the former opinion, and order that the judgment be affirmed.

FARRIER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1908.)

HIGHWAYS (§ 164*)—OBSTRUCTION—CRIMINAL RESPONSIBILITY—EVIDENCE.

Evidence considered, and held insufficient to support a conviction of willfully obstructing a public road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 451; Dec. Dig. § 164.*]

Appeal from Bowle County Court; Sam H. Smelser, Judge.

J. W. Farrier was convicted of willfully obstructing a public road, and appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Hart, Mahaffey & Thomas, for appellant.
F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of willfully obstructing a public road; his punishment being assessed at a fine of \$25.

It is shown, substantially, by the facts, that the jury of review made a report to the commissioners' court, showing where they had located a road in accordance with an order issued to them by said court. The county surveyor, Johnson, was with them and surveyed the land. It is a question of fact between Johnson on one side and the jury of review to some extent, on the other, that he (Johnson) informed them, at the time he surveyed the land for the proposed line of road, that the field notes he had in regard to locations of appellant's lines were not correct. Subsequently he got correct field notes and resurveyed the land, and told Mr. Bassett, one of the jury of view, that the later surveyed line was the correct one, and to so inform the other members of the jury. Appellant sold to the county land immediately south and running parallel with his north boundary line. Mr. Bassett, on the north, gave 15 feet on his side of the division line between himself and appellant; appellant selling to the county 15 feet on the south side of his north line, which was the division line between himself and Bassett. The field notes show that the land runs along this division line and calls for appellants line. The jury, in awarding damages, made the following report:

Name of Landowner.	Description of Land.	Damages.
J. W. Farrier	15 feet on the north side $\frac{44}{100}$ on an acre on the north line	\$10
R. A. Dalby	15 feet on the north side $\frac{35\frac{1}{2}}{100}$ of an acre on the north line.....	\$10
Total damages.....		\$20

This report is in accord with the field notes, and it shows that the jury of review were paying appellant \$10 for the 15 feet along and parallel with his north boundary line. Appellant complained, in regard to the location of the road, that it was not laid out on the land he sold to the county, and before the road was "cut out" Mr. Johnson, the surveyor of the county, upon inquiry made by appellant of him, indicated to him (appellant) the ground where he could place his north fence without interfering in any way with the land that he had sold the county, or in any way obstructing the proposed public road. This seems not to have been controverted, and under the location pointed out to him by the surveyor appellant placed his line of fence, which is shown by Johnson to be clearly outside of and south of the 15 feet sold the county for the road. It does not seem to be clearly indicated when the road was "cut out." The report was made

by the jury on the 28th of June, 1906. The obstruction is charged to have occurred on the 6th day of March, 1907. Appellant himself testified that he had no intention of obstructing the public road; that he had sold land to the county, and he took the advice of the county surveyor as to where the dividing line between himself and the county land was situate, and followed the instructions and advice of the county surveyor.

Without going into a discussion of how far the county might be bound to confine itself to the land sold, we are of opinion that the evidence does not indicate with sufficient cogency that appellant willfully obstructed the road. The evidence shows, by the report of the commissioners, setting out the field notes, as well as their allowance of \$10, that appellant had sold to the county 15 feet of his land lying contiguous to and adjoining his north boundary line. It is not controverted, as we understand the record, that appellant's fence is more than 15 feet away from his north boundary line, and that he used all necessary caution in the location of his fence, so that he might avoid coming in contact with the county road or in any way obstructing it. We further believe this testimony excludes the idea of willfulness.

Because we are of opinion that the evidence is not sufficient to justify this conviction, the judgment is reversed, and the cause is remanded.

YOUNG v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1908.)

BURGLARY (§ 46*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in a prosecution for burglary to commit theft, there was no explanation of defendant's possession of the stolen property, and the case did not rest alone on such possession, the court was not required to charge specifically as to the recent possession of stolen property.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 118; Dec. Dig. § 46.*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Jim Young was convicted of burglary, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Smith county on a charge of burglary. The indictment alleges, in substance, that he broke and entered a house owned by one Joel Eaton with intent to commit the crime of theft. The evidence in brief shows that about the time alleged in the indictment Joel Eaton, with his family and with most of the other white neighbors near him, went fishing; that at the time the door of the house entered, which was a little log house, was fastened with an iron hasp over

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a staple and with a lock over the staple; that on his return the fastening was broken, and among other things three middlings of meat had been stolen. Some time after this he made application for a search warrant, under authority of which he searched the house and premises of appellant, without at the time finding anything he could identify. Subsequently, on information received, he made another search, and found in defendant's house a part of one middling of meat, which he identified by the string by which it had been tied and by certain other marks on it, leaving little or no doubt of the accuracy of the identification. There are numerous other circumstances in the case tending to connect appellant with the transaction which we deem unnecessary to state.

Appellant relies, among other things, upon an alibi and the suggestion that the meat had been stolen by one Prior Knight. The court submitted all these issues to the jury very fully and fairly, instructing the jury, among other things, that if they believed that Knight had entered the house, or if they had a reasonable doubt thereof, they would acquit appellant. It was also claimed by the appellant that the piece of meat in question had been left by Knight and in his absence. The court instructed the jury that if they found from the evidence that Knight carried the piece of meat to appellant's house, or if they had a reasonable doubt as to this fact, they would acquit appellant. He also submitted the issue of alibi in an unexceptionable charge, and in connection with the whole case gave a correct charge on the law of circumstantial evidence. Indeed, there is little or no objection to the charge made in the motion for a new trial. The objection was made that the court failed to give to the jury a plain and specific charge on the possession of recently stolen property, explaining the law applicable to evidence of possession. There was no explanation given by appellant of his possession of the stolen property, nor did the case rest alone upon his possession thereof, and there was no occasion for the court to charge in respect to this testimony. The case is essentially one of fact.

Reading the record carefully, as we have done, we are strongly impressed with the fact that appellant is guilty. In any event it cannot be said that there was no evidence to justify the judgment of conviction. So believing, it is ordered that the judgment be, and the same is hereby, in all things affirmed.

FRENCH v. PROVIDENT DRUG CO.

(Court of Civil Appeals of Texas. Nov. 11, 1908.)

CONTRACTS (§ 245*)—CONTRACT IN LIEU OF ORIGINAL CONTRACT—EFFECT.

A new contract, entered into in settlement and in lieu of a prior contract, precludes an ac-

tion to cancel the prior contract on the ground that it was procured by fraud or mistake.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1129; Dec. Dig. § 245.*]

Appeal from Brown County Court; A. M. Brumfield, Judge.

Action by Robert French against the Provident Drug Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Arch Grinnan, for appellant.

KEY, J. Appellant brought this suit to cancel a contract and recover the consideration paid by him to the defendant. After hearing all the testimony, the trial court instructed a verdict for the defendant, and the plaintiff has appealed.

We have considered all the assignments presented, and find no reversible error. If the original contract was procured by fraud or mistake, which we need not decide, the uncontroverted proof coming from the plaintiff himself clearly sustained the defendant's answer alleging a new contract as a settlement and in lieu of the original contract. Such being the case, the plaintiff had no cause of action, and the court properly directed a verdict for the defendant.

Judgment affirmed.

FAULKNER v. TEXAS & N. O. RY. CO.

(Court of Civil Appeals of Texas. Nov. 11, 1908.)

1. MASTER AND SERVANT (§ 177*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—LIABILITY OF MASTER.

A master is not liable for injuries to a servant caused by the negligence of a fellow servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 352; Dec. Dig. § 177.*]

2. MASTER AND SERVANT (§ 101*)—FAILURE TO FURNISH SAFE APPLIANCES—LIABILITY.

A master, failing to furnish a reasonably safe appliance for his servant, is liable for injuries to the servant caused thereby.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 171, 172; Dec. Dig. § 101.*]

3. MASTER AND SERVANT (§ 286*)—FAILURE TO FURNISH SAFE APPLIANCES—LIABILITY.

Where there was evidence that a bar with which a servant was to do his work was defective, and that by reason thereof it slipped, resulting in injury to the servant, the question whether the master was negligent in furnishing a defective bar was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1010-1031; Dec. Dig. § 286.*]

Error from District Court, Harris County; W. P. Hamblen, Judge.

Action by H. Faulkner against the Texas & New Orleans Railway Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

Breeding, Lewis & Norton, for plaintiff in error. Lane, Jackson, Kelley & Wolters and Baker, Botts, Parker & Garwood, for defendant in error.

FISHER, C. J. The court erred in not submitting to the jury the issue as to whether or not the defendant in error was guilty of negligence in furnishing the plaintiff with a defective bar with which to do the work he was then engaged in. There is evidence tending to show that the bar was defective, and by reason of the defect it slipped, which resulted in the accident from which the plaintiff sustained injuries.

We are inclined to the opinion that the plaintiff and the helper were fellow servants, and for the negligence of the latter he could not recover; but for the failure to furnish a reasonably safe appliance the master could be held liable, and for the error in not submitting that question the judgment will be reversed and the cause remanded.

It is unnecessary for us to pass upon the form of charge submitted by plaintiff in his brief, because on another trial the court will doubtless correctly instruct the jury on the issue to be decided.

Reversed and remanded.

WESTERN UNION TELEGRAPH CO. v. SMITH.

(Court of Civil Appeals of Texas. Oct. 28, 1908. Rehearing Denied Nov. 25, 1908.)

1. TRIAL (§ 125*)—MISCONDUCT OF ATTORNEY—ARGUMENT.

In an action for delay of a telegram, argument of plaintiff's counsel that the jury should punish the telegraph company, as that was the only way to make it do right, and that the damages sued for were not to pay plaintiff so much for his suffering as to punish the telegraph company and make it more careful, was prejudicial error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 303-307; Dec. Dig. § 125.*]

2. EVIDENCE (§ 471*)—CONCLUSIONS.

Where a witness stated the facts on which he relied to show that he exercised ordinary diligence to reach his father as soon as he learned of his illness, it was error to permit him also to state his conclusion that he made the trip to reach his father before his death as quickly as he could.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2152; Dec. Dig. § 471.*]

Appeal from District Court, Colorado County; Munford Kennon, Judge.

Action by Jeff Smith against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Geo. H. Fearons, Lewis & Austin, and Brown, Carothers & Brown, for appellant. Townsend, Ayers & Townsend and Adkins & Green, for appellee.

FISHER, C. J. This is a suit by Smith against the telegraph company for damages for failure to promptly deliver a message announcing the fact that his father was dangerously sick and in a critical condition. Verdict and judgment below went in favor of the plaintiff for \$500, from which judgment the telegraph company has appealed.

The sixth assignment presents reversible error. It complains of the following argument made by counsel for plaintiff to the jury: "When these telegraph companies fail to deliver messages in time, you ought to punish them with your verdict. That is the only way to make them do right—to punish them. These damages sued for are not to pay plaintiff so much for his suffering, but to punish the telegraph company and make it more careful." Unless it can be said that the jury understood this argument as merely "buncombe," and an effort to tickle the ear of the audience, it must be assumed that it was intended to accomplish some purpose in influencing the jury. It was a direct appeal to the jury to return a verdict for damages as an infliction of punishment upon the telegraph company for failure to perform a duty that it owed to the plaintiff. Of course, this is not the law. In a case of this character, where the recovery is for actual damages, there should be allowed no appeal to the jury that the wrongdoer should be punished by awarding damages to the plaintiff. The question is merely one of compensation, and this the attorney who indulged in the argument must be presumed to have known. What effect the argument had upon the jury we have no means of ascertaining; but it is clear that it was calculated to have the effect which was evidently intended by the attorney who made it. That effect, of course, was to influence the jury to punish the telegraph company by a verdict for damages in favor of the plaintiff. The language is susceptible of no other construction.

As the case will be reversed for the reasons just stated, we call attention to the question raised in the seventh assignment of error. The witness, who stated that he made the trip to reach his father before his death as quickly as he could, detailed all the facts upon which that conclusion was based; and we suggest that upon another trial the witness be confined to a statement of the facts that he relied upon to show that he exercised ordinary diligence in his effort to reach his father, leaving the jury to determine the effect of these facts, and whether they are sufficient to show that he reached the bedside of his father as quickly as he could. We do not make this last question ground of reversal; but, having reversed the case, we think the court should guard the admission of the testimony in the way pointed out.

The remaining assignments present no re-

versible error; but for the error pointed out the judgment is reversed, and the cause remanded.

Reversed and remanded.

GULF, C. & S. F. RY. CO. et al. v. CUNNINGHAM et al.

(Court of Civil Appeals of Texas. June 17, 1908. On Rehearing, Nov. 25, 1908.)

1. TRIAL (§ 169*)—DIRECTION OF VERDICT—CARRIAGE OF FREIGHT—INJURY.

Where, in an action against the initial and connecting carriers for injury to horses transported under a contract limiting the liability of each carrier to injury on its own line, there was no evidence that a connecting carrier was negligent or that the horses were injured while in its possession, and the shipper testified that no injury occurred while they were in the possession of the connecting carrier, the court properly directed a verdict in its favor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 381-384; Dec. Dig. § 169.*]

2. CARRIERS (§ 219*)—CONNECTING CARRIERS—CARRIAGE OF FREIGHT—LIABILITY.

In an interstate shipment of horses under a contract limiting the liability of each carrier to injuries on its own line, a connecting carrier is not responsible for any injuries to the horses before they were received by it nor for damages for injuries to them after they were received by it which was the direct result of their having been weakened or injured while in the custody of the initial carrier, though such damage did not develop until after delivery to the connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. § 219.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY.

It is not error to refuse to give a charge submitting an issue not raised by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 596; Dec. Dig. § 252.*]

4. TRIAL (§ 260*)—REQUESTED INSTRUCTIONS—INSTRUCTIONS COVERED BY CHARGE.

Where, in an action against a carrier for injury to a shipment of horses, the court charged that it was not responsible for injuries to live stock while in its custody caused by delays, unless the same were due to negligence, and that it was not responsible for delays reasonably necessary, the refusal to charge that damages for delays could not be recovered unless the delays were unreasonable and negligent was not erroneous, the request being substantially covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

5. TRIAL (§ 260*)—REQUESTED INSTRUCTIONS—INSTRUCTIONS COVERED BY CHARGE.

Where, in an action for injury to a shipment of horses, the court charged that it was the duty of the carrier to use ordinary care to furnish a reasonably safe and suitable car for the transportation of horses, and that a failure to do so was negligence, the refusal to charge that the carrier was not required to furnish a stable car, but only required to furnish a reasonably safe car, was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

6. TRIAL (§ 260*)—REQUESTED INSTRUCTIONS—INSTRUCTIONS COVERED BY CHARGE.

Where, in an action against a carrier for injury to a shipment of horses, the court charged that for plaintiff to recover the jury must find

that the carrier was negligent and that the horses were injured as the proximate result thereof, the refusal to charge that, unless the jury believed that rough handling of the horses was due to negligence which was the proximate cause of the injury, no damages could be awarded on account of rough handling, was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

7. CARRIERS (§ 227*)—CARRIAGE OF FREIGHT—CONTRACTS—EVIDENCE—ADMISSIBILITY.

Where the petition in an action against a carrier for injuries to a shipment of horses alleged that the contract of shipment was made with station agents of the carrier and was ratified by a superior officer, it was permissible to show what the contract made with the station agents was, and that the same was ratified by a superior officer.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 227.*]

8. TRIAL (§ 84*)—EVIDENCE—OBJECTIONS.

An objection to evidence which goes rather to its sufficiency than to its admissibility does not raise the question of the admissibility thereof.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 84.*]

9. EVIDENCE (§ 543*)—OPINION EVIDENCE—COMPETENCY OF WITNESSES.

In an action against a carrier for injuries to a shipment of horses, witnesses testifying that they saw the horses on their arrival at their destination, and were acquainted with the market value of horses at such point, may testify as to what would have been the reasonable value of the horses had they arrived in a reasonably good condition, though the witnesses did not accompany the shipment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2358; Dec. Dig. § 543.*]

10. CARRIERS (§ 182*)—CARRIAGE OF FREIGHT—INJURIES—ACTIONS—VENUE.

Under Acts 1899, p. 214, c. 125, as amended by Acts 1905, p. 29, c. 25, providing that, where freight has been transported by two or more railroad companies doing business or having an agent in the state, a suit for damages may be brought against all the carriers in any county in which either does business or has an agent, etc., an action against the initial and connecting carriers for injury to freight transported under a joint contract is properly brought in the county through which the road of the initial carrier extends and in which the connecting carrier, a foreign corporation, has an agent.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 182.*]

11. CARRIERS (§ 184*)—CARRIAGE OF FREIGHT—INJURIES TO FREIGHT—ACTION—PETITION.

A petition, in an action against the initial and connecting carriers for injuries to a shipment of horses, which alleges that the contract of shipment bound the carriers to transport the horses with reasonable care and to deliver the same to the shipper within a reasonable time, in reasonably good condition, that the horses were delayed in transit and roughly handled, and that inadequate facilities were furnished for feeding and watering en route, resulting in injury to the horses, is sufficient as against the objection of a connecting carrier that it does not show which carrier furnished the cars, or on what line the injuries occurred, or which carrier was guilty of the negligent acts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 832; Dec. Dig. § 184.*]

12. CARRIERS (§ 184*)—CARRIAGE OF FREIGHT—INJURIES TO FREIGHT—ACTION—PETITION.

A petition, in an action against the initial and connecting carriers for injury to a shipment

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of horses, which alleges that the feed and watering pens of the connecting carrier were without troughs and water, and were in such a muddy condition that the horses could not be fed in them, and that as a result the horses suffered injuries, shows that the injury to the horses was caused by the negligence of the connecting carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 834; Dec. Dig. § 184.*]

13. CARRIERS (§ 229*)—CARRIAGE OF FREIGHT—INJURIES—ACTIONS—DAMAGES.

Where a connecting carrier, when making the contract of carriage of horses, knew that the ultimate destination of the horses was a point beyond its line, it will be presumed that the contract was made in view of the market at the destination, and that it was contemplated by the parties that in the event of a breach the measure of the shipper's recovery would be controlled by such market.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 229.*]

14. EVIDENCE (§ 417*)—PAROL EVIDENCE—MATTERS NOT PROVIDED FOR IN CONTRACT—CARRIAGE OF FREIGHT—INJURIES—ACTIONS—EVIDENCE.

Where a connecting carrier, when making a contract of carriage of horses, knew that the ultimate destination of the horses was a point beyond its line, in an action against it for injuries to the horses evidence of its knowledge of the final destination of the horses was admissible as against the objection that it varied the terms of the contract of shipment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1893; Dec. Dig. § 417.*]

15. EVIDENCE (§ 543*)—OPINION EVIDENCE—WITNESSES—COMPETENCY.

Experienced shippers of horses, acquainted with the market value of horses at a designated point at the time of the arrival of a shipment of horses there, may testify as to the value of the shipment at such point, though they may have had knowledge of the average value of the horses at such point.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 543.*]

16. CARRIERS (§ 211*)—CARRIAGE OF LIVE STOCK—CONTRACTS.

Where a carrier of live stock failed to furnish adequate facilities to feed and water the stock, the shipper, who had undertaken to procure feed and water for the stock, was not required to procure feed and water elsewhere.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 928; Dec. Dig. § 211.*]

17. CARRIERS (§ 211*)—CARRIAGE OF LIVE STOCK—CONTRACTS.

A stipulation, in a contract for an interstate shipment of live stock, which requires the shipper to feed and water the stock, is only reasonable and valid so long as the carrier furnishes reasonable facilities for so doing, and where no reasonable facilities are furnished at a place the provision is void as to that place, and the carrier must feed and water the stock, and it is liable for its failure so to do.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 928; Dec. Dig. § 211.*]

18. CARRIERS (§ 209*)—CARRIAGE OF LIVE STOCK—CARS—DUTY TO FURNISH SUITABLE CARS.

A carrier is bound to furnish a safe and suitable car for the transportation of live stock and is not relieved from liability for not doing so, though the shipper examined the car and did not object to its fitness.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 925; Dec. Dig. § 209.*]

On Rehearing.

19. EVIDENCE (§ 244*)—DECLARATIONS OF EMPLOYEES—ADMISSIBILITY.

The declarations of a railroad yard policeman, in the employ of the railroad company and in charge of a shipment of horses in the yard, directing and controlling their movements, as to the condition of the yard, made during the performance of his duties, are admissible and binding on the company.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 925; Dec. Dig. § 244.*]

20. PRINCIPAL AND AGENT (§ 22*)—PROOF OF AGENCY—EVIDENCE.

While agency cannot be proved by the declaration of the agent, such declaration is a circumstance in connection with other facts to prove agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

21. EVIDENCE (§ 258*)—DECLARATIONS—DECLARATIONS OF AGENT—ADMISSIBILITY.

Where there is evidence from which a jury may find agency, the declarations of the agent, made during the agency, in regard to the transaction connected therewith, are admissible as the declarations of the principal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1006; Dec. Dig. § 258.*]

22. EVIDENCE (§ 258*)—DECLARATIONS OF AGENT—ADMISSIBILITY.

Where the fact of the existence of the agency was shown at the instance of the principal on his cross-examination of witnesses, the principal could not complain of admission in evidence of declarations of the agent made during the agency in regard to the transaction connected therewith.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

23. EVIDENCE (§ 241*)—DECLARATIONS OF AGENT—ADMISSIBILITY.

Statements of an agent, made at the time of the transaction, or as soon thereafter as to come within the rule of the res gestæ, are admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 887; Dec. Dig. § 241.*]

24. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

The error, if any, in admitting evidence to establish a fact otherwise established, is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.*]

25. APPEAL AND ERROR (§ 877*)—DIRECTING VERDICT FOR CODEFENDANT.

Where, in an action against the initial and connecting carriers, the court charged that no damages could be awarded the shipper against any carrier except that which occurred on its own lines, the error, if any, in directing a verdict for one of the connecting carriers, was not prejudicial to another carrier.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8568; Dec. Dig. § 877.*]

Appeal from Brown County Court; A. M. Brumfield, Judge.

Action by J. F. Cunningham and another against the Gulf, Colorado & Santa Fé Railway Company and others. From a judgment for plaintiffs against certain of the defendants, the latter appeal. Affirmed.

Baker, Botts, Parker & Garwood, C. L. McCartney, J. W. Terry, and A. H. Culwell.

for appellants. Oscar Calloway and Wilkinson & Lee, for appellees.

RICE, J. Appellees instituted this suit in the county court of Brown county against the Gulf, Colorado & Santa Fé Railway Company, the Texas & New Orleans Railway Company, the Louisiana & Western Railway Company, Morgan's Louisiana & Texas Railroad & Steamship Company, and the Louisville & Nashville Railroad Company, to recover damages growing out of a shipment of 28 head of horses from Mullen, Tex., to Brewton, Ala., in February, 1905, alleging that all of said defendants were corporations, with agents or officers in this state; that the Gulf, Colorado & Santa Fé Railway Company had an agent in Brown county, Tex.; that the T. & N. O. Railway Company had its principal office in Harris county, Tex.; that the said Louisiana & Western Railway Company and Morgan's Louisiana & Texas Railroad & Steamship Company were foreign corporations, incorporated under the laws of Louisiana, but that each had agents representing them in the city of Houston, Harris county, Tex.; and that the Louisville & Nashville Railroad Company was also a foreign corporation, incorporated under the laws of Kentucky, with an agent in Dallas county, Tex.; that at the date of said shipment said several lines of railway were operating their respective roads, giving the terminals of each, extending from Mullen, in Mills county, Tex., the initial point of said shipment, to Brewton, Ala., its ultimate destination, but that at said time each of said lines of railway connected at its point of origin directly with the terminus of the other, so that they together formed a continuous line of road from Mullen, Tex., to Brewton, Ala., and were then engaged in operating railroad trains over their respective lines of road for transportation of freight thereon; that on the 20th of February, 1905, plaintiffs entered into a contract with said Gulf, Colorado & Santa Fé Railway Company, by the terms of which it agreed to furnish plaintiffs at Mullen, Tex., with a reasonably safe stable car for the transportation of one car load of horses from Mullen to Brewton, Ala., to which place said defendant and its several connecting lines, by the terms of said contract, bound themselves to carry said horses; it was further agreed that the freight charges on said horses from Mullen to New Orleans was \$126.50, which was paid by plaintiffs, and that the charge from New Orleans to Brewton, Ala., was \$40 additional; that it was agreed that said horses were to be billed through to Brewton from Mullen; all of which facts were known to and approved by the superior officers of said Gulf, Colorado & Santa Fé Railway Company having authority and control over said matter, whose names were to plaintiffs unknown; that said shipment of horses was tendered to, received

and transported by each of said several defendant companies over their respective lines of railway with full knowledge of the facts of said contract, and with full knowledge of their destination, and that they were designed for sale upon their arrival at Brewton, Ala., whereby they all became bound to transport said horses with reasonable care, speed, and diligence, and to deliver the same to appellees within a reasonable time thereafter, in a reasonably good condition, at their ultimate destination, notwithstanding which said shipment of horses was delayed in transit, roughly handled, inadequate facilities furnished for feeding and watering them en route, the feeding pens being allowed to become muddy and unfit for use, as well as a failure to furnish feed, by reason of all of which said horses were injured and greatly damaged.

The appellant Gulf, Colorado & Santa Fé Railway Company answered by general and special exceptions, general denial, and specially pleaded the provisions of the live-stock contract under which the horses were shipped and those provisions which limited the liability of the carrier to such loss or injury as occurred on its own line, and charged that there was no loss or injury while said stock was in its possession, and that the same were promptly delivered to the Texas & New Orleans Railway Company at Beaumont. It likewise pleaded under its contract that said stock were not to be transported in any specific time or delivered at destination at any particular hour for any particular market, and that the shippers contracted to take care of said stock en route, and that ample opportunity was afforded for this purpose.

The Texas & New Orleans Railway Company and the Louisiana & Western Railway Company answered by general and special exceptions and general denial, and specially pleaded the provisions of the live-stock contract under which the horses were shipped, which, among other things, limited the liability of the carrier to such loss or injury as occurred on its own line, and such as was due to its own negligence, charging that there was no loss or injury while the stock was in their possession, and that the same were promptly carried and delivered, after being received from the Gulf, Colorado & Santa Fé Railway Company at Beaumont, to New Orleans, La., and delivered in good condition to its connecting carrier at said point, and that the shippers agreed to take care of said stock en route; denied partnership with other lines, and that they were bound to transport said shipment to its final destination, but only over its own line.

Morgan's Louisiana & Texas Railroad & Steamship Company, and Louisiana & Western Railway Company, each filed their pleas of privilege to be sued in Harris county, which were overruled, and each answered by adopting the answer of their code-

fendant, the Texas & New Orleans Railway Company, except as to some immaterial matters.

The Louisville & Nashville Railway Company answered by general demurrer, general denial, and by special answer alleging, in substance, that they received said shipment from their codefendants at New Orleans, and transported the same carefully, and without delay, delivering the same to consignees at Brewton, Ala., in the same condition as when received by it; and likewise pleaded the benefit inuring to them under the contract originally made with the plaintiffs by the Gulf, Colorado & Santa Fé Railway Company, wherein their liability was limited to injuries occurring on their own line.

There was a jury trial and verdict in favor of the appellees as follows: \$500 against the Gulf, Colorado & Santa Fé Railway Company, \$267 against the Texas & New Orleans Railway Company, and \$100 against the Louisiana & Western Railway Company, with 6 per cent. interest from date of judgment. Verdict was likewise rendered in favor of Morgan's Louisiana & Texas Railroad & Steamship Company and Louisiana & Nashville Railway Company, being as to the latter in response to a peremptory charge, and judgment rendered in accordance therewith, from which this appeal is prosecuted by the Gulf, Colorado & Santa Fé Railway Company, the Texas & New Orleans Railway Company and the Louisiana & Western Railway Company.

We will first discuss the errors assigned by the Gulf, Colorado & Santa Fé Railway Company, the other two appellants having filed a joint brief.

By its first assignment of error this appellant urges that the court erred to its prejudice in instructing a verdict in favor of the Louisville & Nashville Railroad Company, contending that the charge therein was on the weight of the evidence and usurped the province of the jury, because the liability of said company under the evidence raised an issue of fact, which should have been submitted to the jury. We have carefully examined the record, and find no evidence showing or tending to show that the Louisville & Nashville Railroad Company was negligent in and about said shipment, or that the horses were injured while in its hands; but it appears from the testimony of one of the plaintiffs who accompanied said shipment to New Orleans, and who was present at Brewton, Ala., when it arrived, and who received and unloaded the horses there, that their condition at the time they arrived was not materially different from what it was at New Orleans; that they changed cars at New Orleans, and that the car used in their shipment from New Orleans to Brewton was a 36-foot car. It was shown by the employés of said company handling said shipment between New Orleans and Brewton

that there was no delay and no rough handling, and there was no evidence contravening this testimony. It was therefore the duty of the court to instruct a verdict in behalf of the Louisville & Nashville Railroad Company.

By its second assignment of error, this appellant insists that the court erred in its charge wherein it instructed the jury that the Texas & New Orleans Railway Company was not responsible for any injuries resulting to plaintiffs' horses before they were received by said company, nor for any injuries resulting to said horses after they were received by it which was the direct result of their having been weakened or otherwise injured, if at all, while in the custody of the Gulf, Colorado & Santa Fé Railway Company, provided they believed they had received any injuries or were weakened while in the custody of said Gulf, Colorado & Santa Fé Railway Company, and that said injuries did not develop or become manifest until after they were delivered to the Texas & New Orleans Railway Company, contending that said charge was on the weight of the evidence. We do not think the charge is subject to the complaint made against it, and, in our judgment, announced a correct proposition of law. The same being an interstate shipment, with limitation of liability on the part of each company to injuries occurring on its own line, it certainly cannot be contended that it was error to instruct the jury, as was done in this case, that the Texas & New Orleans was not liable for injuries that may have occurred on the line of the Gulf, Colorado & Santa Fé Railway Company. This assignment is therefore overruled.

The court did not err in refusing to give to the jury special charge No. 3, requested by the Gulf, Colorado & Santa Fé Railway Company, to the effect that they should not assess damages against it on account of muddy stock pens at Silsbee, nor in refusing to give special charge No. 7, relating to insufficient stock pens at Somerville, because the evidence did not raise any issues as to damages at said places.

We do not think there was any error in the refusal of the court to give special charge No. 4, as requested by this appellant, to the effect that even though they should find that the horses were delayed at various places along its line, and that said delays resulted in damage to them, still, such damages could not form the basis of a verdict against it, unless they further found that said delays were unreasonable or negligent, because, at the instance of said appellant, the court had instructed the jury that a railway company was not responsible for injuries resulting to live stock while in its custody caused by delays, unless the same were due to the negligence of such company; and further, that it would not be responsible for delays that were reasonably necessary in the handling of its

trains and making changes at division points.

By its fifth assignment of error, this appellant complains that the court erred in refusing to give its special charge No. 5, to the effect that it was not required to furnish plaintiffs a stable car, even though the jury should find from the evidence that the plaintiffs requested said company's agent to furnish such a car, but that said company was only required by law to furnish a reasonably safe car. By its general charge the court had instructed the jury that it was the duty of defendants respectively, while said horses were in their custody and control, to use ordinary care to furnish a reasonably safe and suitable car for their transportation, and that a failure so to do would be negligence, and to find a verdict for plaintiffs if said horses were injured and impaired in their market value by reason of such failure. We think the general charge of the court was sufficient upon this subject, and that it was not error, on account thereof, to refuse said special charge.

There was no error in refusing to give charge No. 6, requested by this appellant, as shown by its sixth assignment of error, to the effect that the company would not be responsible for injuries sustained by reason of the inherent nature and vicious propensities of the horses, for the reason that the trial court gave a charge substantially covering this phase of the case.

By its eighth assignment of error this appellant claims that the court erred in refusing to give its special charge No. 14, which, in effect, instructed the jury that even though they may find from the evidence that the horses in question received the injuries, as alleged, on account of rough handling, "still you must believe from the evidence that such rough handling was due to negligence of defendants as defined in the charge, and, further, that said rough handling, if any, was the direct and proximate cause of such injuries, and unless you do so believe, you cannot find any damages on account of said rough handling against this appellant." This charge was refused, and we think properly, because special charge No. 9 requested by appellant covered this phase of the case, which, in effect, told the jury that "you are instructed that, before plaintiffs can recover against it, you must find from the evidence that appellant was negligent, and that plaintiffs received some injuries to their horses, and that the negligence of the defendant, if any, was the proximate cause of such injury."

By its ninth assignment of error this appellant insists that the court erred in allowing K. F. Cunningham, one of the plaintiffs, to testify to a conversation had by him over the phone with Johnson, the agent of defendant's company at Brownwood, relative to this shipment, in which it was claimed that Johnson made a contract with him by which

he agreed that appellant would transport said horses from Mullen, Tex., to Brewton, Ala., and would furnish a stable car, suitable for said purpose, within which to convey them, contending by its proposition under this assignment that it was incompetent in this case to prove any contract made between appellees and appellant's agent at Brownwood, since it appeared from the evidence that the horses were shipped under a written contract executed by appellant's agent at Mullen. It will be recalled that the plaintiffs charge in their petition that the contract of shipment was made with the agents at Brownwood and at Mullen, both stations on this appellant's road, setting out the contract in detail; and they further alleged that the contract was known to the superior officers of said company, and, with a knowledge thereof, the same was ratified by them. It is further charged that, in accordance with said contract so made, the car was furnished to plaintiffs at Mullen and shipment of the horses made therein. It was in evidence by said Johnson that he recalled the telephone conversation with plaintiff with reference to said car, at which time he was station agent at Brownwood; that the car was to be furnished at Mullen; that he did not remember to what point the horses were to be shipped, but he thought beyond the state; that he placed plaintiffs' order with the train office at Temple, which office handles the transportation of cars upon said road; that he did not send the car from Brownwood. Plaintiff testified that when he arrived at Mullen with the horses the agent at that place met him and asked if it was Cunningham; that he answered "Yes," whereupon he told me that our car was there." The trial court in its charge to the jury upon this subject instructed them that it was the duty of defendants, while said horses were in their control and custody, to use ordinary care to furnish a reasonably safe and suitable car for their transportation. Since there were allegations in the pleading, as we have seen, to the effect that the contract of shipment, claimed to have been made with the agents at Brownwood and Mullen, was known to and ratified by the superior officers of the defendant company, we think it was permissible to show, first, what the contract was, if any, made between appellees and the company's agents, and then to show that the same was ratified and acted upon by the superior officers of the company. Therefore, in our judgment, this evidence was admissible. We do not believe that this ruling contravenes the doctrine announced in *M. K. & T. Ry. Co. v. Belcher*, 88 Tex. 549, 32 S. W. 518, G., C. & S. F. Ry. Co. v. Dinwiddie, 21 Tex. Civ. App. 344, 51 S. W. 353, and G., C. & S. F. Ry. Co. v. Jackson & Edwards, 99 Tex. 343, 89 S. W. 969, 14 Tex. Ct. Rep. 100, cited by appellant.

In the first case cited it was held that

where it was sought to hold the company liable for delay in the shipment of cotton seed products from Sherman to Gainesville, by reason of notice of the importance of the shipment given to the Gainesville agent, which he failed to communicate to the Sherman agent, that the company not be held liable for his default, by reason of the fact that there was no authority in the Gainesville agent to act for the company relative to said shipment from Sherman; and further, because there was no duty devolving upon the station agent at Gainesville, who received said notice, to convey the same to the agent at Sherman.

In the case of *G. & S. F. Ry. Co. v. Dinwiddie*, supra, it was held that the railway company was not bound by the contract of its agent at one station to furnish cars for shipping cordwood at another station, in the absence of authority on the part of the agent to make such contract, or in the absence of notice to and ratification by the company; it clearly appearing inferentially from said last authority that if the company had had notice of said contract and had ratified the same, then it would have been held liable for its failure to furnish the cars by reason thereof. We think this case is distinguishable from the cases above cited, because here notice and ratification on the part of the company of the acts of the Brownwood agent were pleaded, and that therefore the evidence objected to was clearly admissible under said allegations.

The tenth assignment of error is overruled for the reasons stated in disposing of the third and seventh assignments.

We do not believe there is any merit in the question raised by appellants' eleventh assignment of error, concerning the admissibility of the testimony of the witness Weems. The objection, we think, goes rather to the sufficiency than to the admissibility of said evidence.

We overrule the thirteenth assignment of error, complaining of the action of the court in permitting witnesses Nelson, Blake, and Barnhill to testify relative to what in their judgment would have been the reasonable value of said horses if they had arrived at Brewton in reasonably good condition, because these witnesses all testified that they saw said horses upon their arrival, and were acquainted with the market value of horses at Brewton, and it was not necessary that said witnesses should have accompanied the shipment in order to express an opinion as to what said horses would have been worth had they arrived at their destination in a reasonably good condition.

The Louisiana & Western Railway Company, by its first assignment of error, urges that the court erred in sustaining an exception of plaintiffs to its plea of privilege to the jurisdiction of the court. The petition alleged a joint contract of shipment, and that all of the defendants had agents in the

state, which was also admitted by the plea, and it was also alleged that the shipment passed over the lines of all the defendants, and that a part of the injuries occurred on the line of the Gulf, Colorado & Santa Fé Railway Company, the initial carrier, which extends through Brown county. The plea was otherwise full, negating the exceptions of the venue statute, but not the facts above set out. Under the Acts of 1905, p. 29, c. 23, amending the Act of 1899, p. 214, c. 125, we think the judgment of the court overruling this plea of privilege was correct. The act in question states that: "Whenever any passenger, freight, baggage or other property has been transported by two or more railroad companies, express companies, steamship or steamboat companies, transportation companies or common carriers of any kind or name whatsoever, or by any assignee, lessee, trustee or receiver thereof, or partly by one or more of such companies, or common carriers, and partly by one or more assignees, lessees, trustees, or receivers thereof, operating or doing business as such common carriers in this state, or having an agent or representative in this state, suit for damages or loss, or for any other cause of action arising out of such carriage, transportation or contract in relation thereto may be brought against any one or all of such common carriers, assignees, lessees, trustees or receivers operating or doing business in this state, or having an agent or representative in this state, in any court of competent jurisdiction in any county in which either of such common carriers, assignees, lessees, trustees or receivers operate or does business, or has an agent or representative;" further providing for the apportionment of damages recovered in such suits between defendants not shown to be partners, on the request of either, etc. It was alleged and proven that this appellant had an agent in Brown county, hence the suit as against all of the defendants was properly brought there. See, also, *Ry. Co. v. Williams*, 38 Tex. Civ. App. 405, 86 S. W. 38, and authorities cited under the statute above quoted, in *McIlwaine's Ann. Dig. of Texas*, p. 228.

The other appellants, the Texas & New Orleans Railway Company and the Louisiana & Western Railway Company, by their second assignment of error, say that the court erred in overruling their second special exception to plaintiffs' petition, which was addressed to the insufficiency thereof, on the ground that it did not show which road or roads furnished said car or cars, did not state on what line or what road the injuries occurred, and that it failed to show with sufficient clearness which defendant or defendants were guilty of the negligent acts charged against it, by reason of which want of particularity in said allegations it was unable to tell wherein it was sought to be held liable, and unable to answer thereto. In *International & Great Northern Railroad Com-*

pany v. Jones, 41 Tex. Civ. App. 327, 91 S. W. 611, in which a writ of error was denied by the Supreme Court, it was held that a petition in an action against the initial connecting and terminal carriers for injuries to a shipment of cattle, which charged the carriers with negligence generally in transporting said cattle, and which alleged the damages resulting therefrom, was sufficient, without alleging what effect the negligence of each carrier had on the cattle, though the shipper's agent accompanied the shipment. The same doctrine was recently reaffirmed in *S. A. & A. P. Ry. Co. et al. v. T. O. Martin et al.* (Tex. Civ. App.) 108 S. W. 981, and in which a writ of error was likewise denied. We therefore hold that it was not necessary for plaintiffs to have been more specific in their allegations in this respect. But the petition does show that the car was ordered from the Gulf, Colorado & Santa Fe Railway Company to be furnished at Mullen; that the horses were loaded in it at said point and carried in it from that point to New Orleans. It states the names of the stations where the delays occurred, the length of the delays, the names of the stations where defendant unloaded plaintiffs' horses for feed and rest, and at what points they failed to provide facilities for such purpose. They state in detail the injury to the horses, and added that they were unable to state at just what particular places the acts of rough handling occurred, owing to the fact that a part of said shipment occurred at night, and that plaintiffs were not sufficiently acquainted with the places where such rough handling occurred to identify and designate them, but they allege that such rough handling was frequent and continuous between the town of Mullen and the city of New Orleans.

Said appellants claim there was error in overruling their fifth special exception to the claim of \$50 damages to said horses on account of alleged shrinkage in market value thereof, due to improper and unsuitable pens at Beaumont, claiming that the same was insufficient and stated no cause of action, in that it failed to allege any act of negligence on the part of defendant causing said injuries, and failed to allege what the market value of said horses would have been but for said injuries. The petition did allege that defendant's pens at Beaumont were without troughs and water, were in such muddy and sloppy condition that said horses could not be fed in them, and that on this account, as well as for other reasons pleaded, said horses suffered injuries and were damaged, all of which things were alleged to be due to the negligence of the defendants. It seems to us that the allegations of the petition in this respect were sufficient to show that the muddy condition of said pens caused damages and injury to said horses, and was owing to the negligence of the defendants. We therefore overrule said assignment.

Appellants' sixth, seventh, and eighth assignments of error are overruled for the reasons stated in overruling their second assignment.

It was not error, as contended by appellants' tenth assignment of error, for the court to permit the witness Cunningham to testify what a policeman at Beaumont said about the company's having no feed for his stock, because it appeared that said party was a yard policeman at Beaumont, in the service of appellant Texas & New Orleans Railway Company, and that he was working with appellants' crew in loading and unloading the horses, and was in charge of said crew; and, therefore, evidence of what he said while in the performance of his duties was admissible and binding upon appellants.

There was no error in overruling appellants' eleventh and twelfth assignments of error, complaining of the action of the court in permitting the plaintiff Cunningham to testify that he told the agent of the Texas & New Orleans Railway before his horses left Beaumont that they were going to Brewton, Ala., and the purpose for which they were being shipped to said point, because, as appellees contend, while appellant had contracted to carry the horses only to New Orleans, yet if they knew at the time the contract was entered into that the ultimate destination of said horses was Brewton, Ala., it will be presumed that the contract was made in view of the market at the last-named place, and that it was contemplated by the parties to said contract that in the event of a breach thereof the measure of plaintiffs' recovery would be controlled by that market. Such being the case, it was proper to admit evidence of appellants' knowledge of the final destination of the horses. Such evidence would not vary the terms of the contract of shipment, and would not require appellants to carry the horses beyond New Orleans. The evidence disclosed that the agent who made the contract with the plaintiffs knew that Brewton was the final destination of the horses, and agreed to bill them through to said point, collecting freight therefor to New Orleans, stating that the horses would be unloaded at New Orleans and delivered to the Louisville & Nashville Road. The plaintiff likewise testified that he told the Texas & New Orleans agent at Beaumont that he was going to Brewton with the horses. *G., C. & S. F. Ry. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Reeves v. T. & P. Ry. Co.*, 11 Tex. Civ. App. 514, 32 S. W. 920; *S. L. I. M. & S. Ry. Co. v. De Shong*, 63 Ark. 443, 39 S. W. 260; *T. & P. Ry. Co. v. White* (Tex. Civ. App.) 80 S. W. 641; *C., R. I. & T. Ry. Co. v. Carroll* (Tex. Civ. App.) 81 S. W. 1020; *T. & P. Ry. Co. v. Dishman*, 41 Tex. Civ. App. 250, 91 S. W. 828; 6 Ency. Law & Prac. 631.

We overrule the thirteenth and fourteenth assignments of error, the first of which complains of the action of the court in permit-

ting the witness Weems to testify over the objection of the defendants relative to the market value of the horses at Brewton, Ala., and the second of which complains of the action of the court in refusing to give special charge No. 6, to the effect that the defendants, not having undertaken to carry plaintiffs' stock to their ultimate destination, and there being no evidence of market value at New Orleans, they should find a verdict in favor of appellants, for the same reasons set forth in disposing of the eleventh and twelfth assignments.

The fifteenth, sixteenth, seventeenth, and eighteenth assignments of error are overruled, because it was permissible for said witnesses to have shown the value of the horses at Brewton, it appearing that they were experienced shippers, well acquainted with the market value of horses at Brewton at the time of their arrival there, and the fact that they stated that they knew their average value at Brewton would not affect the admissibility of their evidence in this respect.

For the reasons stated in overruling the first assignment presented by the Gulf, Colorado & Santa Fé Railway Company, appellants' nineteenth assignment is overruled.

We overrule the twentieth, twenty-first, twenty-fourth, and twenty-fifth assignments of error, as presented by appellants, because we do not believe that plaintiffs were precluded from recovery, as contended by appellants, because they did not undertake to procure feed and water for their stock at Beaumont upon the failure of appellants to furnish adequate facilities therefor, because, under the conditions surrounding plaintiffs at the time, as shown by the record, it was unreasonable to require them to procure feed and water elsewhere; nor were they barred from recovery by reason of the fact that they permitted appellants to unload their horses in muddy pens, because, while said shipment was made under a special contract requiring plaintiffs to feed, water, and care for their horses en route, still the same was only reasonable and valid so long as defendants furnished plaintiffs with reasonable facilities for doing so; and, no reasonable facilities having been furnished at Beaumont, said provision of said contract was unreasonable and void as to that place, and the duty then devolved upon appellants to feed, water, and care for said stock, and they were liable for failure so to do. *F. W. & D. C. Ry. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525; *G., C. & S. F. Ry. Co. v. Dunn* (Tex. Civ. App.) 78 S. W. 1080; 2 Hutch. on Carriers (3d Ed.) § 641. In the *Daggett* Case, *supra*, the Supreme Court say: "We are further of the opinion that the special contract, as well as said act of Congress, relieved the carrier of the duty in the first instance of feeding and watering at such points at which it furnished reasonable facilities to the shipper to do so, but that, in

the absence of such facilities at any point, the contract would be unreasonable at such point, and the carrier would be liable for any damages resulting from the failure to feed and water at such point."

The court did not err, as complained of in the appellants' twenty-third assignment of error, in refusing to give appellants' special charge No. 4, to the effect that if Cunningham knew the defective condition of the car before loading his horses thereon, and that they would necessarily receive injuries while in transit, then, as a matter of law, he was guilty of contributory negligence in shipping said horses therein, and could not recover.

We think appellees are correct in their contention that the railway company is bound to furnish a safe and suitable car for the transportation of freight, and is not relieved from liability for not so doing, even if the shipper examined the car and did not object to its fitness. This disposes of appellants' twenty-fourth and twenty-fifth assignments of error, as they raise the same question. It appears from the testimony of Cunningham that he objected to said car, both at Mullen and at Beaumont. *G., H. & S. A. Ry. Co. v. Silegman* (Tex. Civ. App.) 23 S. W. 298; *Hunt v. Nutt et al.* (Tex. Civ. App.) 27 S. W. 1031; *S. A. & A. P. Ry. Co. v. Dolan* (Tex. Civ. App.) 85 S. W. 303; *St. L., I. M. & S. Ry. Co. v. Marshall*, 74 Ark. 597, 86 S. W. 802; *St. Louis & S. F. Ry. Co. v. Brosius et al.* (Tex. Civ. App.) 105 S. W. 1131; 2 Hutch. on Carriers (3d Ed.) §§ 498, 499.

After a full and careful review of all the questions presented by appellants, we are constrained to believe that no reversible error is shown. The judgment of the court below is, therefore, in all things affirmed.

Affirmed.

On Rehearing.

This case was affirmed at the last term of this court, since which time a motion for rehearing has been filed by and on behalf alone of the Texas & New Orleans Railway Company and the Louisiana & Western Railway Company; the Gulf, Colorado & Santa Fé Railway Company, against whom judgment was likewise rendered, not joining therein.

In addition to what was said in the original opinion, we think the testimony of K. F. Cunningham as to what the policeman said to him at Beaumont was admissible, because it clearly appeared from the record that at the time said statement was made to Cunningham said policeman was in fact in charge of the horses in the company's yards, directing and controlling their movements. Besides this, it appeared on cross-examination of this witness by the defendants themselves that he was acting for and on behalf of the company in the matter in which he was then engaged. While, as a rule, we understand that agency cannot be proven by

the declarations of the agent, still the same has been held to be a circumstance, in connection with other facts, that will tend to prove that he was in fact an agent. *Texas Compress Co. v. Mitchell*, 7 Tex. Civ. App. 234, 28 S. W. 45; *Wheeler & Wilson Mfg. Co. v. Crossland*, 2 Willson, Civ. Cas. Ct. App. § 63; book 5, *Rose's Notes*, p. 1453; *M. P. Ry. Co. v. Rountree*, 2 Willson, Civ. Cas. Ct. App. § 387; *White & Willson*, § 339. Where there is evidence from which a jury could find agency, the declarations or admissions made during agency in regard to the transaction connected therewith are those of the principal. *White v. San Antonio Waterworks Co.*, 9 Tex. Civ. App. 465, 29 S. W. 252. And the agency of the policeman having been shown at the instance of the defendant on cross-examination, it is in no attitude to complain. This case does not fall within the rule announced by Judge Connor in *St. Louis & S. F. Ry. Co. v. Easley* (Tex. Civ. App.) 94 S. W. 207, because the chief reason for which the evidence in that case was excluded was because the statement made by the conductor did not accompany the act then being done; nor did it fall within the rule announced by Chief Justice Fisher in *G., C. & S. F. Ry. Co. v. Batte* (Tex. Civ. App.) 107 S. W. 633, for the reason that in that case there was no evidence whatever to show that the party making the declaration was in the employ of the company or acting for it, nor was there any other proof of agency offered. In *Mechem on Agency*, § 714, it is stated, in effect, that where the statements or declarations of the agent are made at the time of the transaction, or so soon thereafter as to come within the rule of *res gestæ*, the same are admissible. Here the declarations were made at the very time of the occurrence to which they related. Apart from this, we do not believe, if there was error in the admission of this testimony, it could have been hurtful to appellants, for the reason that it had been abundantly shown by the uncontradicted evidence of the plaintiffs themselves that the yards were very muddy and sloppy, and that there were no troughs within which to feed said horses.

Nor do we believe that there was any error in permitting the plaintiff to testify that he told the agent of the Texas & New Orleans Company, before his horses left Beaumont, that they were going to Brewton, Ala., as contended by appellant. The only objection made to the introduction of said testimony, as shown by appellants' brief, was that said evidence would vary and contradict the terms of the contract. There was no objection made that the company had had no notice of the ultimate destination of this shipment. Besides, it was alleged in plaintiffs' pleading that a contract was made with the Gulf, Colorado & Santa Fé, by which said horses were to be shipped from Mullen, Tex., by way of defendants' several

railways, their ultimate destination being Brewton, Ala.; and it was alleged that said Texas & New Orleans Railway Company, with full knowledge of the aforesaid contract, and with full knowledge that the destination of said horses was the town of Brewton, Ala., and that they were designed for market upon their arrival there, accepted the same to be so transported. We therefore think this evidence was admissible under the pleadings.

Relative to appellants' contention that it was not permissible to allow plaintiff K. F. Cunningham to testify what he received for certain of the horses sold by him after reaching Brewton, we desire to say that, even if this were error, appellants are not in a position to complain thereof, because other witnesses were allowed to testify, and did testify, without objection, substantially to the same thing, to wit, C. M. Barnhill testified that Howard Nelson and himself bought several head of the horses subsequent to the time of their arrival, stating the amounts that he paid plaintiffs therefor. Defendants themselves, on cross-examination of the witness Black, proved that the horses after their arrival at Brewton were sold for an average price of \$25 each; and by another witness, Joe Barnhill, the Texas & New Orleans Railway, on cross-examination, showed that plaintiffs sold certain of the horses during the month of March after their arrival there, and the prices received for them; so that if it was error, as complained of by appellants, the same was rendered harmless by their own subsequent proval of the same facts.

We cannot believe that there was any error, in the court's peremptorily instructing a verdict in behalf of the Louisville & Nashville Road, because there was no evidence in the record to warrant a judgment against said road, and the plaintiffs themselves admitted that their horses had suffered no injury or damage while in transit upon said road. Besides this, we cannot see how appellants are in an attitude to complain of this action of the court, even if it were error to have so charged the jury, because the jury were specifically charged that in the event there was a verdict for plaintiffs, no damages could be assessed against any defendant except that which occurred on its own line, etc. The plaintiffs, it seems to us, would alone have been the parties entitled to complain, and no complaint is made by them; they having expressly testified, as above said, that no material injury to the horses occurred during their transit over said Louisville & Nashville Railway.

Believing that no such error has been pointed out in appellants' motion for rehearing as would justify a change in our opinion, said motion for rehearing is in all things overruled.

Motion overruled.

GREEN v. COOK et al.

(Court of Civil Appeals of Texas. Nov. 14, 1908.)

APPEAL AND ERROR (§ 1183*)—RECORD—REVIEW.

Where there is no fundamental error apparent in the record, containing no statement of facts or bill of exceptions, and the assignments of error relate to rulings not reviewable without a statement of facts and bill of exceptions, the judgment must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4450-4453; Dec. Dig. § 1183.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action between Little Jimmie Green and D. L. Cook and others. From a judgment for the latter, the former appeals. Affirmed.

Looney & Clark, for appellees.

TALBOT, J. Appellant has failed to file briefs and prepare this cause for submission as required by the rules of this court; nor is there a statement of facts or bill of exception found in the record. By briefs filed by the appellees our attention has been called to this condition of the record, and the proposition made that in such case there is nothing for the appellate court to pass upon, and the judgment should be affirmed. This proposition is correct, where there is no fundamental error apparent of record and the assignments of error related to matters and rulings of the court that cannot be revised without a statement of the facts and bill of exceptions. We have examined the record before us far enough to ascertain that such is the status in this court of the present case.

The assignment of error found in the transcript that appellant has been deprived of a statement of facts through no fault or negligence of appellant or his attorney, but by reason of the acts in bad faith done and committed by attorneys for appellee Cook, if it should be considered at all, is not, in our opinion, sustained by the record. It follows that the judgment of the lower court must be affirmed, and it is so ordered.

Affirmed.

HARRISON, County Judge, v. DICKINSON.

(Court of Civil Appeals of Texas. Oct. 28, 1908.)

INTOXICATING LIQUORS (§ 74*)—COMPELLING ISSUANCE OF LIQUOR LICENSE—GROUNDS.

To entitle one to mandamus to compel the county judge to grant him a liquor license, under Acts 30th Leg. p. 260, c. 138, § 10, he must show the existence of all the facts essential to his right; and where the petition alleged that the place in which the applicant sought to do business was not in a local option district, and that on the hearing of his application the county judge found that the place was in a local option district, and the county judge in his an-

swer alleged that the place was in local option territory, the court, before issuing the writ, must find that the place was not in local option territory.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 74, 75; Dec. Dig. § 74.*]

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Mandamus by E. A. Dickinson against James Harrison, County Judge. From a judgment granting the writ, defendant appeals. Reversed and remanded.

Blain & Howth, for appellant. Teagle & Conley and V. A. Collins, for appellee.

REESE, J. Appellee made application for liquor license to appellant, county judge of Jefferson county, under the provisions of section 10, c. 138, p. 260, Acts of the 30th Legislature. His application contained all the requirements of the statute. Due notice was given, and on the hearing the county judge (who is appellant here) found that all the allegations of the petition were true, but further found as a fact that the place where the applicant proposed to carry on his business was within territory where the sale of intoxicating liquors was prohibited under the local option laws, and on this ground refused to grant the application. Appellee thereupon brought this suit in the district court wherein he seeks a writ of mandamus to compel appellant, as county judge, to grant his application for license as prayed for. Upon hearing, the district court granted the writ as prayed for, from which judgment the county judge appeals.

It is alleged in appellee's petition in the district court, among other things, that the place at which he sought to do business was not in a local option district. It is also alleged that upon the hearing of his application the county judge had found that such place was in a local option district, and had refused it on that ground. Appellant in his answer alleged that the place was in local option territory. In seeking, by the use of the extraordinary remedy of a writ of mandamus, to compel the county judge to grant him the license prayed for, it was incumbent upon appellee to show the existence of all the facts essential to his right and that there was no impediment to the granting of the license as prayed for. *Arberry v. Beavers*, 6 Tex. 473, 55 Am. Dec. 791. By the terms of the act of the Legislature referred to the right of any person to a license to sell liquor was expressly limited to such locality as was not in local option territory. The issue as to whether the place at which appellee desired to pursue his calling was within such territory was clearly raised by the finding of the county judge and by the pleadings of the parties. In such case appellee, to entitle himself to the benefit of the law, was required to show, by proper evidence, that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

this locality was not in a local option territory. This was a fact essential to his right. The trial court did not inquire into this at all, but held that, inasmuch as the statute did not expressly require the applicant for license to set out in his application to the county judge this negative fact and prove it, it was immaterial in the mandamus proceeding. In this we think the court was in error. The issue as to whether the locality referred to in the application was in local option territory should have been first determined in appellee's favor before the writ of mandamus was ordered.

The judgment is reversed, and the cause remanded for another trial in accordance with this opinion.

Reversed and remanded.

HOUSTON & T. C. R. CO. v. CHEATHAM.†
(Court of Civil Appeals of Texas. Oct. 21, 1908. Rehearing Denied Nov. 25, 1908.)

1. CARRIERS (§ 320*)—INJURY TO PASSENGER—NEGLIGENCE — EVIDENCE — QUESTIONS FOR JURY.

Where a passenger was injured by derailment of the train, and there was evidence that the ties at the place of derailment were so rotten that they would not hold the spikes, etc., and that the train was operated over the place at from eighteen to twenty miles an hour, the court properly submitted the issues of negligence, both as to the condition of the track and the operation of the train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1315; Dec. Dig. § 320.*]

2. CARRIERS (§ 297*)—INJURY TO PASSENGER—CONDITION OF TRACK—KNOWLEDGE OF SERVANTS.

The servants of a carrier are charged with knowledge of the condition of the carrier's railroad track at a point where excessive speed would be likely to cause derailment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1204; Dec. Dig. § 297.*]

3. CARRIERS (§ 316*)—INJURY TO PASSENGER—DERAILMENT—RES IPSA LOQUITUR.

Where derailment was shown as the cause of an accident in which a passenger was injured, negligence of the carrier is presumed, and the burden is on it to rebut such presumption.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1283; Dec. Dig. § 316.*]

4. DAMAGES (§ 216*)—PERSONAL INJURIES.

An instruction that, if the jury found for plaintiff, they should assess her damages at the sum which if paid in cash in hand at this time would under the evidence justly compensate her for the injuries directly and proximately resulting from defendant's negligence, if any, and in computing such damages the jury should consider any physical pain and suffering, mental suffering, and anguish plaintiff sustained by reason of the injury and any reasonable charges for medical treatment and medicines which she paid or became responsible for by reason of the injuries, was correct, and not objectionable as authorizing an award of such damages as the jury might think would properly compensate her for her injuries unlimited by any legal rule or by the items specified.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 548; Dec. Dig. § 216.*]

5. DAMAGES (§ 43*)—PERSONAL INJURIES — PHYSICIANS' BILLS—MEDICINES.

A person injured cannot recover expenditures made for physicians' bills and medicines, in the absence of proof that the charges were reasonable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 243; Dec. Dig. § 43.*]

6. TRIAL (§ 62*)—RECEPTION OF EVIDENCE — REBUTTAL.

Where, in an action for injuries to a passenger by derailment at a point 100 yards south of a bridge, defendant's witnesses testified that all the ties used on the road between certain stations, including the point of derailment, were creosoted when the road was constructed, with the exception of three or four miles where the ties had been replaced by creosoted ties, and denied plaintiff's claim of negligence that the wreck was caused by rotten ties, evidence of a witness that she had walked along the track north of the bridge and within 100 yards from the place of the accident and had seen a good many rotten ties, some of which were soft and would not hold the spikes, was admissible in rebuttal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 149; Dec. Dig. § 62.*]

7. APPEAL AND ERROR (§ 1051*) — REVIEW — HARMLESS ERROR.

The admission of immaterial evidence is not ground for reversal when there are other facts and circumstances sufficient to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4161; Dec. Dig. § 1051.*]

8. TRIAL (§ 114*)—MISCONDUCT OF COUNSEL—ARGUMENT.

Where, in an action for injuries to a passenger on a mixed train by derailment, defendant's testimony showed that freight cars often left the track without any cause that could be discovered, plaintiff's counsel was not guilty of misconduct in arguing that defendant was negligent in attaching passenger coaches to the rear of freight trains for the carriage of passengers, which was alone sufficient to entitle plaintiff to recover all the damages she had sustained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 275; Dec. Dig. § 114.*]

9. APPEAL AND ERROR (§ 972*) — REVIEW — MATTERS OF DISCRETION.

Whether counsel in argument has been permitted to direct an erroneous and hurtful deduction from the evidence over objection is a matter largely within the discretion of the trial court, the exercise of which will not be interfered with on appeal in the absence of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3847; Dec. Dig. § 972.*]

10. APPEAL AND ERROR (§ 1140*) — REVIEW—AMOUNT OF RECOVERY—REMISSION—CURING ERROR.

Where a judgment appealed from was erroneous only in so far as it allowed plaintiff a recovery for physicians' bills and medicines, the error was cured by plaintiff's agreement that the amount so erroneously included should be deducted and the judgment as reformed should be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4472; Dec. Dig. § 1140.*]

Appeal from District Court, Lampasas County; John M. Furman, Judge.

Action by Ellen Cheatham against the Houston & Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reformed and affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

S. R. Fisher, J. H. Tallichet, S. W. Fisher, and Baker, Botts, Parker & Garwood, for appellant. T. E. Hammond, Ike D. White, and W. H. Browning, for appellee.

RICE, J. This is a suit by Ellen Cheatham, a feme sole, against the Houston & Texas Central Railroad Company, to recover damages for personal injuries alleged to have been sustained by her while a passenger on said road by the derailment of defendant's mixed train between Burnet and Lampasas, Tex., on April 28, 1907. The defendant in answer to said suit filed a general demurrer and general denial. A jury trial resulted in a verdict and judgment for plaintiff for \$1,750, from which this appeal is prosecuted.

By appellant's first assignment of error it is urged that the court erred in stating the issues in his charge to the jury, because said charge was on the weight of evidence, and in its proposition thereunder insists that said charge states and finds as a fact that defendant was guilty of negligence, as alleged by plaintiff, and gave undue prominence to the plaintiff's case by setting out her allegations, and, in addition, referring the jury to her petition. It seems that the court in stating the issues substantially copied the petition of plaintiff, wherein the acts of negligence are relied upon, but in doing so we fail to find from the record that there was any assumption on the part of the court that the acts complained of were true, as charged, or any statement which could be construed as such. We think there is no merit, therefore, in this assignment, and overrule the same.

By its second assignment appellant urges that the court erred in the third paragraph of its charge on the law of the case, in that it submitted to the jury issues not raised by the evidence, and by its proposition thereunder urges that the court erred in submitting the issue of negligence on the part of appellant in running and operating its train at the place of the accident, because it appeared from the evidence that the same was carefully and properly operated at the time. The petition in this case alleged negligence on the part of appellant both as to the condition of the track at the place of the injury and the manner of operating the train at the time of the accident. There was ample evidence to show that at the place of derailment the track was in bad condition and out of repair, its ties being rotten, in so much so that they would not hold the spikes, etc.; and there is evidence that the train was being operated at the time of the accident at a speed of from 18 to 20 miles per hour. We think this evidence would justify the court in submitting both issues, because the jury had the right to infer from the evidence that the operation of its train along said track at such high rate of speed was in itself negligence; the appellant and its servants being charged with a knowledge of the condi-

tion of its track at said place. 2 Hutch on Carriers, p. 1046, § 926; *Railway v. Lewis*, 145 Ill. 67, 33 N. E. 960. Apart from this the derailment being shown, as a matter of law negligence is presumed, and it devolves upon appellant to rebut the same. 3 Hutch on Carriers, § 1413, p. 1700 et seq. We do not think any error was committed, under the circumstances, in the submission of both issues by the charge to the jury, and overrule this assignment.

By its third assignment of error, appellant complains that the court erred in the fifth paragraph of its charge on the measure of damages, in that it authorized the jury to award plaintiff such damages as in their judgment would fairly and justly compensate her for such injuries as they might find were the direct and proximate result of defendant's negligence, unlimited by any legal rule by which such damages could properly be measured, stating that, in connection with such inquiry, they might take into consideration physical pain and suffering, as well as mental suffering and anguish, and reasonable charges for medical treatment and medicine, in that it did not limit the jury to a consideration of such items only. The charge complained of is as follows: "If you find for plaintiff, you will so say by your verdict, and you will assess her damages at such sum as if paid in cash in hand at this time would under the evidence in your judgment fairly and justly compensate her for such injuries as you may find are the direct and proximate result of defendant's negligence, if any, and in computing such damages, you may take into account any physical pain and suffering and mental suffering and anguish you may find she has sustained by reason of such injuries, and any reasonable charges for medical treatment and medicines which she has paid or become responsible for by reason of such injuries." This charge announces a correct principle of law relative to the measure of damages, and is not in our opinion subject to the objection urged against it, and we therefore overrule this assignment.

The fourth and fifth assignments of error complain of the action of the court in submitting to the jury any charge upon the subject of plaintiff's right to recover for medical treatment and medicine, because there was no evidence that said charges were reasonable. It appears from the evidence that plaintiff paid out \$50 doctors' bills and as much as \$8 for medicine; but, as appellant contends there is nothing in evidence to show that either of said items were reasonable charges, the court was therefore in error in submitting a charge thereon, but appellee has filed a remittitur of said amount and asks that in the event judgment is affirmed that these items be deducted therefrom and the judgment be made to conform thereto. Wherefore the error complained of is harmless, and these assignments are overruled.

The sixth assignment complains of the ac-

tion of the court below in admitting and refusing to strike from the record the testimony of Ophelia Gilmore. By its proposition under said assignment it is urged that, said witness having testified to having seen rotten and defective ties in defendant's track about 100 yards north of the bridge at the south end of which the derailment occurred, such evidence was irrelevant, immaterial, and prejudicial, and had a tendency to confuse the jury, and might cause them to believe that they could hold defendant liable for any defects in its track. By reference to the bill of exception it appears that, after all the witnesses offered by plaintiff had testified except the witness Ophelia Gilmore, plaintiff announced through her counsel in open court that she had one witness coming on the train, and that, until she arrived, plaintiff would rest, reserving, however, the right to put said witness on the stand when she came; the witness referred to being Miss Ophelia Gilmore. After the defendant had concluded its testimony, this witness having arrived, she was introduced, and testified that she remembered the occasion of the wreck on the road, and knew where it occurred; that just prior to that time she had walked along the railroad track near this point, within 100 yards thereof, and had frequently passed said point at which she noticed a good many rotten ties, some of which, when she stepped on them, were soft, some were splintered apart, and that the spikes looked like they were loose, and that they were raised up. On cross-examination of this witness by appellant it appeared that the point where she saw the ties in this condition was between the bridge and Lake Victor, and that she had no occasion to walk on the other side of the bridge, where the wreck occurred; that Lake Victor is north of the bridge; and that the wreck occurred at the south end of the bridge. The train was going north at the time of the derailment. Thereupon counsel for appellant moved to strike out said testimony, because the same referred to conditions in the track existing at least 100 yards from the place where the accident occurred. The court overruled said motion, and appended to said bill an explanation to the effect that L. Phillips, D. McCall, and other witnesses for the defendant had testified that all the ties used on the road from Burnet to Lampasas were creosoted ties at the time of the construction of the road, except for three or four miles from Burnet, and that they had been replaced by creosoted ties, and that at the time the testimony of Miss Gilmore was offered and objected to that counsel for plaintiff stated that said testimony was offered in rebuttal and so admitted by the court. It is argued by appellee that as there was abundant testimony to establish the fact that the wreck was caused by rotten ties in appellant's roadbed, as shown by the plaintiff's witnesses, which fact was controverted by appellant in attempting to show that its road-

bed was in good condition, that its ties had been "doctored" by saturating them with creosote, which gave them long life, and that this condition existed, not only at the place where the car was wrecked, but along its whole line, except some four or five miles out from the town of Burnet, and that other witnesses for appellant testified that its track was absolutely all right and safe for a speed of 18 to 20 miles per hour, and that this testimony relative to the condition of the track by appellant was not confined to the place of the wreck alone, but was offered to show the general condition of the road; hence that it was proper for appellee to rebut this evidence by its witness Miss Gilmore, who testified as above shown. We think the evidence was properly admitted in rebuttal, but, even if this was error, it is not ground for reversal, because it is frequently held that the admission of immaterial evidence is no ground for reversal when there are other facts and circumstances in evidence sufficient to support the verdict, as is the case here. *Commercial Bank v. Jones*, 18 Tex. 830; *Wilson et al. v. Lucas*, 78 Tex. 292, 14 S. W. 690.

By its seventh assignment of error it is urged that the court erred in overruling defendant's objection to the closing argument of counsel for plaintiff. It is shown by a bill of exceptions that on the trial, while counsel for plaintiff was making his closing address to the jury, he stated that the testimony of the defendant tended, and did, show that freight cars often left the track without any cause whatever that could be discovered or detected, and that, this fact being known to the defendant, it was carelessness and negligence on its part to attach passenger coaches to the rear end of freight trains and invite passengers to ride thereon, urging before the jury that the fact that defendant's train, which was wrecked, was a mixed train, carrying freight in front of the passenger coach, was in itself alone sufficient to constitute negligence; and to render the defendant liable to plaintiff for all damages she may have sustained. This argument was objected to by counsel for appellant, but counsel was permitted to proceed, notwithstanding said objection, and the court did not instruct the jury to disregard such argument. The court explained its ruling by stating that the conductor and engineer of appellant's train both testified that freight cars often left the track without any cause whatever that could be detected or discovered.

Counsel for appellee insist that no error has been committed on this score, because they had a right to discuss the evidence and draw their own deductions and inferences therefrom, and, if counsel should draw an erroneous and hurtful conclusion from the evidence submitted, it is contended by them that it would have been the duty of appellant to have controlled the same both by seasonable objection and a special charge to disregard same, which was not done in this

case. We are inclined to agree with appellee in her contention. It is true that counsel had no right to go outside the record and discuss matters not in evidence, but this was not done. Here the matter under discussion was in evidence and the only objection is that counsel in using it was drawing an erroneous and hurtful deduction therefrom. These matters are so largely within the discretion of the trial court that appellate courts do not usually interfere in the absence of some abuse thereof. Here none is shown, and the assignment is overruled.

Finding no reversible error in the record, we conclude that the judgment of the court below should be reformed and affirmed. It is therefore ordered that the sum of \$50, as found by the jury for medicine and medical attention, be deducted therefrom, in accordance with the remittitur of the plaintiff on file, and that the judgment for \$1,700 be in all things affirmed, but that the cost of this appeal shall be taxed against appellee.

Reformed and affirmed.

INTERNATIONAL & G. N. R. CO. v. WELBOURNE

(Court of Civil Appeals of Texas. Nov. 11, 1908.)

1. JUSTICES OF THE PEACE (§ 100*)—ACTION AGAINST CARRIER—INJURY TO GOODS—PLEADINGS AND ISSUES.

Where, in an action before a justice of the peace, against a carrier for injury to cabbages in transit, the pleadings were oral, and the claim for damages was thus summarized by the court: "That defendant company failed to ice said cabbage properly, and failed to carry said cabbage in a proper manner, whereby same were lost to plaintiff"—no issue was presented as to delay or improper handling of the car in which the cabbages were shipped.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 100.*]

2. CARRIERS (§ 117*)—INJURY TO GOODS SHIPPED—PERISHABLE GOODS—MODE OF TRANSPORTATION.

Though a carrier does not expressly contract to furnish a refrigerator car for perishable commodities, if it accepts such commodities for transportation, and in fact furnishes a refrigerator car, it impliedly undertakes to exercise the diligence that that class of goods requires.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 508-516; Dec. Dig. § 117.*]

3. CARRIERS (§ 180*)—CARRIAGE OF GOODS—CONNECTING CARRIERS—LIMITATION OF LIABILITY.

A connecting carrier may limit its liability for goods received for transportation to loss or injury which may occur on its own line.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815-828; Dec. Dig. § 180.*]

4. CARRIERS (§ 185*)—CARRIAGE OF GOODS—CONNECTING CARRIERS—INJURY TO GOODS—PRESUMPTION.

Where freight transported by successive carriers is damaged after its delivery to the initial carrier, and the evidence fails to show on what line the injury occurred, a presumption

arises that the damage occurred through the fault of the last carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-842; Dec. Dig. § 185.*]

5. CARRIERS (§ 177*)—CARRIAGE OF GOODS—CONNECTING CARRIERS—INJURY TO GOODS.

Where the decay of cabbages, transported by successive carriers, began on the line of the initial carrier, it was liable, though the decay continued on the lines of the succeeding carriers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 775-803; Dec. Dig. § 177.*]

6. TRIAL (§ 251*)—INSTRUCTIONS—ISSUES TO SUSTAIN.

In an action against a carrier for injury to goods in transit, an instruction as to inherent defects in the goods shipped was properly refused, where defendant did not raise that issue in its pleading or proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

7. CARRIERS (§ 185*)—CARRIAGE OF GOODS—INJURY TO GOODS—EVIDENCE.

In an action against an initial carrier for injury to cabbages shipped from Texas to Kansas City, Mo., testimony as to the market value of cabbages in Kansas City was admissible.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 185.*]

8. CARRIERS (§ 185*)—CARRIAGE OF GOODS—CONNECTING CARRIERS—INJURY TO GOODS—ACTIONS—EVIDENCE.

In an action against the initial carrier for injury to cabbages in transit, testimony that plaintiff received less for the cabbages than the freight and commission was inadmissible.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 185.*]

9. EVIDENCE (§ 519*)—OPINION EVIDENCE—SUBJECTS OF EXPERT TESTIMONY.

In an action against a carrier for injury to cabbages in transit, testimony of a witness that yellow leaves on cabbages indicate decay should not be received until such witness qualifies himself as an expert as to decay of cabbages.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2328; Dec. Dig. § 519.*]

Appeal from Montgomery County Court; B. A. McCall, Judge.

Action by W. S. Welbourne against the International & Great Northern Railroad Company and another. From a judgment for plaintiff, defendant International & Great Northern Railroad Company appeals. Reversed and remanded.

John M. King and W. M. Williams, for appellant. B. A. Crawford, for appellee.

FLY, J. This is a suit for \$110.74, for damages to 53 crates of cabbages, which accrued by reason of the failure of appellant and its codefendant, the American Refrigerator & Transit Company, to properly ice the refrigerator car in which the cabbages were stored for transportation. The suit was instituted in the justice's court, and was dismissed as to the refrigerator company on its plea of privilege. Judgment was rendered in favor of appellee in the justice's court, and on appeal to the county court the cause was tried by jury, and resulted in a verdict and judgment in favor of appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The pleadings on the part of appellee were oral, and the grounds for damages presented by them are thus summarized by the court: "That defendant company failed to ice said cabbage properly, and failed to carry said cabbage in a proper manner, whereby same were lost to plaintiff." We think it clear that the only issue presented by appellee's pleading is as to the negligence of appellant in failing to keep the car in which the cabbages were stored properly iced. There was no claim of delay or improper handling of the car. The evidence showed that the cabbages were in excellent condition when loaded, and were properly loaded. There is nothing to show that the car was not iced at that time; but, on the other hand, it was loaded by appellee, and he found nothing to object to with it. It is the reasonable inference that the car had a sufficient quantity of ice, because appellee did not ask for more ice, and he swore that it was "the custom at any and all times at loading stations, in case ice becomes exhausted in the bunkers, for the loader and shipper to notify the agent" of the railroad company, and appellee did not pursue that course. While there is no evidence tending to show that there was an express contract, on the part of appellant, to furnish a refrigerator car for the carriage of perishable commodities, and to keep it properly refrigerated, still it accepted a perishable commodity in a refrigerator car, and it impliedly undertook to exercise such care and diligence as that class of goods requires, although the care and diligence may be greater than that required in the transportation of ordinary commodities. *Railway v. Davis*, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143.

This was an interstate shipment, and there was a clause in the contract restricting liability for damages to the line of railroad on which the damage occurred. It was shown that appellant's line ended at Longview, Tex., and that the car containing the cabbages was delivered there to a connecting carrier. The only evidence as to where the cabbages were injured is the testimony of a witness, who stated that he re-iced the car in the yards of the Iron Mountain Southern Railroad Company, at Van Buren, Ark., and noticed that some of the cabbages were beginning to turn yellow. That was at least a day after they had left appellant's line. Being an interstate shipment, appellant had the right to restrict its liability to its own line, and no presumption of negligence would arise as to the initial carrier unless it was based on the fact that the damage occurred on its line. It is the settled law in Texas that, when "freight transported by successive carriers has been damaged subsequent to its shipment, and the evidence fails to show on what particular line the injury occurred, there exists a presumption that it was through the fault of the last carrier." *Railway v. Adams*, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; *Railway v. Edloff*, 89 Tex. 454, 34 S. W.

414, 35 S. W. 144; *Railway v. Cushney*, 95 Tex. 309, 67 S. W. 77; *Railway v. Mazzie*, 29 Tex. Civ. App. 295, 68 S. W. 56. It follows that the court erred when it instructed the jury that the burden was on appellant, the initial carrier, to show that the damage was caused by a connecting carrier. There was, in the absence of proof of circumstances tending to show that the causes operating to produce decay of the fruit were put in operation on its line, no presumption of negligence against it. It would not be necessary to prove that the whole of the decay took place on its line, but the case would be met by proof that negligent acts on the part of the initial carrier had put in operation causes which resulted in the decay of the cabbages before they reached Kansas City.

This court has fully considered the question under consideration in the case of *Oane Hill Cold Storage Co. v. Railway*, 95 S. W. 751, and it was there held: "The rule is not, as urged by appellant, that the receipt of goods in good condition, to be shipped by connecting carriers, and the delivery of them by the last carrier in bad condition, establish a *prima facie* case against all the carriers. The proper rule is that, where goods are delivered to a common carrier to be carried, by a series of connecting lines, to the point of destination, and the goods are delivered in good condition to the initial carrier, the presumption is that they were delivered to each successive carrier in the same condition." The shipment in that case was an interstate one, and the rule is applicable to that class of shipments alone, because the statutes of Texas prohibit carriers from restricting their liability as at common law in regard to shipments within the state. *Rev. St. 1895*, art. 320. Appellee cites the case of *Railway v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. 785, as authority sustaining the proposition, embodied in the charge of the court, that the burden is on the initial carrier, in an interstate shipment, to show that connecting carriers caused the damage to the shipper. It is not authority for any such proposition. In that case a car load of cotton was burned, while standing on the track of the railway that was sued, and the court merely held that, when it was proved that the cotton was destroyed while in possession of the carrier, the burden rested on it of showing that it had not been guilty of negligence. So in this case, if it had appeared that the cabbages had been damaged while in possession of appellant, or that there had been acts of commission or omission on its part which set in motion causes which afterwards resulted in damage to the property, then the burden would have rested upon appellant to show that it had not been guilty of negligence. The same doctrine was announced in *Railway v. Richmond*, 94 Tex. 571, 63 S. W. 619.

There is no merit in the first and second assignments of error, and in connection with

the third it may be stated that there was no evidence raising any issue as to inherent defects in the commodity causing the damage. That was a matter of defense, and the court, in the absence of pleading or proof on that issue, properly ignored it in his charge. The reference to the act of God and a public enemy added nothing whatever to the force and effect of the charge, as no such question presented itself.

The charge complained of in the sixth assignment of error is erroneous. It devolved upon appellee to show that the cause of the damage occurred on the line of appellant's railway; and, unless that was done, appellee had no cause of action. There was no burden resting upon appellant whatever until it reasonably appeared from the evidence that it had caused the damage. Under the charge of the court it was not only necessary for appellant to prove, by a preponderance of the evidence, that it had not been guilty of negligence, but also that the loss occurred on a connecting line. No such onerous duty rested on the carrier.

The special charge, whose refusal is complained of in the seventh assignment of error, embodied the law as hereinbefore stated, and should have been given.

The eighth assignment is without merit. The testimony as to the market value of cabbages in Kansas City was properly admitted.

The testimony as to appellee having received \$17.99 less for the cabbages than the freight and commission should have been excluded. It did not tend to prove any issue in the case.

Appellee should on another trial qualify himself as an expert in regard to the decay of cabbages before he is permitted to testify that yellow leaves indicate decay.

The judgment is reversed, and the cause remanded.

BURNHAM-HANNA-MUNGER DRY GOODS CO. v. CARTER.

(Court of Civil Appeals of Texas. Nov. 13, 1908.)

HUSBAND AND WIFE (§ 85*)—PRIVILEGES OF COVERTURE—BILLS AND NOTES—NOTE FOR HUSBAND'S DEBT.

A married woman is not liable on a note executed by her, where the consideration was a previous debt due the payee from her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 841; Dec. Dig. § 85.*]

Appeal from Bowie County Court; Sam H. Smelser, Judge.

Action by the Burnham-Hanna-Munger Dry Goods Company against Mrs. Nannie Tyson Carter. Judgment for defendant, and plaintiff appeals. Affirmed.

Todd & Hurley and Webber & Webber, for appellant. Glass, Estes & King, for appellee.

HODGES, J. This suit was instituted by the appellant to recover the sum of \$407.50 due upon a promissory note signed by the appellee. The facts show that the consideration for the note was a previous debt due to the appellant from the husband of the appellee, and for the payment of which this note was given. The testimony also shows that the appellee, at the time of the execution of the note, was a married woman residing in Bowie county, Tex. We think, under her plea and proof of coverture, she is amply protected against any liability upon the note. There was no dispute as to those facts, and there can be no doubt as to the application of the law.

The judgment is affirmed.

BOEHRENS v. BRICE et al.

(Court of Civil Appeals of Texas. Nov. 4, 1908.)

1. JUDGMENT (§ 17*)—DEFAULT JUDGMENT—NONRESIDENTS.

No personal judgment can be rendered against a nonresident defendant, served without the state, upon his failure to appear and answer, unless he owns property within the state.

[Ed. Note.—For other cases, see Judgment. Cent. Dig. § 26; Dec. Dig. § 17.*]

2. CORPORATIONS (§ 503*)—ACTIONS—VENUE—NONRESIDENTS.

Since no one can be sued out of the county of his residence, excepting in special instances enumerated in Rev. St. 1896, art. 1194, a plea of privilege by a company sued for tort committed in another county was properly sustained, where it appeared that its domicile was in a third county, that it had no representative or agency in the county of suit, and was not a joint tort-feasor with the other defendants.

[Ed. Note.—For other cases, see Corporations. Cent. Dig. § 1935; Dec. Dig. § 503.*]

3. EVIDENCE (§ 317*)—DECLARATIONS BY THIRD PERSONS—ADMISSIBILITY.

In an action against several defendants for wrongful death of an employé, a statement as to what one of defendant's agents said to decedent on employing him about the work not being dangerous was properly excluded, where none of the other defendants were present when the statement was made, and where, when the testimony was offered, such defendant was no longer a party.

[Ed. Note.—For other cases, see Evidence. Dec. Dig. § 317.*]

4. NEGLIGENCE (§ 136*)—SUBMISSION OF ISSUES.

Where, in a negligence action, there is any evidence from which the jury might find for plaintiff, or from which they might draw a different conclusion as to the issue of negligence, the issue must be submitted to them.

[Ed. Note.—For other cases, see Negligence. Cent. Dig. § 298; Dec. Dig. § 136.*]

5. MASTER AND SERVANT (§ 286*)—DEATH OF SERVANT—ESCAPE OF GAS—NEGLIGENCE—JURY QUESTION.

Under the evidence, held a jury question whether defendants so negligently permitted gas to escape from oil tanks as to cause an employé's death.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Nancy A. Boehrens against W. E. Brice and others. From the judgment, plaintiff appeals. Partly affirmed, and partly reversed.

W. A. Fred Cook, for appellant. L. A. Carlton and Spotts & Matthews, for appellees.

RICE, J. This suit was brought by appellant, plaintiff below, against W. E. Brice, Howard R. Hughes, W. B. Sharp, and the Heywood Oil Company, for the recovery of damages sustained by her on account of the death of her son, Andrew J. Hennigan, Jr., whose death was alleged to be due to poisonous gases inhaled by him, negligently permitted to escape from defendants' oil wells and tanks. It was alleged that at the time of his death, to wit, August 15, 1903, each and all of the defendants were oil producers, being owners of oil wells and tanks located in the Shoestring district of the Sour Lake oil field. It was further alleged that, when oil was pumped from the wells, a large amount of gas permeated the same and passed through the pipes into what are termed "settling tanks," and, if not prevented from escaping therefrom, that the same settles down at and near the ground, and is of such poisonous and deadly nature as to jeopardize the health and lives of persons near thereto. It was further alleged that plaintiff's son, just before his death, together with one Williams, had been employed by said Brice to aid in running an engine and boiler, used in operating one of said pumping plants, or in keeping the pumps running that were used in drilling a well at said place, and that while so engaged defendants unlawfully and negligently permitted the gas to escape from their several wells and settling tanks in such great volume as to poison the air which was inhaled by deceased, thereby causing his death. It was also alleged that the work in said oil field was very dangerous by reason of the escaping gas, and that the two boys were unaccustomed to such work and unacquainted with the danger pertaining thereto; that it was the duty of said defendants, by the use of certain methods, fully set out in plaintiff's petition, to have prevented the escape of said gas, which defendants had wholly failed to do, by reason of which negligence on their part her said son lost his life. It was further alleged that said wells and tanks were separately owned and used by said defendants, except Hughes and Sharp, whom it was alleged conjointly owned and operated certain wells in said oil field. The defendants, except Brice, answered by general denial, general and special exceptions, pleas of not guilty, contributory negligence, and assumed risk; and the Heywood Oil Company, in addition to said pleas, interposed its plea of personal privilege to

be sued in the county of its residence, to wit, in Jefferson county. The defendant Brice filed no answer, but made default. The court sustained the plea of personal privilege urged by the Heywood Oil Company, refused to permit judgment by default to be taken by the plaintiff as against Brice, but dismissed him from the case, and at the request of the defendants Hughes and Sharp, after hearing the evidence, instructed a verdict in their behalf, and judgment was rendered in accordance with said proceedings, from which judgment and rulings of the court plaintiff has appealed, and by her first assignment of error complains of the action of the court in refusing to permit her to take judgment by default against defendant Brice.

It appears from the petition that Brice was a transient person, doing business in Harris county, Tex., but the place of his residence was not stated. It is shown from the bill of exceptions taken to the ruling of the court that Brice was served without the state with citation by personal notice, as permitted under the statute, service being had upon him in the state of Iowa more than 10 days before the convening of the court; said bill of exceptions further reciting that plaintiff's pleading alleged that the place of residence of said Brice was unknown to her and that said Brice did not appear and answer in said cause. We regard the law as well settled that no personal judgment can be rendered against a nonresident defendant who is served by process without the state, it not appearing that he owns property within the state, upon his failure to appear and answer; and therefore we conclude that there was no error in the action of the court below in refusing to render judgment by default against Brice. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Donovan v. Hinzle et al.* (Tex. Civ. App.) 60 S. W. 994.

By her second assignment the appellant complains of the action of the court in sustaining the plea of privilege presented by the Heywood Oil Company. By reference to said company's plea of privilege it appears that it was a resident of Jefferson county; that the cause of action asserted against it and no part thereof arose in Harris county, and that it had no agent or representative in said county; that its principal office was never at any time in Harris county, but was at all times located in Jefferson county. It negatived all of the other exceptions in the statute permitting it to be sued out of the county of its residence, among other things alleging that it was not jointly liable with any of its codefendants on account of the alleged cause of action set up in plaintiff's pleading, and that plaintiff's pleading does not allege or show any joint liability on its part. From the bill of exceptions taken to this ruling of the court

it appears that the oil company had no agent or representative in Harris county, and, further, that there was no joint liability on the part of this defendant with the other defendants sued herein. No defendant can be sued out of the county of its residence, except in certain special instances enumerated in article 1194 of the Revised Statutes of 1895. It appearing that the oil company had its place of residence or domicile in Jefferson county, in order for it to be sued in Harris county on a cause of action which arose in Hardin county, it must be shown that it came within some of said exceptions, all of which were negated by its plea of privilege, duly filed by it in limine. It appearing from the recitations of said bill of exceptions that defendant had no representative or agency in Harris county, and was not a joint tort-feasor with the other defendants, but was separately operating its wells, tanks, and pumps, it seems to us that the ruling of the court sustaining its plea was correct. We therefore overrule this assignment. *Behrens Drug Co. v. Hamilton & McCarty et al.*, 92 Tex. 284, 48 S. W. 5; *Zap v. Davidson*, 21 Tex. Civ. App. 566, 54 S. W. 866.

We overrule the fourth and fifth assignments of error, complaining of the action of the court in excluding the statement of the witness Gallaher as to what was said by Wagner, the agent of Brice, to the deceased, at the time he was employed by him, to the effect that the work was not dangerous, because it appears from the bill of exceptions taken to said ruling that at the time said statement was made by Wagner none of the other defendants were present, and because it further appeared that when this testimony was offered Brice was no longer a party to the suit; he having been dismissed therefrom on account of not having been properly served.

The only remaining assignment which we deem it necessary to consider is the eighth, wherein it is urged by appellant that the court erred in instructing the jury to return a verdict for the defendants. It appears from the evidence in this case that the wells and tanks of the defendants were located within a few hundred feet of each other; that the tanks of Hughes and Sharp were located within about 100 or 150 feet from where Hennigan and Williams had been working when found dead. It was further shown that, in the operation of the business in which defendants were engaged, the gas was conveyed along with the oil from the wells by pipes into settling tanks, and that this gas, if allowed to escape, was very dangerous and likely to destroy the lives of people near by; that it was most dangerous in foggy or damp weather, at which time the gas would descend to the ground; that the night in question was both foggy and cloudy. It appeared that the deceased was employed at the time and at work for the

defendant Brice in the immediate vicinity of the several wells and tanks owned and operated by the other defendants, and that the deceased, Hennigan, while possessing sufficient knowledge to run an engine or pump, knew nothing of the hazard or danger from the escape of gas in the oil fields. It was shown that gas thus conveyed from the wells to the settling tanks, if not properly safeguarded, would, and very often did, escape therefrom, that many persons before this had been "knocked out" by the escape of gas in said oil field. At the time of the injury it appeared from the evidence that there were several ways by which gas could be prevented from escaping from said tanks, or by which its dangerous agency and injurious effect could be lessened. Among others, it was shown that it could be conducted by means of a flume extending to such a distance up in the air that, when discharged, it would float away in the atmosphere and would not become dangerous, or that by the use of a steam jet inserted into the flumes it could be more or less destroyed or neutralized by steam. As to whether or not these tanks were sufficiently covered, and the best known agencies resorted to by the defendants to prevent the escape of gas from their respective tanks, on the night in question, there is conflict of testimony; and, while it is not affirmatively shown that the death of the deceased was due to gas escaping from any particular well, yet we are constrained to believe that there are circumstances in the record from which a jury might determine from whence the same came.

Under the facts of this case we are inclined to believe that the principle invoked by the appellant obtains, to wit, that where there is any evidence upon which the jury, if the issue were submitted to them, might find a verdict in behalf of plaintiff, or from which they might draw a different conclusion as to the issue of negligence, then it becomes the imperative duty of the court to submit such issue to the jury. In the present case we are of the opinion that this issue, to wit, as to whether or not the defendants Hughes and Sharp so negligently permitted the escape of gas from their oil tanks as to cause the death of Hennigan, should have been submitted to the jury; and we say this without intending to intimate any opinion as to the sufficiency of the evidence to support or defeat this issue. *Bonn v. G. H. & S. A. Ry. Co.* (Tex. Civ. App.) 82 S. W. 808; *Lamberda v. Barnum* (Tex. Civ. App.) 90 S. W. 698. In *Bonn v. G. H. & S. A. Ry. Co.*, supra, it is said by the court: "It is well settled that the question of negligence dependent on evidence should not be taken from the jury, except in cases where there is no material conflict, and where there is no room for different minds to draw different inferences from it. The question is one of law for the

court only where the facts are such that all reasonable men must draw the same conclusion from them, and unless the conclusion follows as a matter of law that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish." *Choat v. Railway Co.*, 90 Tex. 82, 36 S. W. 247, 37 S. W. 319; *Lee v. Railway Co.*, 89 Tex. 583, 36 S. W. 63; *Railway Co. v. Gasscamp*, 69 Tex. 545, 7 S. W. 227, and other authorities there cited.

Believing that the court erred in directing a verdict in behalf of said defendants, this assignment is sustained, and, on account of this error in the ruling of the court, its judgment, so far as it affects defendants Hughes and Sharp, is reversed and the cause remanded; but, as to the rulings dismissing the defendant Brice and sustaining the plea of privilege filed by the Heywood Oil Company, the same is affirmed.

Affirmed in part, and reversed and remanded in part.

HILDEBRANDT v. HOFFMAN et al.

(Court of Civil Appeals of Texas. Oct. 30, 1908. On Rehearing, Nov. 25, 1908.)

1. TRESPASS TO TRY TITLE (§ 47*)—PETITION—JUDGMENT.

Where in trespass to try title and for injunction and damages, the petition described the land and defendant disclaimed title and thereby admitted plaintiff's title, a judgment for plaintiff for the land described was proper, though he did not offer evidence of title.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 70; Dec. Dig. § 47.*]

2. TRESPASS TO TRY TITLE (§ 47*)—PETITION—JUDGMENT.

A judgment in trespass to try title which, in describing the land adjudged to plaintiff, follows the field notes of the land claimed in the petition, and which does not undertake to settle any question as to the location of the boundary lines between the lands of plaintiff and defendant, is not objectionable as giving to plaintiff more land than he claimed.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 47.*]

3. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS—REVIEW.

A proposition that a party is restricted in his recovery to the allegations of the petition and the relief prayed for is not germane to the assignment of error that plaintiff in trespass to try title had judgment for more land than he claimed, and cannot be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8000; Dec. Dig. § 742.*]

4. TRESPASS TO TRY TITLE (§ 47*)—PETITION—JUDGMENT.

A petition containing the essentials of a petition in trespass to try title and special allegations on which prayers for injunction and/or damages are based, concluding with a prayer for injunction and damages and for further relief, authorizes a judgment for plaintiff for the and described in the petition.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Cent. Dig. § 69; Dec. Dig. § 47.*]

Appeal from District Court, Austin County; L. W. Moore, Judge.

Action by Dorothea Hoffman and others against Joe Hildebrandt. From a judgment for plaintiffs, defendant appeals. Affirmed.

C. G. Krueger and W. I. Glenn, for appellant. Bell, Johnson, Matthaël & Thompson, for appellees.

REESE, J. Appellees brought this suit in the district court against appellant, alleging in their petition that they were the owners of certain land, describing it by field notes; that appellant had invaded the premises, had built a string of fence within their inclosure, had trampled their grass, and with miscellaneous weapons of war created a general disturbance and invasion of their freehold, causing them great mental anguish, and inflicting upon them irreparable damage. They claim actual damages in the sum of \$300 and exemplary damages of \$1,000, for which they prayed judgment, and also prayed for injunction, and that defendants be required to remove the fence. Appellees sought and obtained a temporary injunction. Appellant pleaded general denial and not guilty as to the wrongs and trespasses charged. He further disclaimed title to any of the land described in the field notes of the petition. Upon trial without a jury appellees had judgment perpetuating the injunction, and ordering appellant to remove the fence placed by him on their land. It was further adjudged that appellees have and recover of appellant the land described in their petition. The only evidence in the record is testimony introduced on both sides on the question of the location of the boundary lines of appellees' land. It will be seen that the case as pleaded and tried is something of a nondescript. There is no assignment of error raising the question of the sufficiency of the pleadings to authorize the judgment.

The first assignment of error is as follows: "The court erred in rendering judgment for plaintiffs for land which they had shown no title in themselves." The appellees did not introduce any evidence of title so far as is shown by the record, but this was not necessary in view of the disclaimer of title on the part of appellant, which was clearly taken and intended as an admission of appellees' title to the land described in their petition. The assignment is overruled.

It is contended by the second assignment that appellees had judgment for more land than they claimed. This contention cannot be sustained. The judgment in describing the land adjudged to appellees follows accurately and exactly the field notes of the land claimed in the petition. The judgment does not undertake to settle any question there may be of boundary, or to locate the lines between the land of appellant and that of appellees, but simply gives appellees judgment for the land as described in their peti-

tion, and no more. There is no merit in the assignment.

The second proposition under this second assignment, "that a party is restricted in his recovery to the allegations of his petition and the relief prayed for," in so far as it may be intended to raise the question of the sufficiency of the pleadings to authorize the judgment, is entirely outside of the assignment, which complains that the court erred in rendering judgment for more land than was sued for. The proposition cannot be considered.

What has been said sufficiently disposes of the third assignment of error, which, with the proposition thereunder, is overruled.

There is no merit in the fourth assignment of error questioning the judgment against appellant for costs.

Finding no reversible error presented, the judgment is affirmed.

Affirmed.

On Rehearing.

Upon the hearing of this appeal, we were inclined to the opinion that the judgment was not authorized by the pleadings, but that the point was not presented by any assignment of error. In this latter holding we still think we were correct, but our attention is called to the alleged error by a proposition under the second assignment of error (not germane to the assignment, however). If error at all, it would be fundamental. Upon a more careful examination of the petition, however, we think that it authorizes the judgment. The petition contains all the essential allegations of a petition in trespass to try title, as well as the special allegations upon which the prayer for injunction and for damages is based, and concludes with a prayer for injunction and damages, and for "such other and further relief as they may be entitled to in the premises." There is no specific prayer for judgment for the land. We think the petition authorized a judgment for the land. *Cravens v. Wilson*, 48 Tex. 841. The case was evidently treated by both parties as a suit in trespass to try title as well as for injunction and damages. The disclaimer of appellants went to the full extent of the land as described in the petition and judgment. The location of the third line in the metes and bounds set out in the petition and judgment, with reference to appellees' fence, was as much a part of the metes and bounds of the land as the other calls. If appellant had desired to limit his disclaimer to the land as described by the calls for course and distance, he should have so pleaded.

Having disclaimed any title or ownership to any of the land sued for and adjudged to appellees, appellant has no ground for complaint against the judgment. Appellees were only given judgment for land which appel-

lant admits by his pleadings he does not own, or claim to own.

The motion for rehearing is overruled.
Overruled.

WILLIAMS v. LIVINGSTON et al.

(Court of Civil Appeals of Texas. Nov. 11, 1908.)

1. EVIDENCE (§ 506*)—EXPERT OPINIONS—MIXED QUESTIONS OF LAW AND FACT.

It was improper to allow an expert witness to give an opinion as to whether decedent had mind enough to comprehend the legal effect of a deed; the opinion being in part on a question of fact, as to the competency, which was for the jury, and in part as to the legal effect of a deed, which was a question of law for the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 309; Dec. Dig. § 506.*]

2. EVIDENCE (§ 471*)—OPINIONS—CONCLUSIONS OF FACT OR LAW.

A witness should not be permitted to give an opinion, which, if the jury believes it to be correct, would determine the matters of law as well as the facts involved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2152; Dec. Dig. § 471.*]

3. EVIDENCE (§ 472*)—OPINIONS—MENTAL CAPACITY—ADMISSIBILITY.

A witness could not give an opinion that decedent did not have sufficient mind to execute a deed or to not know its effect or value, though witness was familiarly acquainted with her, and had testified from his observation of her conduct that she was very weak minded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2194; Dec. Dig. § 472.*]

4. EVIDENCE (§ 506*)—EXPERT OPINIONS—MENTAL CAPACITY.

Capacity to "transact business" is not a proper subject for expert testimony, since the question presents a matter of law.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL—MATTER COVERED.

Instructions substantially covered by those given are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from District Court, Waller County; Wells Thompson, Judge.

Action by Della Livingston against Sandy Williams; Harry Stubblefield and another being substituted as plaintiffs on plaintiff's death. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

J. D. Harvey, A. G. Lipscomb, and W. J. Poole, for appellant.

NEILL, J. On November 22, 1905, Della Livingston sued Sandy Williams to cancel a deed to certain lands made by her to him on September 14th of the same year. The ground upon which cancellation was asked was mental incapacity of the grantor. Pending the suit the original plaintiff died, and her death being suggested, Harry Stubblefield and Myra Downing, the heirs of deceased, were made parties plaintiff. Defendant's ar-

answer consisted of a general demurrer, a disclaimer as to a part of the premise, a general denial, and plea of not guilty. The trial of the case resulted in a verdict and judgment for the plaintiffs.

The only issue in the case was Della Livingston's mental capacity to make the deed. Upon this issue there was testimony pro and con, which required it to be submitted to the jury. Much opinion evidence upon the issue was introduced by either side, of which was the testimony of Dr. Osborne, who having qualified as an expert upon diseases and infirmities of the mind, and having testified that he observed Della Livingston on several occasions between March, 1906, and January, 1906, having been called to treat her professionally, and that at times he considered her blank—no mind at all—her mind was weak, was asked by appellees' counsel whether during the period between said dates she in his judgment had mind enough to comprehend and understand the legal effect of a deed or legal instrument, which he answered: "In my opinion she had not." Again, he was asked: "Now, in seeing her in the condition you saw her in January, in your judgment, doctor, would it have been possible for her to have mind enough to have understood and comprehended the legal effect of a deed made in September?" This he answered: "No; I do not think she did." The appellant objected to each question and answer upon the ground that it invoked and obtained a legal conclusion of the witness upon the very issue to be determined by the jury, under instructions from the court as to the law, from the evidence introduced. The action of the court allowing the questions to be asked and answered over appellant's objection is the basis of the first assignment of error.

There can be no doubt about the assignment being well taken. The first question embodies the fact that the witness himself understood the legal effect of a deed or legal instrument; for, unless he knew its legal effect, he could not answer the question. The answer, then, embraces the witness' opinion on a matter of law as well as of fact; that is to say, the legal effect of a deed or legal instrument and the condition or state of Mrs. Livingston's mind when she made the deed sought to be cancelled. The legal effect of a deed or other legal instrument is a question of law with which a jury has nothing to do; but can only be decided by the court. The mental capacity of the maker of a deed is a matter of fact for the jury, with which a court has nothing to do. Whenever it may become necessary for a jury to be informed as to the legal effect of a written instrument in order to enable it to determine whether the party who executed it had sufficient mental capacity, such information should come from the court, and not from the witness stand. No witness should be permitted to

give an opinion, which, if the jury believes correct, would determine the matters of law as well as the fact involved. The opinion of the witness, being, in part, upon a question of law addressed to the court, and, in part, upon a matter of fact, addressed to the jury, was on a mixed question of law and fact, and should not have been admitted as evidence. *Houston & T. C. Ry. Co. v. Roberts* (Tex. Sup.) 108 S. W. 808; *G., C. & S. F. Ry. v. Kimble* (Tex. Civ. App.) 109 S. W. 234. What we have just said applies in all its force to the other question and answer embraced in the assignment. Construing the answer in connection with the question, the witness was permitted to give it as his opinion that it was not possible for Mrs. Livingston to have mind enough to have understood the legal effect of her deed. If this was taken by the jury as evidence, as it must have been from its being admitted, the case was decided, both as to the law and facts, by the opinion of the doctor, and nothing remained for the jury to do except register his opinion in the form of a verdict, and return it to the court, so that it might be entered as a judgment on its minutes in favor of the plaintiffs.

In *Brown v. Mitchell*, 88 Tex. 367, 31 S. W. 629, 36 L. R. A. 64, after an exhaustive review of the authorities, it was held by the Supreme Court: "That no witness will be permitted to testify to a legal conclusion from facts given either by himself or testified to by another. It is the province of the jury from the testimony to find the facts; but it is the duty of the court alone to inform the jury as to the rule of law by which they are to be governed in determining upon the sufficiency of the facts given to them by the witnesses. The conclusions or opinions to which witnesses may testify in this character of case [one involving mental capacity] are simply to be treated as facts presented to the jury by means of the conclusions drawn by the witnesses from their observations for the reason alone that the facts are of such character that they are incapable of being presented by stating conclusions drawn from their observation." See, also, *Metropolitan Ins. Co. v. Wagner* (Tex. Civ. App.) 109 S. W. 1123; *Mills v. Cook* (Tex. Civ. App.) 57 S. W. 81; *Half v. Curtis*, 68 Tex. 642, 5 S. W. 451; 2 *Wigmore on Ev.* § 1958.

The testimony complained of by the fourth, fifth, and sixth assignments of error each presents the question whether it is permissible to allow a witness who was acquainted with and familiar with the grantor, after testifying from his observation of her conduct and mental condition that she was very weak minded, to give in evidence his opinion that she did not have sufficient mind to execute a deed, or would not know its effect or its value. While there is perhaps a conflict of opinion upon this question, as is in-

dictated by the authorities collated in the notes under the section above cited from Wigmore on Evidence, we think in this state that it is controlled by the opinion of the Supreme Court in *Brown v. Mitchell*, supra, and that under it such evidence is inadmissible. We therefore sustain the three assignments referred to.

The seventh assignment of error involves the question whether it is permissible for a witness who has shown himself qualified to testify as to one's mental condition or state to give it as his opinion that such a one did not have sufficient mental capacity to "transact business." It is held that "what is sufficient capacity to transact business" is a matter of law, depending somewhat upon the nature of the business. As is said in *Fairchild v. Bascomb*, 35 Vt. 416: "A witness may not correctly apprehend the rule of law, and, if he uses such an expression, may be misled himself or may mislead the jury." See, also, *Betts v. Betts*, 113 Iowa, 111, 84 N. W. 975; *McGibbons v. McGibbons*, 119 Iowa, 140, 93 N. W. 55; *Torrey v. Burney*, 113 Ala. 496, 21 South. 348; *Dominick v. Randolph*, 124 Ala. 557, 27 South. 481; *Shapter v. Pillar*, 28 Colo. 209, 63 Pac. 302; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310. As is said in *Shapter v. Pillar*, supra (a case wherein the issue was similar to the one here): "The great weight of modern authority in such cases, in the absence of any statutory provision, is that such capacity is not properly the subject of opinion evidence, but must be determined by the probative facts bearing thereon." From the weight of authority upon the question raised by this assignment, we think such testimony inadmissible.

The special instruction asked by appellant was, in substance, embraced in the main charge; and its refusal was not error. The test of a grantor's capacity to make a deed, though stated in different language, was correctly given in the court's charge and the refused instruction.

On account of the errors indicated, the judgment is reversed, and the cause remanded.

HILL et al. v. MOORE et al.

(Supreme Court of Tennessee. Nov. 14, 1908.)

JUDICIAL SALES (§ 61*)—EVIDENCE—RECITALS IN OFFICIAL DEEDS.

Under Acts 1907, p. 1131, c. 334, §§ 1, 2, making conveyances by public officers, etc., prima facie evidence of the facts recited therein so far as they relate to the execution of the power of the office, a clerk and master's deed, reciting that by a decree of a specified chancery court, rendered at a specified term in a specified cause and entered at a specified page, the clerk on a specified date sold at public auction the land described to the grantee for a specified sum, as appears from the clerk's report, the grantee having paid such sum as required by the decree

confirming the report, shows prima facie the clerk's authority to make the deed, requiring one questioning his authority to file a copy of the record to overturn such prima facie case.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 121; Dec. Dig. § 61.*]

Appeal from Chancery Court, Jefferson County; Hal. H. Haynes, Chancellor.

Action by L. C. Hill and others against J. L. Moore and others. From a decree for complainants, defendants appeal. Affirmed.

C. T. Rankin, for appellants. Swan & Cawood, for appellees.

NEIL, J. This action was brought in the chancery court of Jefferson county to recover a part of a 15-acre tract of land described in the pleadings. The complainant deaigned a complete title from the state. The defendants, however, insist that one link in the chain of title, consisting of a clerk and master's deed, is defective, because that deed is not supported by the record of the case in which the land was sold; hence that, within the rule laid down in *Castleman v. Land Co.*, 1 Tenn. Ch. App. 9, 12, 13, the complainant cannot recover. The case stated does fall within the authority cited, and the point would be fatal to the recovery, but for the fact that the rule referred to is met by Acts 1907, p. 1131, c. 334. This act reads as follows:

"Section 1. Be it enacted," etc., "that all instruments of conveyance executed in official capacity by any public officer of this state, or by any person occupying a position of trust or acting in fiduciary relation shall be admitted, held and construed in and by the courts of this state as prima facie evidence of the facts in such instruments recited in so far as such facts relate to the execution of the power of such office or trust.

"Sec. 2. Be it further enacted, that all such instruments now of record shall be admitted, held, and construed in accordance with section 1 of this act; provided, further, this act shall not apply to any pending litigation."

The deed referred to, so far as necessary to be quoted, reads as follows:

"This indenture, made this the 21st day of January, A. D. 1902, between G. W. Holsinger, clerk and master of the chancery court at Dandridge, for Jefferson county, Tennessee, of the first part, and J. H. Ferguson, of Jefferson county, state of Tennessee, of the second part, witnesseth that by a decree of said court, rendered at the May term, 1899, in the cause of J. H. Carey, Adm'r, et al., complainants, v. J. L. Kirby et al., defendants, and entered on page 567 of Minute Book 11, the said clerk and master did, on the 14th day of November, 1899, sell at public auction the real estate hereinafter described to the said J. H. Ferguson, for \$1,211.85, as appears from the report of said clerk and master, made in said cause to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

November term, 1899, and entered on page 37 of Minute Book 12, the said J. H. Ferguson having paid said sum of \$1,211.85 as required by the decree of said court, confirming said report: Now, therefore, in order to carry into effect said sale, in pursuance of said decree, and in consideration of the sum of \$2 paid to the clerk and master, the receipt of which is hereby acknowledged, the said G. W. Holtsinger, as such clerk and master, doth hereby transfer and convey to the said J. H. Ferguson, and to his heirs and assigns, forever, said tract or parcel of land"—describing the land.

From these recitals the court would presume, under the statute referred to, that the court that ordered the land sold had jurisdiction of the parties and subject-matter, and, in short, that the clerk acted under due authority in making the deed. Under the statute referred to the burden would rest upon any one questioning such authority to file a copy of the record to overturn the prima facie case made by the deed.

Other errors assigned have been examined and overruled orally. They need not be referred to in this opinion.

The chancellor committed no error in decreeing the land to the complainants, and his decree is affirmed, with costs.

WESTERN UNION TELEGRAPH CO. v. POTTS et ux.

(Supreme Court of Tennessee. Nov. 7, 1908.)

1. TELEGRAPHS AND TELEPHONES (§ 68*)—SOCIAL TELEGRAMS—DELAY—RECOVERABLE DAMAGE—MENTAL ANGUISH.

Mental anguish is an element of damage recoverable for delay in delivering a social telegram.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

2. TELEGRAPHS AND TELEPHONES (§ 56*)—TELEGRAMS—DELAYS IN DELIVERY—PERSON ENTITLED TO DAMAGES.

The right to sue for delay in delivering a telegram may be in either the sender or addressee, and either on the contract or for breach of a statutory duty. If on the contract, the right of the addressee is based on the theory that the contract was made for his benefit; if under the statute, the addressee sues as the "aggrieved party."

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 37; Dec. Dig. § 56.*]

3. TELEGRAPHS AND TELEPHONES (§ 59*)—TELEGRAMS—DELAYS IN DELIVERY—ACTIONS—NATURE.

An action for breach of a telegraph company's statutory duty to promptly deliver a message is in effect one for negligence.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 48; Dec. Dig. § 59.*]

4. TELEGRAPHS AND TELEPHONES (§ 67*)—TELEGRAMS—DELAY IN DELIVERING—MEASURE OF DAMAGES.

The measure of damages for wrongful delay in delivering a death message, whether suit

be on the contract or in tort, is, first, at least nominal damages; second, such damages as may be fairly considered as arising naturally, or having been within contemplation of the parties when the contract was made; and, third, in a proper case, punitive damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

5. TELEGRAPHS AND TELEPHONES (§ 67*)—TELEGRAMS—IMPROPER DELIVERY—NOTICE OF DAMAGES.

A telegraph company may learn the grounds on which it may base an estimate of, or anticipate, damages resulting from a failure to properly deliver the message, either from facts communicated to its agents dehors the message or from the face of the message itself.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

6. TELEGRAPHS AND TELEPHONES (§ 56*)—TELEGRAMS—DELAY IN DELIVERY—WHO MAY SUE FOR.

Action for delay in delivering a telegram may be brought by one whose name appears in the message as the beneficiary thereof, though he be neither sender nor addressee, or in the name of an undisclosed principal of the sender.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 37; Dec. Dig. § 56.*]

7. TELEGRAPHS AND TELEPHONES (§ 68*)—DEATH MESSAGES—UNDISCLOSED PRINCIPAL—MENTAL ANGUISH—RIGHT TO RECOVER.

The undisclosed principal of both the sender and the addressee of a death message cannot recover damages for mental anguish; her measure of recovery being only such damages as the apparent sender could recover, the cost of the telegram.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

Appeal from Circuit Court, Hamilton County; M. M. Allison, Judge.

Action by A. B. Potts and wife against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Reversed and rendered.

Shields, Cates & Mountcastle and Brown & Spurlock, for appellant. Murray & Murray, for appellees.

NEIL, J. Action to recover damages for failure to promptly deliver a telegram, recovery in the court below for \$500, and an appeal in error by the company.

The facts are as follows:

The mother of Mrs. Clara Potts, of Chattanooga, Tenn., was lying at the point of death near Springville, Ala. Mrs. Potts requested her brother, W. D. Self, to telegraph news of her mother's death to Chattanooga, when it should occur, in time to enable her to be present at the funeral. The arrangement between them was that the message was to be sent to her husband, A. B. Potts, at his place of business, and he promised his wife that on receiving such a message he would promptly deliver it to her. Mr. Self complied with his promise by handing

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to plaintiff in error for transmission the following message:

"Springville, Ala., 2/14, 1905.

"A. B. Potts, % Master Mechanic, C. S. Shops, Chattanooga, Tenn.

"Mother died this morning, seven o'clock; come to Springville, train one, tonight.

"W. D. Self."

The message reached Chattanooga at 2:48 p. m. on the same day, and could have been delivered in ample time to enable Mrs. Potts to leave for Springville on the 6:30 p. m. train. If she had received the message in time, she could and would have reached Springville in ample time for the funeral. The company, however, negligently failed to deliver the message until after the 6:30 train had left. In consequence of this negligence Mrs. Potts could not leave for Springville until the next morning. She left on the earliest train possible after the delivery of the message to her husband, but was able to reach her mother's home only after the interment had taken place.

Mrs. Potts and her husband brought suit to recover damages on this state of facts, with the result already stated.

The company had no further knowledge or notice of the relations of the parties, or the probable consequences of a negligent failure to deliver the message, than such as was furnished by the face of the message itself.

The company moved for peremptory instructions in the court below, which was refused, and it insists here that the court erred in denying the motion.

The plaintiff in error insists that the facts stated do not make out a case of liability against it, since, as it claims, Mrs. Potts was neither sender nor addressee of the message, and there was nothing on its face indicating that she had any interest in it. Hence it is said the consequences to Mrs. Potts, in the way of mental suffering or otherwise, or a failure on the part of the company to deliver the message, could not have been within reasonable contemplation.

At a former term of the court the judgment of the circuit court was affirmed, and a petition for rehearing was thereafter filed by the telegraph company, and was held under advisement.

It is not necessary to discuss the right to damages for mental anguish arising from delay in the delivery of a social telegram. That question has long been settled in this state. *Wadsworth v. Telegraph Company*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *Railroad v. Griffin*, 92 Tenn. 694, 22 S. W. 737; *Telegraph Company v. Mellon*, 96 Tenn. 66, 33 S. W. 725; *Telegraph Company v. Robinson*, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431; *Telegraph Co. v. Frith*, 106 Tenn. 167, 58 S. W. 118; *Gray v. Telegraph Co.*, 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706; *Telephone Co. v. Brown*, 104 Tenn. 56, 55 S. W. 155.

The right to sue may be in either the sender or the addressee, and may be either on the contract or for breach of the statutory duty to promptly deliver. If on the contract, the right of the addressee is based on the proposition that the contract must be treated as made between the sender and the company for the benefit of the addressee; if under the statute, the addressee sues as the "aggrieved party." *Manier & Co. v. Telegraph Co.*, 94 Tenn. 442, 448, 29 S. W. 732; *Gray v. Telegraph Co.*, 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706; *Telegraph Co. v. Mellon*, supra. The ground of the action, if on the contract, is for the breach thereof; if under the statute, it is for the failure to perform the duty imposed, and in effect the action is equivalent to one for negligence. *Gray v. Telegraph Co.*, 108 Tenn. 39, 49, 50, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706; *Wadsworth v. Telegraph Co.*, supra; *Jones v. Telegraph Co.*, 101 Tenn. 412, 47 S. W. 699; *Telegraph Co. v. Mellon*, supra. The measure of damages, whether the suit be on the contract or in tort, is, in this class of cases substantially the same, viz.: (1) If there has been a violation of the contract, or a breach of duty on the part of the company, the aggrieved party is entitled to recover, in any event, nominal damages. *Wadsworth v. Telegraph Co.*, supra; *Jones v. Telegraph Co.*, supra; *Telegraph Co. v. Mellon*, supra; *Gray v. Telegraph Co.*, supra. (2) Such damages as may be fairly and reasonably considered as arising naturally, in the usual course of things, from the breach of the contract or the violation of public duty, or such damages as may be reasonably supposed to have been within the contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. *Wadsworth v. Telegraph Co.*, supra; *Railroad v. Griffin*, supra; *Telegraph Co. v. Reid*, 120 Ky. 231, 85 S. W. 1171, 70 L. R. A. 289; *McPeck v. Telegraph Co.*, 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 70 Am. St. Rep. 206; 27 Am. & Eng. Enc. Law (2d Ed.) p. 1059. (3) In a proper case, punitive damages. *Telegraph Co. v. Frith*, 106 Tenn. 167, 58 S. W. 118; *Telegraph Co. v. Mellon*, supra. The company may learn the grounds on which it may base an estimate of, or anticipate, the damages that may result or naturally flow from a failure to properly deliver the message, either from facts communicated to its agents debors the message or from the face of the message itself. *Pepper v. Telegraph Co.*, 87 Tenn. 554, 558, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; *Telegraph Co. v. Frith*, supra; *Telegraph Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *Postal Telegraph Co. v. Lathrop*, 181 Ill. 573, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55; *Telegraph Co. v. Feegles*, 75 Tex. 537, 12 S. W. 860; *Reese v. Telegraph Co.*, 123 Ind. 294.

24 N. E. 163, 7 L. R. A. 583; *Telegraph Co. v. Swearingin*, 97 Tex. 293, 78 S. W. 491, 104 Am. St. Rep. 876; *Bright v. Telegraph Co.*, 132 N. C. 317, 43 S. E. 841; *Davis v. Telegraph Co.*, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371; *Telegraph Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549.

It is not necessary to a recovery that the suit should be brought either by the person whose name appears in the telegram as the sender, or by the one whose name appears as the addressee. It may be brought by one whose name appears upon the face of the message as the beneficiary thereof, though neither the sender nor the addressee. *Telegraph Co. v. Mellon*, supra; *Whitehill v. Telegraph Co.* (C. C.) 136 Fed. 499, 500. Or it may be brought by the undisclosed principal of the sender. *Milliken v. Telegraph Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *Leonard v. Telegraph Co.*, 41 N. Y. 544, 1 Am. Rep. 446, 454; *Harkness v. Telegraph Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; *Telegraph Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843.

It would seem to follow, from the principles above stated, that the undisclosed principal of the addressee might also bring the action; but the contrary has been held in two cases. *Lee v. Western Union Telegraph Co.*, 51 Mo. App. 375; *Western Union Telegraph Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678. And there seems to be a general disinclination to extend the right of recovery for mental anguish, as distinguished from physical injury, beyond the point already reached by the authorities. However, it seems to be recognized that, where the person interested in the telegram is the undisclosed principal of both the sender and the addressee, he may recover. *Leonard v. Telegraph Co.*, supra; *Milliken v. Telegraph Co.*, supra.

This is the case we have before the court now for consideration. Both the sender and the addressee were the agents of the undisclosed principal, *Mrs. Clara Potts*.

The petition to rehear and the accompanying brief, so far as they need be noticed, make the point that the court, in the former opinion, erred in respect of the measure of damages. It is conceded that the undisclosed principal of the sender of a telegram could sue for breach of the contract; but it is said that he would have to adopt the contract as he found it, that he would be entitled to recover only such damages as the apparent sender could recover, and that this would necessarily exclude damages for the mental anguish of the undisclosed principal; that the telegraph company and the apparent sender, together with the language of the message, would be the persons and the matter for consideration; that the company would be presumed to have in contemplation the language, purport, and effect of the message, and the relation of the apparent sender thereto, and would be liable to the apparent

sender, in case of a breach of duty in respect of the message, for all such damages as might be considered as arising naturally, in the ordinary course of things, from such breach of contract or violation of duty, but this could not be held to include a special injury to a third person, whose particular relation to the matter could not be held in contemplation, because not only unknown, but unsuggested by the language of the message or otherwise; that where the subject of the message is some commercial matter, and a breach of duty occurs on the part of the telegraph company, the nature of the business, which is the subject of the telegram, places the parties thereto in possession of data from which they may contemplate the probable effect of a failure in correct and seasonable transmission and delivery on the part of the company, and that an undisclosed principal can obtain the benefit of this as fully as the agent, the apparent sender; but that the case is different in respect of social messages, since in these the personal element enters of the special relation of the parties thereto, and unless the existence of such parties and the fact that they have an interest in the message be called to the attention of the company, by something in the language of the message itself or by collateral information given to the company or its agent in the course of the transaction, it is impossible that there should have been had in contemplation the relationship and interest of such parties, and the probable result to them of a breach. It is said that it was on this principle that the recoveries were based in favor of the undisclosed principal in the two commercial cases referred to in the original opinion (*Leonard v. Telegraph Co.*, 41 N. Y. 544, 1 Am. Rep. 446, 454; *Harkness v. Telegraph Co.*, 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672), and on which relief for mental anguish was denied in *Telegraph Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564, and *Pacific Express Co. v. Redman* (Tex. Civ. App.) 60 S. W. 677, and that the two mental anguish cases relied upon in the original opinion (*Cashion v. Telegraph Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160, and *Landie v. Telegraph Co.*, 124 N. C. 528, 32 S. E. 886) have, since the delivery of our former opinion, been discredited by the Supreme Court of North Carolina; the first-mentioned case having been in terms overruled, and the second in effect, by the case of *Helms v. Western Union Telegraph Co.*, 143 N. C. 386, 55 S. E. 831, 8 L. R. A. (N. S.) 249, 118 Am. St. Rep. 811, it having been held in the case last cited, and the two Texas cases (4 Tex. Civ. App. 280, 23 S. W. 564, and [Tex. Civ. App.] 60 S. W. 677) that the undisclosed principal in a social telegram could not recover for his mental anguish, but only such damages as the apparent sender could recover—that is, the cost of the telegram.

This view of the matter was not suggested

by counsel at the former hearing, nor did it occur to the court; but after further examination of the authorities and careful reflection we are of the opinion that this is the correct view. Of course, there never could have been any doubt of the general proposition that an undisclosed principal of the sender could have the benefit of a contract made for him by his agent in the name of the latter; but the conditions which he must submit to in availing himself of such contract were not sufficiently attended to in due correlation to the measure of damages in cases of the character before us.

In our own case of *Foster v. Smith*, 2 Cold. 474, 478, 88 Am. Dec. 604, the court said:

"It will make no difference in such cases * * * that the principal, at the time of entering into the contract, is unknown or unsuspected, nor that the third person has dealt with the agent, supposing him to be the sole principal. The only effect of the last consideration is that the principal will not be permitted, while insisting upon the contract, to intercept the right of such third person in regard to the agent; but he must take the contract, subject to all the rights of such third person, in the same way as if the agent was the sole principal, and subject to these rights the principal may generally sue upon such contract in the same manner as if he had personally made it. Neither can it make any difference that the contract be of that character that the agent may maintain a suit upon it in his own name. In cases where a third person deals with an agent, supposing him to be the principal, and without any knowledge that the property involved in the transaction belongs to another, such third person may acquire rights which will be protected; and to this end, it can make no difference whether the action be in the name of the principal or agent. The right to sue upon the contract entered into by the agent, within the scope of his power, and to the enjoyment of all its benefits and advantages by operation of law, flows to the principal, though he may be unknown; and the fact that the third person dealt with the agent, believing him to be the principal, cannot defeat the rights of the principal. Neither will the fact that the name of the principal was concealed, while such third person was induced to contract with the agent believing him to be the principal, be permitted to defeat the rights of such third person under or growing out of such contract, even though the action be brought in the name of the principal; and in all such cases it may be said the principal 'steps into the shoes of the agent.'"

In *Western Union Telegraph Co. v. Kerr*, supra, it appeared that, the husband of Mrs. Kerr being ill, she asked one Henderson to send a message to Dr. J. C. Jones, at Gonzales, Tex. This message was sent, but was signed only by Henderson, and it was not known to the telegraph company, or to

its agent, that Henderson was acting as agent for Mrs. Kerr. The message was not delivered promptly, the husband of Mrs. Kerr died, and the suit was brought to recover compensation for mental anguish and for suspense experienced by her, as the result of the failure of Dr. Jones to arrive as she expected. On this subject the court said:

"The telegram, according to the petition, was sent by the agent of appellee for her benefit. A breach of the contract thus made would give rise to a cause of action for damages legitimately resulting. That this is true, if Henderson acted as plaintiff's agent, appellant's counsel does not deny. The second question presented does not involve a denial of the right of an undisclosed principal to sue upon a broken contract made by his agent for his benefit, but raises a question as to the character of damages recoverable."

After adverting to the fact that the telegraph company had no notice that Henderson was acting as agent for Mrs. Kerr, the court continued: "There was nothing in the dispatch, or the circumstances attending its delivery, to excite any inquiry as to the plaintiff's connection with it. How can it be said that a condition of her mind, the result of the failure to deliver, entered into the calculation of the parties when it was sent? It may be true that she can enforce the contract, if made by her agent for her benefit; but she must adopt it as it was, and can recover nothing but what the agent could recover if he sued in his own name. All defenses and rights which the defendant could urge against the agent, if suing, it may urge against the plaintiff. *Mechem*, Ag. § 773. Can it be contended that, in a suit on this telegram by Henderson, such element of damages would be mental anguish of Mrs. Kerr? * * * That the fact of the agency was not communicated may be immaterial to some questions, but very material to others. The principal may sue for breach of the contract made for his benefit, whether his existence and connection with it were disclosed or not; but he cannot, in our opinion, recover a class of damages affecting his person, which an ignorance of his existence put beyond the contemplation of the other contracting party."

The case of *Pacific Express Company v. Redman*, supra, is in strict accord. In that case it appeared that Miss Redman, through her agent, N. B. Pruett, ordered certain medicine, by express, from a neighboring town. By reason of the negligence of the express company the medicine was not promptly delivered, and as a result thereof Miss Redman averred that she suffered great physical and mental pain, and her recovery was seriously retarded. It was not known to the express company that Mr. Pruett was acting as her agent. He made the order in his own name, and it was held that Miss Redman

could not recover any damages peculiar to herself, but only such as Pruett could have recovered if he had been suing.

In view of what has been said in this opinion, we think that the conclusion reached in the former opinion, as to the liability of the company, was erroneous, and that a peremptory instruction should have been given in favor of the company, to the extent, at least, of directing a verdict for nominal damages only—that is, for the price of the message, 40 cents. A judgment will accordingly be entered now. The plaintiff in error will pay the costs of this court, and the defendant in error the costs of the court below.

KNIGHTS OF PYTHIAS OF NORTH AMERICA, ETC., et al. v. BOND.

(Supreme Court of Arkansas. Nov. 2, 1908.)

APPEAL AND ERROR (§ 1134*)—ABSENCE OF BILL OF EXCEPTIONS—AFFIRMANCE.

Where it appears from the record that no bill of exceptions was filed within the time allowed by the lower court, and no error appears on the face of the record, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4454; Dec. Dig. § 1134.*]

Appeal from Circuit Court, Pulaski County; Robert J. Lea, Judge.

Action between the Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia, and the Grand Jurisdiction of Arkansas against John A. Bond. From the judgment, the Knights of Pythias appeal. Affirmed.

Jones & Price, for appellants. L. J. Brown, for appellee.

MCCULLOCH, J. It appears from the record that no bill of exceptions was filed within the time allowed by the circuit court; and, as no error appears on the face of the record the judgment must be affirmed. It is so ordered.

FARMERS' & MERCHANTS' BANK v. LAYSON LUMBER CO.

(Supreme Court of Arkansas. Nov. 2, 1908.)

1. EVIDENCE (§ 179*)—SECONDARY EVIDENCE—GROUNDS—POSSESSION BY ADVERSARY.

Where a deed in plaintiff's chain of title had never been recorded, and was presumptively in possession of the grantee, whom plaintiff, after making a reasonable effort, was unable to find, parol evidence of the contents of the deed was admissible as though the deed was lost and destroyed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 596; Dec. Dig. § 179.*]

2. JUDGMENT (§ 682*)—CONCLUSIVENESS—PERSONS NOT PARTIES.

Kirby's Dig. § 5694, relating to the foreclosure of special municipal assessments, provides that the owner of property assessed shall be made a defendant, if known, and, if not

known, the fact shall be stated in the complaint "and the suit shall proceed as a proceeding in rem against the property assessed." Held that, where a suit to foreclose an assessment was brought against an alleged owner after he had conveyed the property to another by an unrecorded deed and the complaint did not state that the owner was unknown, the suit was not in rem, and the decree was therefore not binding against the alleged owner's grantee and his successors in title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1203; Dec. Dig. § 682.*]

Appeal from Polk Chancery Court; J. V. Bourland, Chancellor.

Suit by the Layson Lumber Company against the Farmers' & Merchants' Bank. Decree for complainant, and defendant appeals. Affirmed.

Norwood & Alley, for appellant. Pole McPhetridge and Olney & Lundy, for appellee.

BATTLE, J. The Layson Lumber Company brought this suit against the Farmers' & Merchants' Bank, in the Polk chancery court, to set aside a decree under which lot No. 6, in block No. 53, in the city of Mena, in this state, had been sold to pay certain delinquent assessments due to improvement district No. 1, in said city, and to cancel a deed executed to the Farmers' & Merchants' Bank, the purchasers at the sale.

An assessment was made by the city council of Mena upon lot No. 6, in block 53, and the other lots in the district, for the purpose of constructing certain public improvements. The assessment due the district for the years 1903 and 1904 not being paid within the time prescribed by law, a suit was brought on the 12th day of October, 1904, by the board of improvement of the district against J. D. Eubanks as the owner of lot 6, in the Polk chancery court, to enforce the payment of the unpaid assessment. It was not stated in the complaint in the suit that the owner was unknown, but, on the contrary, Eubanks was named as such. The plaintiff in that suit recovered a decree against the defendant for the unpaid assessments, and the lot was ordered to be sold to pay the same, and a commissioner was appointed to make the sale. The commissioner sold the lot on the 6th day of January, 1906, to E. W. Hutchinson, and the sale was approved and confirmed by court on the 30th day of the same month. On the 10th day of April, 1907, Hutchinson transferred his certificate of purchase to the defendant, Farmers' & Merchants' Bank, and on the 27th day of May following a deed therefor was duly executed by the commissioner to the defendant, which was approved by the court.

Eubanks did not own the lot, and had no interest in it at the time the suit was brought against him, but had conveyed it to Robert Parker on the 25th day of September, 1903, who conveyed to John Layson on the 7th day of June, 1906, and he conveyed it to a trustee

for Layson Lumber Company on the 3d day of July, 1906.

In the trial of this suit it was shown that the deed of Eubanks to Parker was not on record, and it was proved by plaintiffs that they did not know where Parker is or was, and that they had made efforts to find him for the purpose of taking his deposition in this case and failed. Upon this proof plaintiffs, over the objection of the defendant, were allowed to prove by Eubanks that he conveyed the lot to Parker on the 25th day of September, 1903.

The court set aside the deed of commissioner to the defendant, quieted title to the lot in plaintiffs, and decreed that they pay the amount of assessments upon the lot for the years 1903 and 1904 to the defendant; and it appealed.

The trial court committed no error in admitting the testimony of Eubanks to show that he conveyed the lots to Robert Parker on the 25th day of September, 1903; it having been virtually shown that the deed he executed for the purposes of this suit was lost, it not being recorded, and appellees having failed to find Parker after making a reasonable effort to do so. The deed could not be procured, and secondary evidence was admissible to prove its contents. Like a deed lost or destroyed, it is the only evidence which can prove its contents. In such cases it is the best evidence that can be produced, and for that reason is competent.

The decree in the suit against Eubanks did and does not affect Parker and those holding under him or their interest in the lot; they not being parties thereto and the suit not being in rem. The statute in such cases provides: "The owner of the property assessed shall be made a defendant if known; if he is not known, that fact shall be stated in the complaint [which was not done in the complaint in the suit against Eubanks], and the suit shall proceed as a proceeding in rem against the property assessed." Kirby's Dig. § 5694. In *Greenstreet v. Thornton*, 60 Ark. 369, 373, 30 S. W. 347, 348, 27 L. R. A. 735, a suit like this, Mr. Justice Riddick, delivering the opinion of the court, and discussing this statute, said: "There is only one contingency in which a general notice is authorized by the statute in proceedings of this kind, and that is when the owner of the property is unknown. That fact must be alleged in the complaint, and the suit proceeds, so says the statute, 'as an action in rem against the property.' Summons issues against the unknown owner of the particular property, and service is had by affixing a copy of the same to the property and by publication. In such a case the notice is general to the unknown owner, whoever he may be, and, if the summons is served in the manner required, all parties must take notice, for it includes all who have an interest in the property.

But, as before stated, this general notice is only allowed where the owner of the property is unknown, and that fact alleged in the complaint. When it is not alleged that the owner is unknown, and the proceedings are against a certain person named as a defendant, and alleged to be the owner of the property, then, whether there be actual service upon him or only constructive service in the manner designated by the statute, it is a notice to him only, and the decree affects only his interest in the land, whatever it may be, and no one else is bound by it."

Decree affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. RICHARDSON.

(Supreme Court of Arkansas. Nov. 2, 1906.)

1. CARRIERS (§ 318*)—PASSENGER—ACTIONS—EVIDENCE—SUFFICIENCY—NEGLIGENCE.

In an action by a passenger, the evidence held to warrant a finding that the company was negligent in failing to maintain its track free from low places and defects.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1307; Dec. Dig. § 318.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS OTHERWISE GIVEN—INJURY TO PASSENGER.

In an injury action by a passenger, instructions that railroads are not insurers of passengers, and are not liable for accidental injuries, and, if plaintiff was injured by the sudden jerking of the train, but such jerking was the usual movement incident to the running of such trains, he could not recover, were properly refused, as being fully covered by instructions to find for defendant if the injury was accidental, and that passengers assume the ordinary risks incident to the running of trains, including the ordinary swinging and jerking of the train.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. § 260.*]

3. CARRIERS (§ 321*)—PASSENGERS—ACTIONS—INSTRUCTIONS—FORM.

An instruction that a carrier must use the highest degree of care, diligence, and skill which means the highest degree of diligence, care, and skill that a prudent and cautious man would exercise to prevent injuries to passengers, by providing a reasonably safe track, and handling its trains in a prudent manner in view of the condition of the track, though perhaps not as explicit as it might have been, when fairly interpreted, meant that the company must exercise the highest degree of care which a prudent man would exercise, reasonably consistent with the mode of conveyance and the practical operation of the road, to provide a reasonably safe track, etc., and was proper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1327; Dec. Dig. § 321.*]

4. CARRIERS (§ 321*)—PASSENGERS—ACTIONS—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the evidence showed that a passenger was injured by a fall because of a sudden jerk of the train, an instruction was proper that a carrier must use the highest degree of care which a prudent man would exercise, reasonably consistent with the mode of conveyance, to provide a reasonably safe track, and if plaintiff was injured by reason of the train running over a low place in its track, which the company negligently permitted, he could recover.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1327; Dec. Dig. § 321.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. APPEAL AND ERROR (§ 216*)—PRESENTATION BELOW—INSTRUCTIONS—MORE SPECIFIC INSTRUCTIONS—REQUESTS—NECESSITY.

Where an instruction stated the correct rule of law when fairly construed, if the other party believed it conveyed a different meaning, he should have asked the court to correct it, and, not having done so, cannot complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 628; Dec. Dig. § 216.*]

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Action by Ed. S. Richardson against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appealed. Affirmed.

The appellee, a commercial traveler, was a passenger on appellant's train between Little Rock and Texarkana. He was riding in a sleeper. About 10 o'clock in the morning, after he had made an effort to hang his hat on a hook, he was standing on both feet in the aisle of the car. The train was going at a very high rate of speed, and the car he was in gave a very decided lurch, causing appellee to fall, and to break the second joint of the third finger of the left hand. Appellee had been riding continuously on trains for a great number of years. The lurch was a swinging, sinking movement as well as he could describe it. The movement was like one set of wheels being thrown lower than the other. It was not caused by making a curve; one side of the car went down and the other up. Appellee was earning, at the time of his injury, \$21.75 per day. He lost 22 days while under treatment of his physician, and about two weeks after that. His doctor bills were \$10.75. The injury was painful at the time of the occurrence, and was still painful at times when the trial was had. The fracture of the joint had never knitted so that it was the same as before the injury. On account of the injury he did not have the same grip, and could not carry his sample case as he once could. Appellee sued appellant, alleging that it was "negligent in failing to maintain a reasonably safe track from low places and defects, and in a condition suitable for the proper running of trains, and that appellant was negligent in running at a high rate of speed over a track containing such defects." Damages were laid at \$2,000. The appellant denied all the material allegations, and set up contributory negligence.

The court gave, at the request of appellee, the following prayers: "(1) The jury are instructed that it is the duty of the carrier of passengers to use the highest degree of care, diligence, and skill, which means the highest degree of care, diligence, and skill that a prudent and cautious man would exercise to prevent its passengers from injuries by providing a reasonably safe track, and handling its trains in a careful and prudent manner in view of the nature of said track; and, if you believe from the evidence in this case that plaintiff, while a passenger on de-

fendant's passenger train, and without fault on his part, was injured by reason of defendant's said train running at a high rate of speed over a sink or low place in its track, and that defendant was negligent in permitting said sink or low place in said track, or in running over same at a high rate of speed, then your verdict should be for plaintiff. (2) The jury are instructed that, if they believe from the evidence in this case that plaintiff was injured while traveling as a passenger upon one of defendant's passenger trains, and that said injury was caused by a defect in its railroad track, the law presumes that the defendant was negligent, and the burden of proof is upon said company to show, by a preponderance of the evidence, that the injury was not caused by its negligence. (3) You are instructed that if you find for the plaintiff, you will assess his damages at a sum that will fairly compensate him for the bodily injuries sustained and pain suffered by him, if any, the expense of his sickness resulting from the injury, and the pecuniary loss shown by the evidence to have been sustained by him by reason of his inability to attend to his business."

The following prayers were granted at the instance of appellant: "(2) The jury are instructed that in this case the law raises no presumption against the defendant; and, should the jury believe from the evidence that plaintiff's finger was injured while he was a passenger on one of defendant's trains, yet that fact alone would not enable him to recover in this case. (3) The court instructs the jury that the mere fact that plaintiff's finger was injured while he was a passenger on defendant's train does not establish a cause of action against the defendant, but the proof must go further, and establish, by a preponderance thereof, that said injury was due to some act, either of omission or commission on the part of this defendant, its agents, or employes. (4) The court instructs the jury that, if they believe from the evidence that the injury to plaintiff's finger happened by and through a mere accident, they will find for the defendant. * * * (6) The court instructs the jury that passengers traveling in railway trains assume the ordinary risks and inconveniences incident to the running and management of trains, among which are the ordinary rocking, swinging, jerking, or jolting of the train while in motion."

The court refused the following prayers: "(1) The jury are instructed to find for the defendant. * * * (5) The court instructs the jury that railway companies are not insurers of passengers, and they are not liable for injuries received by passengers by being carried on their trains, if the injury was a result of mere accident, the happening of which could not, by ordinary care and prudence, have been foreseen or anticipated. * * * (7) You are instructed that it was

the duty of the plaintiff to keep his seat while the train was in motion, and if you believe from the evidence that plaintiff was unnecessarily standing up in the car at the time of the injury, and that he would [not] have been injured had he not been standing up, then you are instructed to find for the defendant. * * * (9) Although the jury may believe from the evidence that plaintiff was injured as claimed, and that said injury was the proximate result of the jerking, lurching, or swinging of defendant's train, yet if they further find and believe from the evidence that said rocking, lurching, and swinging of the train was a usual and ordinary incident to the running of passenger trains, such as the one which plaintiff was on, you will find for the defendant."

Exceptions were duly saved to the rulings of the court in giving and refusing prayers for instructions. The verdict and judgment were for \$500. A motion for new trial, assigning as error the rulings of the court on the prayers for instructions, and that the verdict was excessive, was presented and overruled, and this appeal was duly prosecuted.

Mehaffy, Williams & Armistead, for appellant. R. W. Rodgers and Webber & Webber, for appellee.

WOOD, J. (after stating the facts as above). The evidence was sufficient to sustain the verdict that appellant "was negligent in failing to maintain a reasonably safe track, free from low places and defects." The testimony of appellant tended to show that the injury to appellee might have been produced by appellee being "off his balance" while the train was making a curve. But appellee's evidence was in sharp conflict with this, and the question was one for the jury.

Appellant contends that the court erred in not submitting to the jury its theory and contention, presented in its prayers numbered 5 and 9, that the injury was the result of an accident such as was a usual and ordinary incident to the running of passenger trains. But these prayers were fully covered by instructions 4 and 6 given at the instance of appellant. The court did not err in refusing to multiply instructions "announcing in effect the same legal principles." *Hanger v. Evins*, 38 Ark. 334; *Railway v. Thomason*, 59 Ark. 140, 26 S. W. 598; *Furlow v. State*, 72 Ark. 384, 81 S. W. 232; *Goss v. State*, 74 Ark. 33, 84 S. W. 1035.

The court did not err in giving instruction number 1. The instruction announced the correct rule of law applicable to the evidence adduced. The verbiage may not be as explicit as it should be, but the court evidently intended to conform to the rule announced in *Railway Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571, and to tell the jury that it was the duty of appellant company to exercise "the high-

est degree of care which a prudent and cautious man would exercise, reasonably consistent with its mode of conveyance and the practical operation of its road, to provide a reasonably safe track," etc. Such we think is a fair interpretation to be put upon the language of the instruction. If appellant conceived that the verbiage conveyed a different meaning, it should have asked the court to correct it. Not having done so, it is not in a position to complain. *Railway v. Barnett*, 65 Ark. 255, 45 S. W. 550; *Mt. Nebo Anthracite Coal Co. v. Williamson*, 73 Ark. 530, 84 S. W. 779; *St. L. Southwestern Ry. Co. v. Bowen*, 73 Ark. 594, 84 S. W. 783.

The judgment is affirmed.

OZAN LUMBER CO. v. BIDDIE.

(Supreme Court of Arkansas. Nov. 2, 1908)

1. APPEAL AND ERROR (§ 843*) — REVIEW — QUESTIONS CONSIDERED.

In an action under a statute making all corporate employers and certain unincorporated employers liable for injuries to employees by the negligence of other servants, defendant being a corporation, the validity of the statute only as to corporations need be determined on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

2. CORPORATIONS (§ 371*) — CORPORATE POWERS—EXTENT.

Corporations have only those powers conferred upon them by charter, either expressly or as incidental to their existence.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1516; Dec. Dig. § 371.*]

3. CORPORATIONS (§ 13*) — INCORPORATION — "CHARTER"—GENERAL CORPORATION LAWS.

Under Const. art. 12, § 2, prohibiting the General Assembly from passing special acts conferring corporate powers, etc., and section 6, permitting corporations to be formed under general laws which may be altered or repealed from time to time, the general laws under which a corporation is formed constitute its charter.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 49; Dec. Dig. § 13.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1088-1090; vol. 8, p. 7600.]

4. CORPORATIONS (§ 38*) — CORPORATE EXISTENCE—AMENDMENT OF GENERAL CORPORATION LAWS—"CHARTER."

Since the general laws under which a corporation is formed are its charter, their amendment under Const. art. 12, § 6, providing that corporations may be formed under general laws which may be altered or repealed from time to time, operates as an amendment of the charter.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 121; Dec. Dig. § 38.*]

5. CORPORATIONS (§ 39*) — CORPORATE EXISTENCE—AMENDMENT OF CHARTER.

Const. art. 12, § 6, provides that corporations may be formed under general laws which may be altered or repealed, and the General Assembly may alter or annul any corporate charter now existing and revocable at the adoption of the Constitution, or any thereafter created, whenever it may be injurious to the state in such manner, if no injustice is done to the corporations. Acts 1907, p. 162, approved March 3, 1907, makes all corporations who employ servants or employees liable for their injury or death

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

resulting from the negligence of any other servant or employé in the same manner as if the injury was that of the employer. *Held*, in an action under the statute against a corporation organized under the constitutional provision, that the only limitation to the reserved power to amend or alter was that the amendment be reasonable, and the statute making all corporations liable for injuries, etc., to its employes, was reasonable, and was constitutional as to corporations.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 39.*]

Appeal from Circuit Court, Nevada County; Jacob M. Carter, Judge.

Action by Frank Biddie against the Ozan Lumber Company. From a judgment for plaintiff, defendant appealed. Affirmed.

McRae & Tompkins and D. L. McRae, for appellant. J. O. A. Bush, for appellee.

BATTLE, J. The Ozan Lumber Company is a domestic corporation, doing a general sawmill business, with its principal place of business and offices at Prescott, in Nevada county, Ark.

Frank Biddie brought an action against it, and alleged in his complaint, in part, as follows:

"That on the 28th day of May, 1907, the plaintiff was in the employment of the defendant, working at its sawmill at Prescott, and was setting 'dogs.' That plaintiff was in the exercise of due care. That the defendant had at that time in its employment as sawyer one Mr. Schenks, who, in placing a log on the carriage, or in turning it on the carriage with a steam 'nigger,' through carelessness, negligence, and incompetence, threw the log over the guards and struck plaintiff's right hand, mashing, wounding, and bruising his middle finger and other parts of his right hand. That from said injury he has suffered and will continue to suffer great physical pain. That said injury will permanently impair plaintiff's ability to earn money and obtain employment, and greatly disfigure his person. The plaintiff has suffered damage by reason of said injury in the sum of \$1,000," and asked for judgment for that amount against the defendant.

The defendant answered, and denied the material allegations of the complaint.

Evidence was adduced in the trial of the action tending to prove the following facts: Plaintiff was in the employment of the defendant in May, 1907, working at its sawmill, and was setting what are called "dogs," a part of the machinery used in sawing logs. A man named Schenks was also employed by the defendant in the operation of the sawmill, and was sawyer. The plaintiff and Schenks were engaged in operating a carriage on which logs were moved to and from the saw; plaintiff using the dogs, and Schenks another part of the machine called the "nigger." They had a crooked log upon the carriage, one-half of which had been sawed.

While the carriage was running rapidly, Schenks made two or three ineffectual efforts to turn the log, and finally threw it over the guards on the hand of plaintiff, and mashed his fingers, while he was holding the dog lever. Plaintiff was in the exercise of due care. Schenks was guilty of negligence in failing to stop the carriage after making two efforts to turn the log and failing, and in using too great force in turning it, and in throwing the log over the guards and mashing plaintiff's hand.

Was plaintiff injured through the carelessness of Schenks? This question was submitted to the jury upon correct instructions by the court, and they returned a verdict in favor of plaintiff for \$750; and the defendant appealed.

The verdict of the jury was sustained by evidence. But appellant says Schenks was a fellow servant of appellee, and appellant was not responsible for the consequences of his negligence.

The act entitled "An act to give right of action against an employer for injuries or death resulting to his agents, employes or servants, either from the employer's negligence or from the negligence of some of his other employes, servants or agents, and to repeal all acts and parts of acts in conflict herewith," approved March 8, 1907, provides as follows:

"That hereafter all railroad companies operating within this state, whether incorporated or not, and all corporations of every kind and character, and every company whether incorporated or not engaged in the mining of coal, who may employ agents, servants or employes, such agents, employes, or servants being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employé or servant, resulting from the careless omission of duty or negligence of any other agent, servant or employé of said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer." Acts 1907, p. 162.

Appellant contends that the act is unconstitutional, because it violates section 18 of article 2 of the Constitution of Arkansas, which is as follows: "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." Also of the fourteenth amendment of the Constitution of the United States, which provides: "No person shall be deprived of life, liberty or property without due process of law."

The appellant is a corporation, and we need determine the effect of the act only as to corporations.

Corporations possess only those powers or properties which the charters of their crea-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion confer upon them, either expressly or as incidental to their existence; and these may be modified or diminished by amendment or extinguished by the repeal of their charters.

Section 2 of article 12 of the Constitution of this state provides: "The General Assembly shall pass no special act conferring corporate powers," etc.—and section 6 of the same article provides: "Corporations may be formed under general laws; which laws may from time to time be altered or repealed," etc. Under these sections the general laws under which a corporation is formed constitutes its charter. *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 285, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; *Morawetz on Private Corporations* (2d Ed.) § 318. The Constitution specially provides that these general laws can be altered or repealed. As they form a part of the charter, the amendment or repeal of them operates as an amendment or repeal of the charter. *Durand v. New Haven, etc., Co.*, 42 Conn. 211; 1 *Thompson on Corporations*, § 94.

The Constitution of this state expressly imposes a limitation upon the power to amend or revoke the charter of a corporation. Section 6 of article 12 of the Constitution further provides: "The General Assembly shall have power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever in their opinion, it may be injurious to the citizens of the state, in such manner, that no injustice shall be done the corporations."

The reserved power to amend a charter in the absence of an express limitation must be exercised upon terms that are just and reasonable. In *Shields v. Ohio*, 95 U. S. 319, 324, 24 L. Ed. 357, Mr. Justice Swayne, in delivering the opinion of the court, says: "It is urged that the franchise here in question was property held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is: 'Consensus facit jus.' It was according to the agreement of the parties. The company took the franchise subject expressly to the power of alteration or repeal by the General Assembly. There is therefore no ground for just complaint against the state. * * * The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration."

In *Sinking Fund Cases*, 99 U. S. 721, 25 L. Ed. 498, Chief Justice Waite, in delivering the opinion of the court, after quoting the last two sentences of the foregoing quotation, says: "The rules as here laid down are fully sustained by authorities."

In *New York & New England Railroad*

Company v. Bristol, 151 U. S. 556, 567, 1 Sup. Ct. 437, 440, 38 L. Ed. 269, it is said: "A power reserved to the Legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the Legislature may deem necessary to secure that object or any public right"—citing *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 2 Sup. Ct. 267, 27 L. Ed. 408; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; *Pennsylvania College Cases*, 13 Wall. 190, 20 L. Ed. 550; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. Ed. 204; *Wilmington Mining Co. v. Fulton*, 205 U. S. 60, 27 Sup. Ct. 412, 51 L. Ed. 708.

It is obvious that this power to amend charters of corporations is in force under the Constitution of this state with the same limitation. It was virtually so held in *Lepp v. Railway Co.*, 58 Ark. 435, 25 S. W. 83, 23 L. R. A. 264, 41 Am. St. Rep. 109. In that case, after a review of authorities, it is said: "It is obvious that the Legislature cannot, under the power to amend, take from corporations the right to contract; for it is essential to their existence. It can regulate it when the interest of the public demand it, but not to such an extent as to render it ineffectual or substantially impair the object of incorporation." *St. L. & St. Paul Ry. Co. v. Paul*, 173 U. S. 404, 408, 409, 19 Sup. Ct. 419, 43 L. Ed. 746; *Union Sawmill Co. v. Felsenthal*, 85 Ark. 346, 353, 354, 108 S. W. 217.

The amendment to charters of corporations made by the act in question makes the employer liable in damages for injuries or death sustained by one of its employes through the negligence of a fellow servant. Is this not a reasonable amendment to the charters of corporations? Why should not the employer suffer the consequences resulting from the negligence of his employe, instead of the employe who is injured by such negligence? The employe has no control over his fellow servant—did not employ him, and cannot discharge him. The employer employs, can control and discharge him. The act does not make him liable for such damages unless the employe is at the time in the exercise of due care. Acts of Legislatures imposing such liability on railroad companies have been upheld by the courts on account of the hazardous character of the business of operating a railway. The only difference of the reason for such acts and the act in question is the danger of the service of railroads is greater than that of other corporations—a difference in degree, and not in kind. We think the act in question is constitutional as to corporations.

The appellant does not deny, but tacitly concedes, that it was organized under the provisions of the present Constitution of the state.

Judgment affirmed.

WILLIAMS v. STATE.

(Supreme Court of Arkansas. Nov. 16, 1908.)

RAPE (§ 53*)—ASSAULT WITH INTENT TO COMMIT—EVIDENCE—SUFFICIENCY.

Evidence held not sufficient to support a conviction of assault with intent to rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 79-81; Dec. Dig. § 53.*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Sam Williams was convicted of assault with intent to rape, and appeals. Reversed, and remanded for a new trial.

Jas. B. Gray, for appellant. Wm. F. Kirby, Atty. Gen., and Daniel Taylor, Asst. Atty. Gen., for the State.

HART, J. At the August term, 1908, of the Lonoke circuit court, the grand jury returned an indictment in due form against Sam Williams, charging him with assault with intent to rape upon Beryl Shadle. He was tried and convicted at the same term of the court. His punishment was fixed at a term of three years in the state penitentiary, which he is now serving pending his appeal to this court.

Miss Beryl Shadle, the prosecuting witness, testified as follows: "I live at England, Lonoke county, Ark. On July 27, 1908, I was living on Plum bayou, some seven or eight miles southeast of England, and on that morning I started from my home at England to my school on Plum bayou, riding in a buggy alone. I started from England about 7 o'clock in the morning, and, when I had gotten about five miles from home, I was tackled by a negro. The negro's name is Sam Williams, and that is him there [pointing to the defendant]. Q. Go on, and tell all that occurred, whose house you were passing. A. I was passing the house where Mahomes live, and my attention was called by some one saying, 'Wait,' and I looked around to the left to see, and a negro was just starting across the fence, had his right foot over the rail, and was fixing to put the other one over, and I thought he was talking to some one on the other side, and I looked across the road and saw he wasn't, and I looked again, and he was sliding off the fence inside the road. He said, 'You look mighty sweet in that buggy, Honey,' and I realized then that he was talking to me, and I whipped the horse with the lines and I looked back at the negro, and he had crossed back over the fence, and he was running up the fence the way I was going. And I ran a good piece, and the buggy ran up against a stump, and threw me out and dragged me a piece, and I went to Mr. Hughes house, and called him. When the negro first called, he was 10 or 15 steps from me. When I last saw him, he was on the inside of the fence in the field about 15 or 20 steps from where I first saw him, run-

ning in the direction I was going." The remaining testimony was directed towards the identity of appellant, the attempted establishment of an alibi by him, and his denial of having been the negro who accosted the prosecuting witness. The view we have taken of the case renders it unnecessary to abstract this evidence. The Attorney General confesses error. In this he is correct.

The case under consideration is ruled by that of Anderson v. State, 77 Ark. 37, 90 S. W. 846. In that case the court in discussing the sufficiency of the evidence to sustain a charge of assault with intent to rape said: "The statutes of this state, requiring the unlawful act to be coupled with the present ability to do the injury, clearly indicates that the unlawful act must be the beginning or part of the act to injure, of the perpetration of the crime, and not of preparation to commit some contemplated crime." In the present case the testimony does not show even a simple assault on the prosecuting witness. The negro was never closer than 10 or 15 feet to her. He made no attempt to touch her person, and, when she whipped up her horse, immediately crossed back over the fence. Of course, the language used by him to her was calculated to scare her, but the evidence wholly fails to sustain the judgment for assault with intent to rape, or even the charge of an assault merely.

Therefore the judgment is reversed, and the cause is remanded for a new trial.

In re GOLDSMITH.

(Supreme Court of Arkansas. Nov. 2, 1908.)

1. CERTIORARI (§ 1*)—PURPOSE AND SCOPE OF WRIT.

Certiorari is granted where it is shown that the inferior tribunal has exceeded its jurisdiction, and where it has proceeded illegally and no appeal will lie, or the right has been unavoidably lost.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. CERTIORARI (§ 5*)—RIGHT TO WRIT—OTHER REMEDY—APPEAL.

Where the circuit court denied certiorari to review prosecutions for violation of a city ordinance, petitioner was not entitled to certiorari from the Supreme Court to review such order; his right of appeal being neither lost nor prevented.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

Certiorari to Circuit Court, Clay County; Frank Smith, Judge.

Certiorari on petition of S. B. Goldsmith to review an order of the circuit court denying his petition for certiorari to review certain proceedings in the mayor's court of the incorporated town of Piggott convicting petitioner of violating an ordinance declaring the owning, operating, or maintaining of a pool table within the town to be a nuisance, etc. Writ denied.

Moore, Spence & Dudley, for petitioner.

PER CURIAM. The town of Piggott passed an ordinance declaring that the owning, operating, or maintaining a pool table within the limits of said town was a nuisance, and provided for penalties against any one violating its provisions. Goldsmith was prosecuted under said ordinance, and fined several times in the mayor's court, and he took appeals from so many of said fines as he was able to secure bondsmen to the circuit court. He petitioned the circuit court for a writ of certiorari, setting forth said ordinance and the prosecutions under it and the pending and threatened prosecutions, and alleged facts tending to prove that his business was not a nuisance, and could not be made so by ordinance. He prayed that the ordinance and proceedings in mayor's court be certified to the circuit court, to the end that the ordinance and proceedings thereunder be declared void, and the town enjoined from proceeding against him for alleged violations of it. The circuit court denied the petition, and Goldsmith, after due notice, has petitioned this court for a writ of certiorari to bring the proceedings of the circuit court here, to the end that the judgment of that court denying the writ be reversed and the proceedings in mayor's court under said ordinance be quashed, and a record of the proceedings in circuit court be tendered with the petition.

In *Burgett v. Apperson*, 52 Ark. 213, 12 S. W. 559, the court said: "The writ [of certiorari] is granted in two classes of cases: First, where it is shown that the inferior tribunal has exceeded its jurisdiction; and, second, where it appears that it has proceeded illegally and no appeal will lie, or that the right has been unavoidably lost"; citing authorities. In *Reese v. Cannon*, 73 Ark. 604, 84 S. W. 793, this principle was restated and applied. The application here is not predicated on want of jurisdiction of the circuit court to grant the writ of certiorari, but that it erred in not doing so. Had the court granted it, the opposing side might have applied here and presented that question. The right of appeal from the circuit court is not lost or prevented, and that is as far as the court is called upon in order to decide this application.

The petition for the writ is denied.

SOUTER v. WITT.

(Supreme Court of Arkansas. Nov. 2, 1908.)

1. VENDOR AND PURCHASER (§ 78*)—CONTRACT FOR SALE OF LAND—FORFEITURE—RELIEF IN EQUITY.

Where a written contract for the sale of land made time of the essence of the contract and other clauses clearly indicated that the par-

ties intended that payments should be made at the time stipulated, and the vendor was not obliged to execute a conveyance until full compliance with the terms of the contract, the vendee, after default, was not entitled to relief in equity against the forfeiture.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 121, 122; Dec. Dig. § 78.*]

2. APPEAL AND ERROR (1009*)—QUESTIONS REVIEWABLE—FINDINGS ON CONFLICTING EVIDENCE—CONCLUSIVENESS.

Where the evidence is conflicting, the testimony accredited by the chancellor will be accepted on appeal; nothing else appearing to determine the preponderance.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3972; Dec. Dig. § 1009.*]

3. VENDOR AND PURCHASER (§ 95*)—CONTRACT FOR SALE OF LAND—FORFEITURE FOR NON-PAYMENT OF PURCHASE MONEY—WAIVER—EVIDENCE.

Where a vendor of land under a contract requiring the payment of the purchase money at specified dates according to the terms of two notes told the vendee at the time the contract was made and afterwards that, if he would pay the notes by the time the last note was due it would be all right, there was a waiver of a forfeiture for nonpayment of the first note when due.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 159; Dec. Dig. § 95.*]

4. VENDOR AND PURCHASER (§ 95*)—CONTRACT FOR SALE OF LAND—FORFEITURE FOR NON-PAYMENT OF PURCHASE MONEY—WAIVER.

Where a contract for the sale of land provided that, on nonpayment of the purchase-money notes, the vendee should forfeit his rights and should pay rent for the premises, the failure of the vendor after default in payment of the notes to demand rent of the vendee, and his retention of the notes after expiration of the time for payment, was not a waiver of the forfeiture.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 159; Dec. Dig. § 95.*]

5. VENDOR AND PURCHASER (§ 95*)—CONTRACT FOR SALE OF LAND—FORFEITURE FOR NON-PAYMENT OF PURCHASE PRICE—WAIVER—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a finding that a vendor of land did not waive a forfeiture of the contract of sale for nonpayment of the purchase price.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 95.*]

Appeal from Columbia Chancery Court; E. O. Mahoney, Chancellor.

Action by J. D. Souter against J. M. Witt for specific performance of a contract for the sale of land. Decree for defendant, and plaintiff appeals. Affirmed.

Appellant bought of appellee a tract of land in Columbia county, Ark. The parties entered upon a written contract, which, so far as may be necessary to set forth, specified: "That, in consideration of the stipulations hereinafter contained and the payments to be made as herein specified, the first party agrees to sell unto the second party, the following real estate [here follows a description of the land], and the contract continues as follows:

"And the said second party, in consideration of the premises, hereby agrees to pay to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the order of the said first party the following sums at the several times named below:

When Due.	Dollars. Cents.
Dec. 1st, 1905.....	125.00
Dec. 1st, 1908.....	150.00

"With 10 per cent. interest per annum on all notes from date until paid.

"For which amounts the party of the second part has executed and delivered to the said first party two promissory notes, dated on the 22d day of August, 1904.

"And the party of the second part hereby covenants and agrees that no timber shall be cut on this land without a special agreement, indorsed hereon, and signed by the parties hereto, except for necessary fuel for the family, erection of buildings and fences on said premises, and clearing of the land for actual and immediate cultivation, and that all improvements placed upon said premises shall remain thereon and shall not be removed or destroyed until final payment for said land; and, further, that he will regularly and seasonably pay all such taxes and assessments as shall be lawfully imposed upon said premises.

"In case the said second party, his legal representatives, or his assigns, shall pay the several sums of money aforesaid punctually, and at the several times above limited, and shall strictly and literally perform all and singular the stipulations and agreements aforesaid after their true tenor and intent, then and thereupon the first party will make unto the said second party, his heirs or assigns, upon the surrender of this contract, a warranty deed, conveying the title to said afore-described lands and premises in fee simple. But, in case the said second party shall fail to make the payments aforesaid, or any of them, punctually and upon the strict terms and at the times above limited, and likewise to perform and complete all and each of the agreements and stipulations aforesaid, strictly and literally, without any failure or default, time being of the essence of this contract, then this contract shall, from the date of such failure, be null and void, and all rights and interests hereby created or then existing, in favor of the said second party, his heirs or assigns, or derived under this contract, shall utterly cease and determine, and the premises hereby contracted shall revert to and revest in the said first party, his heirs or assigns, without any declaration of forfeiture or act of re-entry, or without any other act by said first party to be performed, and without any right in said second party of reclamation or compensation, or moneys paid or improvements made, as absolutely, fully, and perfectly as if this contract had never been made.

"And it is further covenanted and agreed by and between the parties hereto that, immediately upon the failure to pay any of the notes above described, all previous payments shall be forfeited to the party of the first part, and the relation of landlord to

tenant shall arise between the parties hereto, for one year from January 1st, immediately preceding the date of default, and the said party of the second part shall pay rent at the rate of forty dollars for occupying the premises from the said January 1st, to the time of default, such rent to be due and collectible immediately upon such default."

The contract was executed August 22, 1904, and on the same day appellant executed and delivered to appellee the notes according to the stipulations of the contract. Appellant went into possession of the land in December, 1904. He made improvements on the place and paid the taxes amounting in the aggregate to \$212.81. Appellant testified as follows: "I have never paid the notes given for the purchase price of said land. Just before the first of said notes was due, I went to Mr. Witt, and told him that I did not know that I would be able to pay all of the first note when due. That I was making improvements on the place, and needed all the money I could get to put on the place, and that the place was good for his money. He gave an affirmative grunt, but gave no intimation that he would want his money when it was due, or that he had any objection to giving me time on it. I had been doing business with Mr. Witt before this time, and had owed him money and he never had insisted on my paying it when due, but was always willing to extend time, and I understood from what he said and the way he acted that he was willing for me to have additional time on the land notes. About the 1st of January, 1907, I went to Mr. Witt to make a payment on my land notes, and asked him if he wanted it all, or was willing to take just a part of it, that I could pay it all if he wanted it, but would rather pay a part of it. He then claimed that I was too late, and that he would not then let me have the land at the price we had agreed upon. Up to that time I understood that Mr. Witt was perfectly willing to extend time on the notes. If I had not understood it that way, I would have met them when they were due. Mr. Witt has never asked me to pay anything on these notes. He has never said anything to me about paying rent. He has never returned to me my notes, or indicated to me in any way that my delay was unsatisfactory to him. About the 1st of last February I went to Mr. Witt's house, and offered to pay him the full amount of the purchase price, with interest up to that time, and asked him for a deed to the land. He refused to give the deed or to receive the amount that I offered to pay. When I first went to Mr. Witt in January, 1907, and asked him if he would take a part or did he want all of the money, he asked me if I had all of the money with me. I told him that I did not have all the money with me, but that I could get it. He then refused to let me have the land at the price agreed upon. He afterwards told me that if I had had the money with me that he

would have let me have the land. Mr. Witt passed this place frequently, and knew that I was going ahead making improvements on it after the time the notes were due." The statement in the last clause was practically nullified on cross-examination. The appellant further testified that, when he first signed the contract, there was a blank in that part of the printed form in regard to the description of the land and the amount to be paid for rent; that since the contract was signed the description and the word "forty" has been inserted; that there was no agreement that appellant should pay rent in case of a failure to pay notes when due.

J. M. Witt testified that: "The contract and notes are as executed by me and Mr. Souther, with the exception that I afterwards wrote the numbers in there by agreement with Mr. Souther. I never did give Mr. Souther to understand that I waived any of the conditions of the contract. He spoke to me about being able to pay a part only as I remember of the first note about the time it became due or possibly afterwards. It seems to me that it was some time just before Christmas of the year the first note became due. I do not remember what answer I gave him, but probably the one he says I made is correct. He never did after that conversation offer to pay any part of the first note until in this year. He never did speak to me again about the payment of either notes until January of this year. Mr. Souther had been in debt to me at different times before we made this contract, and was frequently slow in making payments. I never pressed him for payments. I have never asked Mr. Souther for the payment of the notes given for the land involved in this suit. I have never returned the notes to him. I always told Mr. Souther at the time of making the contract, and after that, that, if he would pay the notes by the time the last note was due, it would be all right. At the time we made the contract I told Mr. Souther that he could have his own time to pay for the land, and he named the terms stipulated in the contract. At the time we made the contract, Mr. Souther remarked that he expected it would be hard on him to make all of the first payment, and I told him I guess it would be all right if he didn't pay the first full payment. This was when we were talking about the land, and before the written contract was signed. I expect maybe that I would have taken the money and made Mr. Souther a deed if he had come up with the money in full any time before January 1, 1907, the time I marked the contract canceled. The contract we made was a bona fide sale. The forfeiture clause was put in the contract to show that he was to pay me so much money before he could get the land according to the stipulations of the contract. I never asked Mr. Souther to pay any rent on the place. The day we signed the contract Mr. Henderson wrote it, and, when he came to the rent part of it, he asked what amount

of rent, and I told him that it made no difference, as I didn't intend to charge him any rent no way. He then asked what the rent would be worth, and I said that if I was going to rent it, I would want \$40 or \$50, and he must have then put in the \$40. I never did ask Mr. Souther to surrender this place to me, never demanded any rent on it, never demanded any payment of the notes, and have never surrendered the notes to him. I took the two copies of the contract the day we made it to fill out the numbers of the land, and never gave him back a copy of it. Mr. Souther has never asked for the notes, and I think I told him in January, 1907, when he spoke to me about the matter, that he could get the contract and notes at any time. Whatever I might have done since December 1st last I would have done it outside of the contract and not under it. There was never anything said between me and Mr. Souther about paying rent." It was shown by the witness who filled out the printed form of contract and notes that he inserted the word "forty" in the contract.

The suit was by appellant against appellee for specific performance. The court upon the above facts refused the relief prayed in appellant's complaint, and dismissed it for want of equity. Appellant seeks by this appeal to reverse that decree.

McKay & Lile, for appellant. Stevens & Stevens, for appellee.

WOOD, J. (after stating the facts as above). The written contract is plain. There is a clause expressly making "time of the essence of the contract," and other clauses which clearly show that the parties intended at the time of the execution of the contract that the payments should be made at the times stipulated. From the language of various provisions of the contract, the conclusion is irresistible that payment at the time specified was made a condition precedent to the right of appellant to acquire the title, and to obtain a deed to the land. This being true, the case, so far as the written contract is concerned, comes well within the rule announced by Mr. Pomeroy and quoted by Judge Riddick in *Carpenter v. Thornburn*, 76 Ark. 578, 89 S. W. 1047, as follows: "It is well settled that, when the parties have so stipulated as to make the time of payment of the essence of the contract within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default. With respect to this rule there is no doubt. The only difficulty is in determining when time has thus been made essential. It is also equally certain that, when the contract is made to depend on a condition precedent—in other words, when no right shall vest until certain acts have been done, as for example, until the vendee has paid certain sums at certain specified times—that also a court of equity will not relieve the

vendee against the forfeiture incurred by a breach of such condition precedent." 1 Pom. Eq. § 455. See, also, *Ish v. Morgan*, 48 Ark. 413, 3 S. W. 440; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; 4 Pomeroy, § 1408. But it does not follow that, because there has been a forfeiture under the strict letter of the contract, the vendor is entitled to insist upon it. That depends upon his conduct with reference to it. The Supreme Court of the United States in *Cheney v. Libby*, supra, after announcing the doctrine we have mentioned as to the proper construction of a contract where time is essential, says: "The discretion which a court of equity has to grant or refuse a specific performance, and which is always exercised with reference to the circumstances of the particular case before it, may, and of necessity must, be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions." Some of our own cases to the same effect are *Little Rock Granite Co. v. Shall*, 59 Ark. 405, 27 S. W. 562; *Morris v. Green*, 75 Ark. 410, 88 S. W. 565; *Banks v. Bowman*, 83 Ark. 524, 104 S. W. 209.

The real difficulty in this case has been to determine, on the issue of fact, as to whether appellee's conduct was a waiver of the forfeiture. Appellant and appellee are the witnesses pro and con, respectively, on this issue, and, as is said by Chief Justice Hill in *Banks v. Bowman*, supra: "Where there is a conflict, it is a mere difference between two witnesses detailing the same transaction, and the court accepts in such conflict the testimony accredited by the chancellor; nothing else appearing to determine the preponderance." There was a clear waiver of any forfeiture on account of a failure to pay the first note when it became due. The testimony of appellee himself shows that. For among other things, he says: "I always told Souter at the time of making the contract, and after that, that, if he would pay the notes by the time the last note was due, it would be all right." The appellant, before the first note was due, went to the appellee and told him that he (appellant) was making improvements, and that he would not be able to make all of the first payment when due, and that thereupon appellee gave "an affirmative grunt." He says that he had been doing business with appellee before this time and had owed him money, but that appellee had never insisted on payment when the money was due, and was always willing to extend the time. Therefore appellant concluded that appellee was willing for him to have additional time on the second note, as well as the first. But appellant did not ask appellee about payment on the second note until after same was due. Then he found that appellee was unwilling to extend the time, claiming that appellant was too late, etc. Appellant

testified that he understood from what appellee said and did that he was willing to extend the time of payment after the last note became due; but appellant fails to point out any conduct on the part of appellee before or after the time for the payment of the last note that would warrant appellant in believing that appellee would extend the time for payment beyond the date when the last note was due.

Appellee testified that his indulgence to appellant was with reference to the first payment. True he says that "maybe he would have taken the money" and given appellant a deed had he "come up with the money in full before January 1, 1907," the day the contract was marked canceled. But appellee says it was a bona fide sale, and "the forfeiture clause was put in the contract to show that he was to pay me so much money before he could get the land according to the stipulations of the contract." The fact that appellee never asked appellant to pay any rent on the place, and that appellee retained the notes after the expiration of the time of payment, cannot be taken as a waiver of the forfeiture. Appellee says that he told appellant in January, 1907, when he spoke about the matter, that he, appellant, could get the contract and notes at any time. He says that he did not intend to charge him rent, and there was nothing said about it that what he did since December 1, 1906, the time for the final payment, he would have done outside of the contract, and not under it."

The fact that appellee did not charge appellant rent may be regarded as an act of kindness to appellant rather than an acknowledgment on the part of appellee that he did not own the land. The testimony is set out in full, and it fully sustains the finding of the chancellor.

His decree is therefore affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. HAMBRIGHT.

(Supreme Court of Arkansas. Nov. 2, 1908.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—EVIDENCE.

The sufficiency of the evidence to sustain a finding on appeal must be tested solely on the accredited testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3934; Dec. Dig. § 1001.*]

2. RELEASE (§ 57*)—VALIDITY—FRAUD—MISREPRESENTATION—EVIDENCE.

In an action for injuries to a servant, evidence held to sustain a finding that a release of plaintiff's injuries pleaded as a defense was obtained from him by fraud.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 106-108; Dec. Dig. § 57.*]

3. RELEASE (§ 16*)—VALIDITY—MISTAKE.

Where a settlement for an employee's injuries was based on a mutual mistake of fact

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

predicated on a physician's medical opinion as to the employé's condition at the time the settlement was made, which opinion induced the settlement, a release consummating such settlement constituted no defense to an action for the servant's injuries.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 31; Dec. Dig. § 16.*]

4. MASTER AND SERVANT (§ 300*)—INJURIES TO SERVANT—PHYSICIAN'S STATEMENT.

Where a railroad company employed the surgeon in charge of a hospital, it was estopped to assert that an employé treated at the hospital was not entitled to rely on such surgeon's statements as to his physical condition, which were made the basis of a settlement for the injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1209; Dec. Dig. § 300.*]

5. RELEASE (§ 24*) — DEFENSES — CONSIDERATION—RETURN.

Where, in an action for injuries to a servant, there was a controversy as to whether a release was intended to cover defendant's liability for the injuries, or whether it was merely the reimbursement of the employé for his loss of time and expenses incident to the injury, he was not required to tender a return of the amount received as a consideration for the release as a condition of his right to sue for his injuries.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 45; Dec. Dig. § 24.*]

6. EVIDENCE (§ 434*) — PAROL EVIDENCE — RIGHT TO WRITTEN CONTRACT—FRAUD.

The rule forbidding the addition, alteration, or contradiction of a written instrument by parol testimony does not apply where there is an issue of fraud in the procurement of the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2005-2020; Dec. Dig. § 434.*]

7. APPEAL AND ERROR (§ 273*)—EXCEPTIONS—SUFFICIENCY—INSTRUCTIONS.

Where a general exception is taken to the refusal of several instructions and one of the instructions is bad, the exception does not preserve the other instructions for review.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 273.*]

Appeal from Circuit Court, Miller County; Jacob M. Carter, Judge.

Action by W. O. Hambright against the St. Louis Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hambright was a brakeman on a freight train in the employ of the appellant railroad company, and on August 10, 1906, was knocked from his train by a defective waterspout at Austin, and seriously injured. He was taken to his home in Memphis, Tenn., where he was under the care of competent physicians of his own selection. Later he went to the hospital of the railroad company in St. Louis, Mo., where he arrived on the 27th of September. He remained there under treatment for about two weeks, when he returned to Memphis. At that time he promised the chief surgeon, Dr. Outten, that he would return to the hospital. It was a rule of the hospital that employés under treatment there should remain until they were discharged by the chief surgeon, who gave them what was called a "clearance,"

which they took to the general claim agent of the railroad company. This clearance was a statement of the exact physical condition of the employé, who was expected to take it to the claim agent as a basis for settlement before returning home. On the 21st of November Dr. Outten wrote Hambright, upbraiding him for not fulfilling his promise to return, stating that he, Dr. Outten, had been placed in an embarrassing position by permitting him to leave, evidently referring to his failure to obtain his clearance, and see the claim agent before his discharge. Hambright returned to the hospital shortly after receiving this letter, and was examined by Dr. Outten, the chief surgeon, on December 3d. Dr. Outten then wrote a letter to the general claim agent, making a report upon Hambright's case. He says: "I find a marked deformity of the spinal column, commencing with the twelfth dorsal and involving the first and second lumbar vertebra. There is undoubtedly a diseased condition here, as not only the spinal processes are enlarged, but seemingly the laminae of the vertebra as well." He goes fully into the case, and concludes as follows: "I cannot tell at this examination whether it will be permanent or not, but, as I have said before, a young man 29 years of age, under intelligent treatment, and when you take into consideration the region of the column involved, there is a bare possibility that it will get well. In any event, it is a serious injury, and one that decidedly menaces his future usefulness. This letter will take place of the clearance, as Hambright will report to you tomorrow morning." Hambright said this letter was given to him sealed, and he carried it to the office of Mr. Jones, the general claim agent, but failed to see Mr. Jones, and left the letter for him. Dr. Outten said that it was his custom to acquaint employés with statements he made to the claim agent, and he is satisfied he did so in this case. He denied the statements attributed to him by Hambright and Phillips hereafter set out. He said that all of his examinations were made in the interest of the employés as well as the company; that he is employed by the company, but that his salary comes out of a hospital fund, which is raised by assessments on all the employés of the company. Hambright says: That, when Dr. Outten examined him, he told him that his injuries were not serious, and that he would be able to go to work by the 1st of March, and he replied to him: "Doctor, it is up to you. I don't know, and I want to know just what you think." That the doctor said: "It is nothing bad, and you will be all right by the 1st of March." A friend of Hambright's, one Phelps, said he was with Hambright at this time, and that Dr. Outten told Hambright that he was not permanently injured, that his injuries were not going to be serious, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index

that he would be able to take his place back by March, 1907. Hambright returned to Memphis without making a settlement, but subsequently wrote to Dr. Outten that he would like to arrange with Mr. Jones or some of his agents to see him, as he would like to settle with the railroad company. A pass was furnished him to St. Louis, and he went there and saw the claim agent on the 28th of December. There is irreconcilable conflict between the testimony of the claim agent and his stenographer and that of Hambright as to the transaction at that time. The claim agent puts in evidence certain writings: First, a proposition signed by Hambright to him, reciting his injury and his condition, and proposing to settle with the railroad company for \$1,250. A written acceptance follows, signed by Jones as general claim agent for the railroad company. Then follows a formal release setting forth in full the accident occasioning the injury and the extent of his injury, and that in his judgment the injuries received are of permanent character, and reciting an agreement to settle for \$1,250 and acknowledging receipt of the same in full settlement of all actions, suits, or claims of every class or character arising to him or accruing to him by reason of the injuries referred to. Written upon this by Hambright in his own handwriting is this clause: "I understand this release." Mr. Jones and his stenographer testified that these papers were dictated to the stenographer in the presence of Hambright, and were signed by him, and that they truly reflect the transaction, and they further testify that Mr. Jones had no communication with Dr. Outten at that time, that Dr. Outten's letter, which served as a clearance, was the sole information he had before him of Hambright's condition. On the other hand, Hambright testifies that Mr. Jones called up Dr. Outten over the telephone, and, after inquiring as to Hambright's condition, listened for a few moments, and then turned to him and said: "Dr. Outten says that you are not badly hurt, and that you will be able to go to work by the 1st of March." He says that he placed every reliance upon the statement of Dr. Outten, and thought that he knew exactly what he was talking about, and that he consulted no other doctors at that time in regard to his condition, and that after receiving this information from Mr. Jones that he asked him in regard to his work, and that Jones told him that he would see that his job would be ready for him as soon as he was able to work. He said he told Jones he was hurt bad, and wanted pay for his time off; and he says that the settlement was based on the actual wages from the time of his injury to the 1st of March, and doctor's bills, expenses, and medicines, and that he put in no claim for a settlement for his injuries, and did not know that that element was stated in the writing which he signed, that the papers he signed were not dictated

in his presence or hearing, and that he did not read them over because he did not consider it necessary, as he thought it was a receipt for his wages and expenses as agreed upon. The \$1,250 was paid to Hambright and he returned to his home in Memphis. His physical condition did not improve, and in the latter part of February he consulted physicians there to see if he would be able to return to work the 1st of March, and was advised that he was permanently disabled from pursuing work in the railroad service requiring physical exertion. The evidence is undisputed that his injuries are of such a nature that he will be unable to do any work which would require physical exertion, and that the only service in the railroad employ for which he would be fitted would be such a position as flagman at a crossing at a salary of \$40 or \$45 a month. He says he is not sufficiently educated to do any clerical work, and his earnings are dependent upon comparatively unremunerative positions. He was earning at the time of the injury about \$150 per month, and he had just been promoted to a freight conductor, but had not assumed that position at that time.

This suit was brought by Hambright against the railroad company to recover damages for his injuries, alleging negligence. The answer denied negligence, and pleaded contributory negligence, and further pleaded a settlement for \$1,250 in full satisfaction of the damages on account of the injury. The plaintiff filed an amended complaint, admitting the settlement and the receipt of \$1,250, and charged fraud and deceit on the part of defendant's chief surgeon and general claim agent in procuring the settlement. The defendant filed an amended answer denying any false or fraudulent statements in procuring the settlement.

The facts above outlined were developed in the evidence and also the facts as cause of the injury. As there is no controversy in this court over the original cause of action, the sole controversy being in regard to the validity of the release, the testimony and instructions pertaining to the liability are not necessary to be set out in order to understand the issues here. The court gave the following instructions:

"(3) The execution of the release by the plaintiff, which bears date December 28, 1906, and put in evidence, is an admitted fact. But, if the jury find from a preponderance of the evidence that before or at the time the consideration was paid for said release and the same was executed that the physician and surgeon of the defendant railway company made an examination of the plaintiff's injuries, and thereupon assured the plaintiff that his injuries were not permanent, but that plaintiff would be able to resume his position and duties with defendant by the 1st of March following, and relying upon said statement to be true, he executed said release, but soon afterwards it

was developed that plaintiff was permanently injured, and that he never would be able to perform labor in his line of employment, but that at the time of making said statements defendant's physician and surgeon either knew that plaintiff was permanently injured and misrepresented that fact, or was honestly mistaken as to the extent of plaintiff's injuries and misled him into signing said release, then plaintiff is not bound by same, and the jury should so find.

"(4) If the jury find for the plaintiff, they will assess his damages at a sum that will compensate him for the bodily injury sustained and the mental and physical pain and suffering endured and to be endured by reason of such injuries. The effect of the injuries on his health according to the degree and probable duration, his pecuniary loss from his diminished capacity for earning money through life, if any such has been proven; and, after you have fixed the sum, you will deduct the amount which defendant has paid plaintiff, and the difference should be the amount of your verdict."

The defendant asked 10 instructions, all of which the court refused. The jury returned the following verdict: "We, the jury, find for the plaintiff and assess his damages at \$5,000, after allowing credit for the amount paid." Defendant railroad company has appealed.

T. M. Mehaffy and J. E. Williams, for appellant. L. A. Byrne, for appellee.

HILL, C. J. (after stating the facts as above). 1. Appellant says that the evidence is not sufficient to show that the plaintiff was either deceived or misled, or that any fraud was practiced on him in obtaining the settlement. In discussing this it must be taken that the jury has accepted the testimony of Hambright and Phelps and rejected that of Outten and Jones; and the sufficiency of the evidence must be tested solely upon the accredited testimony. In *H. & T. C. Ry. Co. v. Brown* (Tex. Civ. App.) 69 S. W. 651, an employé of the railroad company was injured and was taken to a hospital, where he was treated by Dr. Stewart, the surgeon of the railroad company. The doctor represented to him that the bones of his arm had knitted and united together, that his arm was well, and that as soon as the swelling had passed away his arm would be as good as ever. Brown, the employé, had stated that he was ready to settle with the railroad company whenever the bones of his arm had knit together and his arm was cured. The court said: "The facts in evidence warrant the conclusion that Stewart made the representations and statements to the appellee for the purpose of inducing him to execute the release to appellant, and that the appellee believed the statements were true, and relied upon the same, and was thereby induced to make the settlement and sign the release; that the representations and state-

ments so made by Stewart were false, in that the bones at the time of the trial were not united, and that his arm was practically destroyed in its usefulness. The court correctly submitted this issue to the jury. We cannot agree with the contention of appellant that it may escape liability on the ground that the representations and statements made by Stewart was a mere expression of opinion. It was more than an opinion. It was the statement of a fact. The effect of his statement was that the appellee was a sound man, and that the bones of his arm had knitted together, and that it would be all right. It is true this statement may have been predicated upon his opinion as a medical expert, but the opinion is based upon facts of which he possessed knowledge. The fact that the statement made by Stewart was not intentionally false does not affect the right of the appellee to have the release set aside if he was misled by the statement, and executed the release believing the statement was true. In such a case innocent misrepresentations may as well be the basis of relief as where such statements are intentionally false." This case was quoted from and approved by the federal Court of Appeals of the Ninth Circuit in *Great Northern Ry. Co. v. Fowler*, 136 Fed. 118, 69 C. C. A. 106. In that case a brakeman on a railroad was injured and was examined by the company's physician, who advised him, after a cursory examination, that his injuries were slight, and that he would be ready for work in two weeks. He consulted no other physician as to the extent of his probable injuries. The decisions touching this exact point are carefully considered and discriminated, and these conclusions reached: "He accepted the statement and opinion of the appellant's surgeon, and on the basis of it received \$195 and signed the discharge. We entertain no doubt that such a release executed under a mutual mistake of fact so induced by the appellant should be set aside. It is true that, where there is no misrepresentation or fraud on the part of the releasee, a releasor cannot subsequently avoid his release on the ground that his injuries were more serious than he thought them to be, even though his opinion at the time of making the settlement may have been based upon that of a physician employed by the releasee to examine and report on the extent of his injuries; * * * but it is equally true that a mutual mistake of fact or an innocent misrepresentation of the facts of the releasor's injury, made by the releasee's physician, may be effective to avoid a release induced thereby."

The case of *T. & P. Ry. Co. v. Jowers*, (Tex. Civ. App.) 110 S. W. 946, is essentially similar to the case at bar. An employé of the railroad company was injured and sent to the same hospital to which Hambright went, and was under the care of Dr. Vasterling, who was also one of the physicians who attended Hambright while he

was at the hospital. The course of dealing between the hospital and the patient was shown to be the same in that case as it was in this. The plaintiff's evidence was that he had settled upon the statement of Dr. Vasterling that his injuries were slight, and it was proved that such was not the case. The court said: "The fifth and sixth assignments are submitted together in the appellant's brief, and assail the court's charge in submitting the issue of bad faith or fraud upon the part of Dr. Vasterling, appellant's physician in charge of the hospital, and Hoepfner, appellant's claim agent stationed at that place, in advising the appellee concerning the extent of his injuries at the time the release was executed. The propositions (two in number) submitted under those assignments indicate that the particular objection was to the action of the court in submitting any such issue at all under the circumstances. The first proposition asserts that fraud cannot be predicated upon a representation which is a mere statement of opinion, and not the statement of the fact. The appellants lose sight evidently of the fact that fraud may be based upon the giving of an opinion as well as the statement of any other fact. In this particular suit the contention is relied upon that the physician fraudulently gave an incorrect opinion, and thereby misled the appellee into agreeing to a settlement [citing authorities]. The second proposition assumes as a matter of fact that the physician acted in good faith. That, we think, was an issue for the jury." See, also, on the general principle involved, *Railway Co. v. Kosischke*, 104 Fed. 440, 48 U. S. App. 626, the Circuit Court of Appeals of the Eighth Circuit. The appellee's evidence fully meets the requirements of the authorities to avoid a release induced by fraud.

2. A special exception was taken to submitting the question of Dr. Outten being mistaken as to the extent of plaintiff's injuries to the jury in the third instruction. As shown by the above authorities, if the settlement was based upon a mutual mistake of fact, predicated upon the doctor's medical opinion as to the present condition of the employé, which opinion induced the settlement, the instruction was correct. If there was room to find that there was such mistake of fact as above indicated, it would be equally effective to set aside the release, and the appellant cannot be injured by having the most charitable construction given to the statements of Dr. Outten.

3. It is said that Hambright came direct from his own physicians and ought to have known, and must have known, something of his condition outside of anything Dr. Outten said to him, and that he could not have been misled in this regard. Hambright testified that he had been under Dr. Outten's care from September, and that he did not know his own condition, but relied upon Dr. Outten, and asked him to tell him his true con-

dition. In the third instruction the court predicated plaintiff's case on a reliance upon Dr. Outten's statements, and the verdict means that the jury believed he did rely upon them. Dr. Outten says that his examinations were made in behalf of the employés as well as the railroad; that his employment came from the railroad company and his compensation came from a hospital fund derived from assessments of the employés. Certainly Hambright had a right to rely upon his good faith, and it does not lie in the mouth of the railway company to say that an employé cannot safely rely upon statements of its chief surgeon who occupies this delicate position between it and its employés.

4. It is next argued that the court erred in entertaining this suit without requiring a tender of the amount received in the settlement of December 28th. This point was reserved by exception to the fourth instruction. This contention, however, was settled against the appellant in *St. L., I. M. & S. Ry. Co. v. Smith*, 82 Ark. 105, 100 S. W. 884. In that case, as in this, there was a controversy over a release; one side claiming that it was for a single purpose and the other side claiming that it was a full release. The court said: "So, if the jury found that she was paid the sum of money as compensation only for the inconvenience and delay caused by the collision, or that she was induced to sign the receipt by false representations, which she relied on, as to its contents, she would not be bound to return the sum paid before suing to recover the damages sustained." If plaintiff's evidence was true, then the tender was not necessary; and the defendant did not ask for the converse of the proposition to be submitted.

5. Objection is made to the third instruction; but, as seen in the previous discussion, it is in accord with the authorities.

6. Error is assigned for the refusal to give each of the 10 instructions asked on the part of the defendant. The first and second of these charged the jury that, if the writings introduced in evidence were signed by the plaintiff, he would be bound by the terms and conditions thereof and not permitted by oral testimony to change, vary, add to, or contradict them. The rule of evidence forbidding the addition, alteration, or contradiction of a written instrument by parol testimony of antecedent and contemporaneous negotiations does not apply where there is an issue of fraud in the procurement of the writing. *Jordan v. Fenno*, 13 Ark. 593; *Gauss Sons v. Doyle & Co.*, 46 Ark. 122; *Colonial & U. S. Mortg. Co. v. Jeter*, 71 Ark. 185, 71 S. W. 945. The exception to the refusal of the court to give the 10 instructions was a general one, and where such is the case, if any of the instructions are bad, such exception does not preserve for review the other instructions. *Young v. Stevenson*, 75 Ark. 181, 86 S. W. 1000. There was no error in refusing to give any of these

instructions. As they are not in reviewable shape, the questions presented by them cannot properly be discussed.

Judgment affirmed.

McCULLOCH, J., concurs in judgment, but not in all of the opinion.

ASHFORD v. RICHARDSON.

(Supreme Court of Arkansas. Nov. 16, 1908.)
APPEAL AND ERROR (§ 1039*)—REVIEW—HARMLESS ERROR—PLEADING.

Act May 11, 1905 (Acts 1905, p. 798), provides that the circuit and chancery courts may consolidate actions when it appears reasonable to do so. Kirby's Dig. § 8148, provides that no judgment shall be reversed for any error or defect which does not affect the substantial rights of the adverse party. *Held*, that whether or not an action for slander and an action for a malicious prosecution growing out of the same transaction can be joined under Kirby's Dig. § 6079, enumerating actions which may be joined, the court might have consolidated the actions under such act of May 11, 1905, if they had been separately brought, and, the verdict in one of the causes of action thus joined being for \$1 only, the judgment will not be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4076; Dec. Dig. § 1039.*]

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

Action by Carter Richardson against Fred C. Ashford. From a judgment for plaintiff, defendant appeals. Affirmed.

Carter Richardson brought this suit in the Garland circuit court against Fred C. Ashford, and united in the same complaint an alleged cause of action for slander with one for malicious prosecution. The complaint alleges: "That on the 10th day of May, 1906, the defendant in a certain discourse which he then and there had with the plaintiff, in the presence and hearing of Walter Flowers, Arthur Owens, Bob Jones, and divers other good and worthy persons, falsely, slanderously, and maliciously spoke of and concerning the plaintiff the false, slanderous, defamatory, and malicious words following, to wit: 'You God damned son of a bitch, you went and raped a woman, and I am going to have you sent to the penitentiary for it.' That subsequently, on the same day, but on a different occasion, in the presence of the said Bob Jones and of divers other worthy persons, the said defendant in a certain discourse he then and there had with the said Bob Jones and divers other persons then and there being falsely, maliciously, and slanderously spoke of and concerning the plaintiff the following false, slanderous, defamatory, and malicious words, to wit: 'I've got the two sons of bitches in jail now [meaning the said plaintiff and Arthur Owens], and I'm out, so you see what my money will do. I am going to have both of them [meaning thereby the said plaintiff and Arthur

Owens] sent to the pen for raping that woman. Carter Richardson did rape her, and Arthur Owens held the other woman while he did it.' That said language in its common acceptation then and there amounted to charging this plaintiff with having committed a felony, and to bring into disrepute the good name and character of plaintiff, and was then and there knowingly and maliciously false and slanderous. That, by reason of the speaking, publishing, and uttering of said false, slanderous, and malicious words, the plaintiff has been damaged in his reputation in the sum of \$5,000. The said plaintiff, for a further cause of action against said defendant, alleges: That the said defendant on the 10th day of May, 1906, in the city of Hot Springs, Garland county, state of Arkansas, falsely and maliciously, and without reasonable or probable cause, procured one Emma Henderson to charge the plaintiff before one J. W. Alford, a justice of the peace within and for Hot Springs township, in said county of Garland, state of Arkansas, with the crime of assault with intent to commit rape, and procured the said justice to issue a warrant for the arrest of the said plaintiff on said charge, and thereupon the said plaintiff was arrested under said warrant and imprisoned for ——— hours, and compelled to give bond in the sum of \$500 to obtain his release. That on the ——— day of May, 1906, at the trial of said cause, the plaintiff was acquitted of said crime and discharged, and the said prosecution is wholly ended and determined. That said charge and arrest was published in several newspapers by the procurement of the defendant, and the plaintiff was grievously injured in his credit and reputation, and incurred an expense of ——— dollars in costs and counsel fees in defending himself. That, by reason of said matters, the plaintiff has been injured and damaged in the sum of \$5,000. Wherefore plaintiff prays judgment against said defendant in the sum of \$10,000 and other relief." The defendant demurred to the complaint and moved to require plaintiff to elect on which count he would proceed. The court overruled his demurrer and motion, and he duly excepted. Defendant, then without waiving his demurrer, filed his answer, which was a denial of all the material allegations of the complaint. There was evidence adduced at the trial tending to establish both slander and malicious prosecution. The jury returned the following verdict: "We, the jury, find for the plaintiff, Carter Richardson, on the first count, 'charge of slander,' and assess his damages on said count at \$1. * * * and also we find for the plaintiff on the second count 'charge of malicious prosecution,' and assess his damages on said count at \$200." The court rendered judgment accordingly, and the defendant has duly prosecuted his appeal to this court.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

C. Floyd Huff and C. V. Teague, for appellant. Greaves & Martin, for appellee.

HART, J. (after stating the facts as above). The sole issue raised by the appeal in this case is whether the actions for slander and for malicious prosecution may be joined in the same complaint. Section 6079 of Kirby's Digest is as follows: "Several causes of action may be united in the same complaint where each affects all of the parties to the action, may be brought in the same county, be prosecuted by the same kind of proceedings, and all belong to one of the following classes: * * * Fifth. Claims arising from injuries to character. Sixth. Claims arising from injuries to person or property." Counsel for appellant contend that the action for slander is included in the fifth class, and that the action for malicious prosecution belongs to the sixth class, and hence, under the section above quoted, that the two actions cannot be joined in the same complaint. We do not deem it necessary to decide this question. The act of May 11, 1905, provides that, when causes of action of a like nature or relative to the same question are pending before any of the circuit or chancery courts of this state, "the court may make such orders and rules concerning the proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so." Acts 1905, p. 798. "The wrong of a malicious prosecution is akin to the wrongs known under the designation of slander and libel. Though it is injurious in that it is likely to subject the party to expense and trouble to make good his defense, it is also a most effective species of defamation, the defamatory matter being not only published, but made more formal, and apparently authoritative, by the machinery of the law being made use of for the purpose." Cooley on Torts, p. 225.

The court had jurisdiction of both causes of action, and, if no objection had been made, they could have proceeded to judgment in the same time. The causes of action were of a like nature. They arose out of the same transaction, and, if separate suits had been brought, the court could have consolidated the two actions. No exceptions were saved either to the introduction of testimony, or to the instructions of the court, nor is it claimed that the verdict is not sustained by the evidence. The verdict of the jury on the declaration for slander was only \$1. Hence it is manifest that the action of the court in permitting the two causes of action to be united in the same complaint and to be tried together did not result in prejudice to appellant. Section 6148, Kirby's Dig., provides that no judgment shall be reversed by reason of any error in defect which does not

affect the substantial rights of the adverse party. This rule was applied in the case of Mahoney v. Roberts (Ark.) 110 S. W. 225. The court said: "It was not a prejudicial error to join a cause of action for breach of contract with another for a tort where the same evidence was necessary to sustain both causes, as the two causes of action, if brought separately, might have been consolidated under the act of May 11, 1905."

Finding no error in the record, the judgment is affirmed.

SUMPTER, County Judge, v. BUCHANAN. (Supreme Court of Arkansas. Nov. 16, 1908.)

APPEAL AND ERROR (§ 151*)—RIGHT OF REVIEW—APPEAL BY COUNTY JUDGE.

Kirby's Dig. § 1493, providing that when appeals from the county court are prosecuted in the circuit or Supreme Court, the judge of the county court shall defend the same, does not authorize the county judge to appeal from a decision of the circuit court in favor of the county.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 949; Dec. Dig. § 151.*]

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

M. J. Murphy presented a claim against Garland county to the county court, and on appeal to the circuit court, by a taxpayer of such county, from an allowance of such claim, the circuit court rendered judgment in favor of the county, from which judgment O. H. Sumpter, county judge, appeals. Appeal dismissed.

The subject-matter of this action is an allowance made by the county court of Garland county to M. J. Murphy for work and materials alleged to have been done and furnished by him for the plumbing and heating of the county jail. Appellee, as a citizen and taxpayer of Garland county, duly prosecuted an appeal from the order of allowance to the circuit court. After hearing the evidence the circuit court rendered the following judgment: "Now on this day, this cause having heretofore been submitted to the court, the court, being well and sufficiently advised, finds as a matter of fact that the contract as alleged to have been made by the county court with M. J. Murphy in the sum of \$2,125 for plumbing and heating the county jail of Garland county was void, for the reason that the same was not made during term of the county court, and for the further reason that the contract was not advertised and publicly let, also that because no previous appropriation had been made for making such improvement. In view of the above findings the court does not feel called upon to pass on the reasonableness or unreasonableness of the amount of the allowance, and therefore finds that the judgment of the county court in allowing the claim of M. J. Murphy for \$2,125 was without authority of law, and there-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fore void." O. H. Sumpter, as judge of the county court, filed his motion for a new trial, and, upon the same being overruled, has duly prosecuted an appeal to this court. Appellee moves to dismiss his appeal.

C. Floyd Huff, Murphy, Coleman & Lewis, for appellant. Wood & Henderson, for appellee.

HART, J. (after stating the facts as above). Section 1493, Kirby's Dig., provides that when appeals are prosecuted in the circuit or Supreme Court, the judge of the county court shall defend the same. This court has held that this includes the right to take an appeal. *Ex parte Morton*, 69 Ark. 48, 60 S. W. 307; *Ouachita County v. Rolland*, 60 Ark. 516, 31 S. W. 144. These were cases where the county judge appealed from an adverse judgment. Here the judgment of the circuit court was in favor of the county, and the question is presented, Can the county judge in such case take an appeal? In discussing the statute above referred to, in the *Ouachita County Case*, the court said: "It is obvious that the authority conferred by them [referring to the words 'shall defend the same'] was given for the purpose of protecting the interest of the county which may be involved. It would be against the liberal policy of the law to so limit it as to deny him the right to take an appeal when the county may be aggrieved by the judgment of a circuit court. As a general rule, all parties aggrieved are allowed to take appeals from all judg-

ments of the circuit and inferior courts. There can be no good reason why counties should be denied the same right, except as to judgments of the county courts." Thus it will be seen that the statute primarily imposes upon the county judge the duty of defending its suits on appeal, and, as an aid to him in the discharge of that duty, he may take an appeal from a judgment of a circuit court when he deems it necessary for the purpose of protecting the interest of the county. But in defending suits in which the county is interested, he acts only as agent or representative of the county, and unless the decision is adverse to the county, there is no occasion for the county judge to prosecute an appeal. His only duty is to make a defense for the county, and if the judgment of the circuit court is in its favor, he has discharged the duty imposed upon him, and his authority to act ceases. The general rule is that a party who succeeds has no right to an appeal. *Elliott on Appellate Procedure*, § 147. This rule was applied by this court in the case of *Phillips v. Goe*, 85 Ark. 304, 108 S. W. 207, where the parties prosecuting the appeal had been granted the relief which they originally asked for. This opinion is not to be taken as in any manner determining whatever rights, if any, Murphy may have by appeal or otherwise, and merely goes to the right of the county judge to prosecute an appeal from a judgment in favor of the county.

Ordered that the appeal be dismissed.

BEVIS v. VANCEBURG TELEPHONE CO.
(Court of Appeals of Kentucky. Nov. 20, 1908.)

1. NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Contributory negligence is matter of defense, as to which defendant has the burden of proof, though plaintiff unnecessarily pleaded that she was injured while in the exercise of due care, and this is traversed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 229-231; Dec. Dig. § 122.*]

2. NEGLIGENCE (§ 141*)—INSTRUCTIONS.

An instruction which requires, for a recovery by plaintiff, that the jury find, not only actionable negligence by defendant, but also that plaintiff was in the exercise of ordinary care for her safety, is erroneous, as her failure to exercise ordinary care, unless the proximate cause of the injury, would not defeat recovery.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 382-390; Dec. Dig. § 141.*]

3. APPEAL AND ERROR (§ 1064*)—REVIEW—PREJUDICIAL ERROR—INSTRUCTIONS.

Where there was no evidence of contributory negligence, but there was some evidence that the person with whom plaintiff was riding was driving fast, and the jury may have inferred from this that plaintiff was not exercising ordinary care for her safety, by not controlling or attempting to control the actions of her companion, error in requiring the jury to find, as a condition to recovery, that plaintiff was in the exercise of ordinary care for safety, was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4221-4224; Dec. Dig. § 1064.*]

4. DAMAGES (§ 91*)—PUNITIVE DAMAGES.

There is no ground for punitive damages, where one is injured by driving into a telephone pole in the side of a road.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.*]

Appeal from Circuit Court, Lewis County.

"To be officially reported."

Action by Fanny L. Bevis against the Vanceburg Telephone Company. Judgment for defendant, and plaintiff appeals. Reversed, and remanded for new trial.

W. Elmo Darragh, Thos. R. Phister, R. D. Wilson, and A. D. Cole, for appellant. W. J. Halbert, for appellee.

O'REAR, C. J. On a former appeal of this case the opinion states the facts as then appearing and the law applicable to them. As the case then went off on a peremptory instruction, the plaintiff's case only appeared. *Bevis v. Vanceburg Telephone Company*, 121 Ky. 182, 89 S. W. 126. On a return of the case the issue was submitted to the jury, resulting in a verdict and judgment for appellee.

The case is, briefly summarized, that Miss Bevis, while driving in the nighttime along one of the public roads of Lewis county, was everely injured by the buggy's running against one of appellee's poles, which was situated in the road, and it is claimed so far out in or near to the traveled way as to imperil persons using the highway when driv-

ing vehicles by that point. It may be conceded that the presence of the telephone pole was a nuisance, in the nature of a purpres-ture. Appellant did not know of its existence. Her companion, who was driving the buggy, and who had entire control of it for the purposes of the trip, is not shown to have been aware of the situation of the pole. In attempting to drive around and pass a buggy ahead of them, the horse was pulled to one side of the road, whereby the buggy was brought into contact with the pole, throwing appellant out, and injuring her as stated. In the former opinion it was said that the driver's negligence, if there was any, was not to be imputed to appellant. There is no evidence of appellant's negligence in the matter, as the term "negligence" is used in law. There was some evidence that appellant's companion was driving rapidly, but not necessarily recklessly. Except for the presence of the telephone pole, there is no reason to believe any bad result would have ensued from it, and not then, except for the buggy in front, which it was attempting to pass. There is not negligence in the mere fact that the driver of one buggy may desire and attempt to drive faster than the one ahead going the same way. One may be in a hurry, properly so, and the other not.

There was a plea of contributory negligence; but, as there was not evidence to support it, the trial court did not instruct the jury on that score. The court did instruct the jury, however, that, before the plaintiff was entitled to recover a verdict, they should believe from the evidence that the plaintiff was herself in the exercise of ordinary care for her own safety, in addition to believing the establishment of the various ingredients of actionable negligence on the part of the defendant. The question is whether the interpolation of the condition as to plaintiff's exercising due care for her own safety was proper, and if not, whether it was prejudicial. In this jurisdiction contributory negligence is a defense, and to be available must be pleaded, and, if an issue is made, must be proved. It is defined as being the failure by the plaintiff to exercise ordinary care for his own safety, but for which the injury would not have occurred, notwithstanding the defendant's negligence. The law endeavors to fix the responsibility upon the agent of the proximate cause. There is no dividing it, resting it partly upon one concurrent cause, and partly upon another, where the plaintiff's own negligence is one of the concurrent causes. The rigidity of this rule is apparently justified by the practice, which shifts the burden of proof and raises the necessity for the plea and proof. When the plaintiff shows the injury was caused by an act or omission of the defendant which is contrary to its duty toward the plaintiff in the premises, a prima facie case

has been made out, and a verdict would be warranted, unless the act or omission can be excused, or the plaintiff can be shown by the defendant to have failed at the time to exercise ordinary care for his own safety, but for which, in spite of defendant's negligence, the injury would not have resulted. Thus the burden of showing the defendant's negligence is upon the plaintiff, while that of showing plaintiff's contributory negligence is upon the defendant. If, however, the plaintiff should be put to it to prove, not only that the defendant was negligent in the particular charged, but that he was at the time in the exercise of due care for his own safety, he would be compelled to carry the burden upon both propositions. It is true that, before one can recover for another's negligence, the former must have been without such negligence as to have caused his own injury. But the question we are considering is not one of right to recover, but of the correct practice in the enforcement of the right.

In pleading it is not unusual to charge that plaintiff, while in the exercise of due care for his own safety, was injured by the defendant's negligence in certain named particulars; but such an allegation is not necessary. *Louisville & Portland Canal Company v. Murphy*, 9 Bush, 522. While the plaintiff may needlessly plead that, whilst he was in the exercise of due care, by the defendant's negligence, in this, etc., he was injured and damaged, etc., he would have nothing added to his preliminary burden to show his right to recover, even though the defendant had traversed the allegation. If the plaintiff in this case was injured by the negligence of the defendant sued upon, she was entitled to recover a verdict, although she was not exercising ordinary care for her own safety, unless her failure to do so was the proximate cause of the injury. *Elliott, Roads & Streets*, 640. It was therefore error to have imposed upon her the condition and burden of showing that she was at the time using ordinary care for her own safety, before the jury were allowed to find for her. *Palmer Tr. Co. v. Paducah Ry. Co.*, 89 S. W. 515, 28 Ky. Law Rep. 473; 29 Cyc. 604; *Hoyt v. Hudson*, 41 Wis. 105, 22 Am. Rep. 714; *R. E. v. Fleming*, 30 Ohio St. 484; *City of Lincoln v. Walker*, 18 Neb. 244, 20 N. W. 113, and note of cases collected.

We must remain in doubt as to the effect of the error upon the jury. There were two trials—one resulting in a disagreement of the jury. The jury on this case were taken to the place of injury to inspect the location of the pole. There was some evidence, as stated, that plaintiff and her companion were traveling very fast. We cannot say that the jury may not, from these facts, have inferred that plaintiff was not exercising ordinary care for her own safety, by not controlling

the actions of her companion, or attempting to do so. But, if they regarded that as it they must have given that clause considerable weight in arriving at their verdict. We conclude that the error was prejudicial.

There is no ground for punitive damages in the case.

Judgment reversed, and remanded for a new trial under proceedings not inconsistent herewith.

TROENDLE et al. v. HIGHLEYMAN.

(Court of Appeals of Kentucky. Nov. 24, 1906.)

1. BILLS AND NOTES (§ 117*)—CONSTRUCTION—PLACE OF PAYMENT—RATE OF INTEREST—WHAT LAW GOVERNS.

Where notes, which fixed no place of payment, were drawn and sent to one in Tennessee, who signed them without change and forwarded them to the sender in another state, they were Tennessee contracts, and the laws of that state governed as to the rate of interest.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 248-254; Dec. Dig. § 117.*]

2. INSURANCE (§ 593*)—RIGHT TO PROCEEDS—ASSIGNMENT—POLICY PAYABLE TO WIFE.

Where a life insurance policy was payable to insured's wife, for her sole use and benefit, if she survived until time of payment, her interest in the policy was "settled" upon her as separate property, within a statute permitting married women to dispose of their separate estate, settled upon them for their separate use, and hence a pledge of her interest therein was enforceable.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1478; Dec. Dig. § 593.*]

Appeal from Circuit Court, Christian County.

"Not to be officially reported."

Action by S. L. Highleyman against T. R. Troendle and others. From a judgment for plaintiff, defendants T. R. and Lily A. Troendle appeal. Affirmed as to appellant T. R. Troendle, and reversed as to appellant Lily A. Troendle, with directions to enter judgment for a less amount.

Downer & Russell, for appellants. Humphrey & Humphrey and L. R. Yeaman, for Connecticut Mut. Life Ins. Co. T. H. Bush and Joe McCarroll, for appellee.

NUNN, J. On December 31, 1891, the Connecticut Mutual Life Insurance Company of Hartford, Conn., issued its policy of life insurance upon the life of Theodore R. Troendle, in the sum of \$5,000. Under the terms of the policy, which is known as a "20-payment life," the insurance will become fully paid up after the payment of 20 annual premiums, but will not be due and payable until the death of the insured. The policy in question is payable to the assured, Lily A. Troendle, wife of the insured, "for her sole use and benefit, or, in case of her decease before payment, to his children or their descendants, if any survive; if none, to his executors, administrators, or assigns." The policy provides that at the end of 10 years from the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

date of the issuance of the policy, or at the end of each period of 5 years thereafter, the policy having been in force such entire periods for the full sum first named, the company will pay to the person or persons therein designated the cash value therefor, to be ascertained by the table of "cash values" indorsed on the policy, the premiums having been continually paid upon the policy. On February 18, 1901, appellant Theodore R. Troendle, went from his home in Memphis, Tenn., to St. Louis, Mo., the place of appellee's residence, and made an agreement with appellee by which he obtained a loan in cash of \$850 and executed a note for the sum of \$1,100, and assigned the insurance policy referred to as collateral, with the consent of the insurance company, to secure the payment of the note. The note and policy were sent to Memphis, Tenn., the place of residence of Lily A. Troendle, one of the appellants, who signed the note and the indorsement on the policy, and placed them in an envelope directed to appellee; and when received by appellee, through the United States mail, he issued a check for \$850, payable to, or for the benefit of, appellant Theodore R. Troendle, and directed it to a bank in the city of Hopkinsville, Ky. On February 15, 1902, appellant T. R. Troendle executed another note payable to appellee for \$1,900. It seems that this last note settled the first, and also included several premiums, which appellee agreed to pay to the insurance company on this policy. This note and the insurance policy, with another indorsement thereon for the security of appellee, were sent to Memphis, to appellant Lily A. Troendle, for her signature, which she signed and returned to appellee in the same manner as she did the first. It appears that afterwards another note was executed by appellants to appellee for the sum of \$407. It is claimed by appellee that the note for \$1,900 did not cover the amount first loaned to appellants and the cash he paid to appellant T. R. Troendle at the time of the execution of the \$1,900 note, and the amount of the premiums on the policy which he had contracted to pay, and that the \$407 note was executed to cover the difference.

Appellee instituted an action on this last note in the Christian circuit court in December, 1905. Appellants answered, denying that they owed anything on it, and alleged that it was executed without any consideration, and by another paragraph set out every transaction had with appellee, stating the separate amounts received by T. R. Troendle from appellee and the premiums paid by appellee on the policy, and the assignment of the insurance policy as collateral. They also alleged that the obligations were Tennessee contracts, and that the laws of that state only allowed the collection of 6 per cent. interest, and that there was a large amount of usury contained in the notes. Appellant Lily A. Troen-

die presented a paragraph in her answer to the effect that the amount loaned by appellee was loaned to her husband and was used solely for his benefit; that she received no part of the consideration; that she only attempted to bind herself as the surety for her husband, and to place her interest in the policy as collateral security for the payment of the debts; that the law of the state of Tennessee prohibited this; and she pleaded the laws of that state as a bar to any recovery against her, or to the subjection of her interest in the insurance policy to the payment of her coappellant's debts. They both asked that appellee be required to file in the action all the notes held by him and the insurance policy, that the whole matter might be adjudicated in one action. Appellee complied with this request, and traversed the allegations of the pleadings of appellants.

The parties took their proof by deposition, the case was submitted for trial, and the court adjudged that appellee recover of appellant T. R. Troendle the sum of \$2,334.79, and interest thereon at the rate of 8 per cent. per annum from that date, until paid and his cost, and also adjudged that appellee had a lien upon the insurance policy for the payment of that sum, and directed the insurance company to pay appellee, upon demand, the cash surrender value due thereon, under the terms of the several assignments of same indorsed thereon, not exceeding the amount due on the judgment, and, when so paid, should be credited on the judgment, and that appellants should "be bound by and charged with said payment, when so made, and such payment, when so made, shall operate as a full release and discharge of the Mutual Benefit Life Insurance Company of Hartford, Conn., of further liability under said policy to the said T. R. Troendle and Lily A. Troendle." To so much of the judgment as decides that the notes are Missouri contracts, and allows appellee the right to 8 per cent. interest on his debts, and declares a lien upon the policy of insurance, and subjects the same to appellee's debts, the appellants appeal.

It is conceded that the laws of Missouri, at the time the notes were executed, allowed the collection of 8 per cent. interest when contracted for in writing, and that the payment of 8 per cent. interest was specified in each of the notes. It is also conceded that the laws of Tennessee, at the dates mentioned, did not allow the recovery of interest exceeding 6 per cent. The notes, by their terms, do not fix any place for their payment. They are silent upon this question. Appellee introduced evidence to the effect that the contracts were to be performed in the state of Missouri; that such was the intention of the parties at the time the notes were executed. Appellants introduced evidence to the contrary. We have examined the testimony with some care, and are unwilling to

disturb the finding of the lower court upon this question, in so far as appellant T. R. Troendle is concerned; but as to Lily A. Troendle it is different. The evidence shows that she had no personal transactions with appellee. He never saw her until after the suit was instituted. As stated, she resided in Memphis, Tenn., and the papers which she signed were prepared and sent to her there, and she signed them without any change. She accepted them as prepared by appellee, and, as there was no place fixed in the notes for their payment, the laws of Tennessee must govern and fix the liability of appellant Lily A. Troendle. There is no evidence that she understood and agreed that the laws of Missouri might fix her liability thereon. In the case of Northwestern Mutual Life Insurance Company v. Joseph, 103 S. W. 317, 31 Ky. Law Rep. 714, 12 L. R. A. (N. S.) 439, this court announced a principle which governs the question under consideration. In that case Joseph signed some papers as prepared by the insurance company, which he accepted without change, mailed them to the company, and while in the mail, but before they reached the company, Joseph died. The question under consideration was whether or not the contract was completed when Joseph mailed the papers. This court decided that the contract was completed when Joseph signed and mailed the papers; that when he accepted the contract as presented by the papers, and placed them in the United States mail, the contract was completed, and he had no further control over it. In the case of William Glenny Glass Co. v. Taylor, 99 Ky. 24, 34 S. W. 711, this court passed upon a question analogous to the one at bar. In that case Mary D. Bradford, who afterwards married Taylor, signed a note payable in New York, and, when sued, pleaded the New York statutes in regard to interest. The court in its opinion used the following language: "The note, when signed by Mary D. Bradford in Kentucky and inclosed to the payee, was an executed instrument, as much so as if the payee had been present and the note delivered to him in Kentucky." Under these authorities appellant Lily A. Troendle was not liable for 8 per cent. interest, but for only 6 per cent.

Appellant Lily A. Troendle further contends that the assignment of her interest in the insurance policy to appellee was not binding upon her, for the reason she was a married woman at the time she assigned her interest in the policy. Appellee introduced two lawyers of the state of Tennessee, who testified that under the laws of that state she was bound by the assignment, even though she was a married woman. The statute of Tennessee on the subject, as produced by the witnesses, is as follows: "All married women over twenty-one years of age, owning a separate estate, settled upon them and for

their separate use, shall have and possess the same power of disposition, by deed, will, or otherwise, as if unmarried." The interest of Lily A. Troendle in the policy had been settled upon her for her sole use and benefit. It was her separate property, and under the Tennessee laws she had the right to pledge it. We are therefore of the opinion that the lower court did not err in subjecting her interest in the policy to the payment of the judgment, except as to the usury contained therein.

We are further of the opinion that the court did not err in rendering a judgment against T. R. Troendle for 8 per cent. interest, as the preponderance of the evidence shows that the contract with him was made in Missouri, and was understood by him to be performed in Missouri.

The insurance company is not a party to this appeal, nor does appellee take a cross-appeal.

For these reasons the judgment of the lower court is affirmed as to appellant T. R. Troendle, and reversed on behalf of appellant Lily A. Troendle, with directions to subject her interest in the policy to the payment of the judgment, after eliminating all interest contained therein, except 6 per cent.

LUGART v. LEXINGTON TURF CLUB et al.

(Court of Appeals of Kentucky. Nov. 18, 1908.)

1. MECHANICS' LIENS (§ 63*)—RIGHT TO LIEN —WRITTEN CONSENT OF OWNER.

A materialman was not entitled to a lien under Gen. St. 1888, c. 70, art. 1, § 1, giving a lien to materialmen upon real property improved if the material was furnished under contract with, or by the "written" consent of, the owner, where the work was done under a contract with a lessee with the owner's knowledge and verbal consent.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 80; Dec. Dig. § 63.*]

2. MECHANICS' LIENS (§ 58*)—RIGHT TO LIEN —AGREEMENT OF OWNER — OWNERSHIP OF LAND — VENDEE UNDER EXECUTORY CONTRACT.

Gen. St. 1888, c. 70, art. 1, § 1, provides that, where the owner of real estate claims by executory contract which for any cause shall be rescinded, a mechanic's lien which in the meantime has attached shall follow the property in the hands of the person to whom it goes by reason of the rescission. The petition alleged that a lessee of a lot owned and held it under a contract to purchase from the owners, but elsewhere averred that it was owned by the lessor "and her children living at her death," and it did not appear that her children were parties to the contract of sale. *Held*, that it did not appear that the lessee was the owner of the lot under an executory contract, and hence a lien for materials furnished during the term of the lease would not follow the lot on the expiration of the lease.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 72; Dec. Dig. § 58.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. LIFE ESTATES (§ 23*)—CONVEYANCES BY LIFE TENANTS—INTEREST CONVEYED.

One owning only a life interest in land with remainder to her children could not convey a valid title to the fee without the children uniting with her in the conveyances, or conveying their interest by separate instruments.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 43; Dec. Dig. § 23.*]

4. VENDOR AND PURCHASER (§ 3*)—SALE DISTINGUISHED FROM LEASE—OPTION TO PURCHASE.

Where an agreement leasing land provided that, if the lessee at any time during the continuance of the lease should desire to purchase the leased premises, it could do so for a certain sum, the contract was a lease, and would vest no title in the lessee, in the absence of the exercise of the option by the lessee.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3.*]

5. HUSBAND AND WIFE (§ 150*)—DISABILITIES OF WIFE—WIFE'S SEPARATE PROPERTY—CONVEYANCES—REQUISITES OF CONVEYANCES.

Gen. St. 1888, c. 52, art. 11, § 2, provides that real estate of a married woman shall be liable for such of her debts contracted after marriage for necessities as shall be evidenced by writing signed by her. The lease of a lot by a married woman who owned a life estate therein provided that any alterations or improvements thereon shall be performed by the lessee, and a petition seeking to establish a lien against the lot for improvements placed thereon alleged that plaintiff performed the work upon the leased premises under a contract with the lessee. *Held*, that the improvements were made on the lot at the instance of the lessee, and the lessor's interest in the lot was not liable therefor under the statute; the debt as evidenced by the lease not being created for her account.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 575; Dec. Dig. § 150.*]

6. HUSBAND AND WIFE (§ 150*)—DISABILITIES OF WIFE—SEPARATE PROPERTY—LIABILITIES—LIENS.

No equitable liens exist against a married woman's property, and a lien can only be created in the manner provided by statute.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 575; Dec. Dig. § 150.*]

7. APPEAL AND ERROR (§ 171*)—REVIEW—THEORY OF CASE BELOW—QUESTIONS NOT RAISED.

Whether a materialman had a remedy for materials furnished under Gen. St. 1888, c. 70, art. 1, § 4, permitting him to remove materials furnished a lessee from the premises, if the lease thereafter fail, and the lessor refuses to pay for them, will not be decided on appeal where he based his claim on other grounds below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1053; Dec. Dig. § 171.*]

8. MECHANICS' LIENS (§ 63*)—RIGHT TO LIEN—AGREEMENT—CAPACITY TO CONTRACT—MARRIED WOMAN.

Under Local & Private Laws 1871, p. 4, c. 1073, applicable to Fayette county alone, providing that, if a married woman owning land in the county thereafter contracts for materials for the improvement of a building thereon, the person furnishing the materials, etc., shall have a joint lien upon the land and the buildings thereon, one furnishing materials for the erection of a building on a lot owned by a married woman under a contract with her lessee, and not with her, was not entitled to a lien on the lot.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 80; Dec. Dig. § 63.*]

Appeal from Circuit Court, Fayette County. "To be officially reported."

Mechanic's lien proceedings by John Luigart against the Lexington Turf Club and another. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

Falconer & Falconer and C. J. Bronston, for appellant. Morton, Webb & Wilson, for appellees.

SETTLE, J. On November 29, 1882, the master commissioner of the Fayette circuit court, acting under and pursuant to an order of that court, conveyed by deed to Mrs. Joanna E. Montague for life, with remainder to such of her children as might be living at her death, a lot of ground in the city of Lexington fronting on Main street 60 feet and extending back the same width to Short street. By a writing of date January 28, 1891, signed by Joanna E. Montague and Thomas J. Montague, her husband, this real estate was leased to the Lexington Turf Club, a corporation, for the term of five years from that date. The Lexington Turf Club at once took possession of the property, and in the year 1892 entered into a contract with John Luigart, a contractor and builder of the city of Lexington, whereby the latter undertook to furnish the necessary materials and erect for it upon the lot a building and other improvements, and this work Luigart did during the year 1892 at a total cost to his employer of \$4,200. Of this amount, \$2,548 was paid by the latter, leaving a balance due Luigart of \$1,652, for which he filed in the office of the clerk of the Fayette county court, within 120 days of the furnishing of the last material and completion of the work, a mechanic's and materialman's lien against the property in question, and on March 31, 1893, brought suit in the Fayette circuit court against the Lexington Turf Club, Joanna E. Montague, her husband and children, seeking a personal judgment against the Lexington Turf Club and the enforcement of his alleged mechanic's lien against the lot in question. Later two amendments were filed to the petition, and to the petition as thus amended a general demurrer was filed by the Montagues, which the lower court on March 16, 1908, sustained, and, no effort being made to further amend the petition, the action was dismissed. From the judgment sustaining the demurrer and dismissing the action, this appeal was taken. Thomas J. Montague, husband of Joanna E. Montague, died after the institution of the action, and, one of the daughters having married, that fact was brought to the attention of the court by the last amended petition, and her husband made a party to the action. No explanation of the delay in disposing of the case appears in the record.

The question presented by the appeal for

our consideration is: Did the petition, as amended, state a cause of action? It alleged substantially the following facts: (1) That the materials and work for which appellant sought to enforce the mechanic's lien were furnished and done in erecting a building and otherwise improving the Montague lot under a contract made by him with the Lexington Turf Club. (2) That the lot was the property of Joanna E. Montague and her children living at her death, and had been conveyed them by "deed of November 29, 1882, recorded in Book 67, page 59, Fayette county court clerk's office." (3) That the Lexington Turf Club was in possession of the property under contract to purchase it from Joanna E. Montague, Thomas J. Montague, and their children, and that, "with the knowledge and consent of said owners, the said Lexington Turf Club was permitted to erect said buildings upon said lot, which said lot was delivered to said turf club for the purpose of erecting said buildings upon same." (4) That the Lexington Turf Club took possession of, owned, and held the lot under a written contract made by it with Joanna E. Montague and Thomas J. Montague, which gave the turf club the right to make, at its own cost and expense, such alterations and improvements upon the premises leased as it might desire to make during the continuance of the lease. (5) That the alterations and improvements made upon the lot were at the expiration of the lease to be and remain the property of Joanna E. Montague. (6) That the turf club under its contract with the Montagues had the option to purchase the leased premises at any time during the continuance of the lease upon paying therefor \$30,000, and that it did not exercise this option, but, on the contrary, rescinded the lease contract and restored to the owners the possession of the property.

At the time the material was furnished and work done by appellant in improving the lot in question the laws contained in what was known as the "General Statutes" of Kentucky were in force, and, if he has or can enforce a lien upon appellees' lot, it is under article 1, c. 70, Gen. St. 1888, section 1 of which gave a lien to the mechanic or materialman upon the real estate improved where the material was furnished or work was done "by contract with or by the written consent of the owner," but the lien could only be secured "on any interest such owner has in the same." Section 2 of the article and chapter mentioned provides: "If the owner claims by executory contract, and if, for any cause, such contract shall be rescinded or set aside, the lien aforesaid shall follow the property into the hands of the person to whom the same may come, or with whom it may remain by reason of such rescission. * * * Manifestly appellant did not secure a lien by virtue of these sections or either of them. It is not claimed in the petition that he fur-

nished the materials, or did the work by contract with the appellees or by their written consent. On the contrary, the averment is that it was by contract with the Lexington Turf Club, and with the knowledge and consent of appellees. Verbal consent on their part, if given, was not sufficient. Written consent from them was necessary, and, as this was not charged, the language of the petition falls to show that appellant's alleged lien was acquired under section 1 of the statute, supra. It is also wide of the mark to say it was acquired under section 2, for it does not appear from the petition that the Lexington Turf Club claimed to be, or was in fact, the owner of the real estate by "executory contract." It is true the petition alleges that the Turf Club acquired, owned, and held the property "under a contract to purchase same from the owners," but elsewhere in the petition it is averred that it was the property of "Joanna Montague and her children living at her death," and in still another part of the petition it is explained that the Lexington Turf Club "took possession of, owned, and held" the property "under and by virtue of a certain written contract made and entered into by and between the defendants Joanna Montague and Thomas Montague." If this contract could have made the Lexington Turf Club owner of the property by executory contract, it was only to the extent of the life estate of Mrs. Montague, as it is not averred that her children, the remaindermen, were parties to the contract made by her with the Lexington Turf Club, nor do their names appear in or to that contract. The mother and father could not pass a valid title to the property to a purchaser without the children's uniting with them in a writing for that purpose, or conveying by separate instruments. When we look to the contract between the appellee Joanna Montague, her husband, and the Lexington Turf Club, we find it to be a mere lease of the lot therein described for a term of five years. It is true it provides that the Lexington Turf Club might at any time during the existence of the lease purchase the property at the price of \$30,000, but this privilege conferred by the contract upon the club was nothing more than an option of which it might or might not avail itself. The option was never exercised, and until exercised no title, not even an equitable one, to the lot, passed to or vested in the company. The language of the contract with respect to this option is: "If the party of the second part, at any time during the continuance of this lease, shall desire to purchase the leased premises, it shall have the right to purchase same upon the payment of the sum of \$30,000.00, cash in hand." Obviously the contract was, what its own language declares it to be, only a lease, and so remained as long as the Lexington Turf Club retained possession of the property, and the relation of landlord and tenant

It created was never changed to that of vendor and purchaser, for the lessee never availed itself of the option to purchase. We are aware that this court in the case of *Bacon v. Kentucky Central Company*, 95 Ky. 373, 25 S. W. 747, held that, where a substantial consideration for a contract conferring an option exists, it will be upheld, but this view of the question in no way changes the legal character of an "option." Until accepted and thereby made a part of the contract, it confers no interest, and creates no liability.

We are constrained to hold that on yet another ground the petition is clearly insufficient to charge appellees' real estate with the cost of the improvements erected thereon by appellant. It is apparent from the petition that the lien claimed by appellant, if any was created at all, would have to be confined to the interest of the appellee Joanna Montague in the property, yet the petition fails to allege either of the two things essential to fasten responsibility upon her or her property, viz., that the alleged debt for which the lien is sought to be enforced was contracted "on account of necessities," that the debt was "evidenced by writing signed by her." The property rights of married women in this state at the time the lease to the Lexington Turf Club was made by appellee Joanna Montague and her husband, and when appellant's claim was created was governed by chapter 52, art. 11, § 2, Gen. St. 1888, which provides: "Such real estate or rent (belonging to a feme covert) * * * shall be liable for her debts and responsibilities * * * contracted after marriage (1) on account of necessities, for herself or any member of her family, her husband included, as (2) shall be evidenced by writing signed by her." It cannot fairly be contended that the provision of the lease contract giving the Lexington Turf Club the privilege of making alterations and improvements upon the leased premises was such a writing as would, under the statute supra, bind Mrs. Montague or her estate; for the provision of the lease contract referred to contains the restriction that "the entire costs and expenses of such alterations and improvements to be borne and paid by the party of the second part." Here we have a writing which, instead of evidencing an intention on the part of the owner of the real estate to burden it or herself with the cost of such improvements as the lessee might make upon the property, expressly declared her intention not to do so. This provision, together with the averment of the petition that appellant undertook the erection of the improvements upon the leased premises under a contract with the Lexington Turf Club, conclusively shows that he gave credit to and expected to be paid by the turf club alone. Construing the statute, supra, in *McMahon v. Lewis*, 4 Bush, 138, the court said: "Whilst, under our statute a married woman having an estate may bind herself for necessities, it is essential that the credit should

originally be given to her, and not alone to the husband; for, if to him alone, she will not then be an original debtor, but a mere security." *Gatewood v. Bryan*, 7 Bush, 509; *Roberts v. Riggs*, 84 Ky. 251, 1 S. W. 431. The statutory method of acquiring such a lien as appellant seeks to enforce was not pursued by him, and, this being true, the court below was powerless to afford the relief prayed for, as said by this court in *Webster v. Tattershall*, 86 S. W. 1126, 18 Ky. Law Rep. 439: "No equitable lien exists against the property of the married woman, and it can only be created in the manner pointed out by statute. The mechanic undertaking the risk must examine the title, and particularly in a case where it is a matter of record in the county where the property improved is situated." *Kentucky Building & Loan Company v. Kister*, 101 Ky. 321, 41 S. W. 293. The petition, as amended, discloses appellant's knowledge of appellee's title at the time of his undertaking with the Lexington Turf Club to improve the leased premises, for it avers that the deed conveying them the real estate was recorded as far back as the year 1882. According to the petition, appellant then also knew the nature of the lease contract under which the Lexington Turf Club held the property. In view of these facts, it would seem that he has little ground to claim that advantage was taken of him, at any rate we cannot under the circumstances assume that he was ignorant of the situation; but, if he was, it was his own fault, as the means of information were at hand.

If appellant had a remedy against the real estate improved by him, it was that given by section 4, art. 1, c. 70, Gen. St. 1888, which provides: "If the labor be performed or the material furnished by contract with a lessee of real estate for a term of years, and if before the expiration of the term by lapse of time, the lessee's interest therein shall, from any cause, become forfeited to the lessor, or shall be surrendered to him; and if the lessor shall refuse to pay for the same, the person performing the work or furnishing the materials shall have the right to remove the same from the leased premises: Provided, it can be done without material injury to any previous improvement on said leased premises." It is not necessary, however, for us to decide whether appellant could have availed himself of the remedy conferred by the above statute, as he has not invoked it that question is not before us.

It is insisted for appellant that consent in writing from appellee Joanna Montague and her husband to the improving of the real estate by appellant was not essential to his acquiring a mechanic's lien. This contention is rested upon the following statute or special law passed in 1871 (Local & Private Acts 1871, p. 4, c. 1073), and made applicable to Fayette county alone, viz.: "That if a married woman owning land or lots in the

county of Fayette, shall hereafter contract alone, or in conjunction with her husband, with any mechanic or other person or persons, to erect any building situated on any such land or lots of such married woman, or to do any repairs upon such land or lots, * * * or if such married woman shall hereafter contract alone, or in conjunction with her husband, or with any person or persons, for lumber or other materials or articles for the building, improvement, or for the purpose of repairing any building or making any improvement upon such lots of land, such person or persons performing labor or furnishing lumber or materials, under the contract as aforesaid, shall have a joint lien upon the land or lots, and the buildings and erections situated thereon to the extent of the value of labor performed and materials and other things furnished by the claimants respectively." It is doubtless true, as claimed by appellant, that this act was in force when he contracted with the Lexington Turf Club to improve appellee's lot and when he completed the work, but we fail to see that it entitled him to the lien attempted to be asserted, for it does not appear from the averments of the petition that the material and work furnished and performed in improving appellee's property were contracted for by the appellee Joanna Montague either alone, or in conjunction with her husband or other person, and this we understand from the language of the act must have been done, even to create a lien upon her interest in the property, which was merely a life estate. In other words, to acquire a materialman's or mechanic's lien under the special act upon the real estate of a feme covert, the materials furnished or work done to improve such real estate must have been furnished or performed pursuant to a contract with her. Moreover, the act did not provide that such contract with the feme covert could be made in any other manner than as prescribed by section 2, art. 11, c. 52, Gen. St. 1888, that is "evidenced by writing signed by her."

Being of opinion that the petition as amended fails to state a cause of action against the appellee Joanna Montague, and that the facts therein averred do not show appellant entitled to a lien upon the real estate sought to be subjected to the payment of his debt, it follows that the circuit court did not err in sustaining the demurrer.

Wherefore the judgment is affirmed.

CHRISTIAN WIDOWS' & ORPHANS' HOME v. HARBER.

(Court of Appeals of Kentucky. Nov. 27, 1908.)

EXECUTORS AND ADMINISTRATORS (§ 138*)—
MANAGEMENT OF ESTATE—SALE OF REALTY
—POWER UNDER WILL.

A will devised land to testatrix's two children, with remainder to their respective issue, or in default of issue from either then to the

other, and in default of issue altogether then to another. The will also gave testatrix's daughter the use of the land until she became 21 years old, or married in the meantime, in which event the land, if it could not be advantageously divided equally, might be sold and the proceeds reinvested in land for the use of the children. Both children survived testator, married, and had living issue. Held that, it appearing that the land could not be advantageously divided, the executor named in the will could sell it as an entirety at private sale, reinvesting the proceeds in other land, one-half in a tract for each of testatrix's children subject to the same limitations as were contained in the will.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 560, 561; Dec. Dig. § 138.*]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action between the Christian Widows' & Orphans' Home and William H. Harber, executor of Nancy Anne Harber. From the judgment, the Christian Widows' & Orphans' Home appeals. Affirmed.

Smith & Smith, for appellant. J. Tevis Cobb, for appellees. J. T. Greenleaf, for purchaser.

O'REAR, C. J. Mrs. Nancy Anne Harber's will devises a tract of land of about 212 acres in Madison county to her two children, with remainder to their respective issue, or in default of issue from either then to the other, and in default of issue altogether then to the Christian Widows' & Orphans' Home of Louisville. She named her son as executor. There is this clause in the will: "It is my will that should I die before my daughter, Willie, becomes twenty-one years of age, she shall have the use and benefit of this entire two hundred acres of land until she does become twenty-one years of age, unless, in the meantime, she marries, in which event this land is to be divided equally, or, if it cannot be advantageously divided, it may be sold and the proceeds reinvested in some land for the use and benefit of each of my children during their natural lives."

Willie, the daughter named, survived her mother, is married, and has issue living. The son also has issue living. The circuit court has found that the land cannot be advantageously divided. The executor has contracted to sell the land as an entirety. The purchaser doubted the executor's authority to sell and convey. The circuit court decided that he had the authority under the will, and that he might sell at private sale, reinvesting the proceeds in other land, one-half in a tract for Willie Harber Igo (the daughter of testatrix), and the other half in a tract for Daniel S. Harber (the son of the testatrix), with the same limitations as are contained in Mrs. Harber's will. This we think is correct. The testatrix named her executor for the purpose of having him

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

do what the will provided should be done in reference to changing the estate.

Judgment affirmed.

COLEMAN et al. v. SIMMS et al.

(Court of Appeals of Kentucky. Nov. 24, 1908.)

DEEDS (§ 211*)—VALIDITY—FRAUD—EVIDENCE.

Evidence held not to show that a deed was obtained through fraud of the grantee and her husband.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 645; Dec. Dig. § 211.*]

Appeal from Circuit Court, Mercer County.
"Not to be officially reported."

Action by Mary Coleman and another against Mary Parker Simms and husband to set aside a deed. Judgment for defendants, and plaintiffs appeal. Affirmed.

Emmet Puryear, E. M. Hardin, and Greene & Van Winkle, for appellants. E. H. Gaither and J. F. Vanarsdall, for appellees.

CLAY, C. Appellants, Mary Coleman and Add Coleman, are the daughter and divorced husband of Annie J. Coleman, who died in 1899. When appellant Mary Coleman was a child about eight years of age, Add Coleman and his wife, Annie J. Coleman, separated. Thereafter the wife obtained a divorce and went from his house to that of her father, where her sister lived. The remainder of her life was spent with her sister. Five days before her death, Annie J. Coleman conveyed to her sister, Mary Parker, who afterwards married appellee Joshua Simms, all the estate which she then possessed. The consideration set forth in the deed was \$1 and love and affection and an agreement on the part of Mary Parker to care for her grantor and furnish her with food, clothing, etc. In case the grantor outlived the grantee, the land was to revert to the former. Appellant Ida May Coleman instituted this action to have the deed set aside and adjudged to be null and void. The petition charges fraud on the part of Mary Parker Simms and her husband, and also alleges that Annie J. Coleman, the mother of appellant, was feeble-minded, was addicted to the use of morphine, had led a dissolute life, was easily influenced, and was wholly incompetent to make the deed. Judgment was rendered in favor of Mary Parker Simms and her husband, and Mary Coleman and her father appeal.

The testimony for appellants is to the effect that the relations between Mary Coleman and her mother, Annie J. Coleman, were always friendly, and that Mary Coleman frequently visited her mother before her death. About a half dozen witnesses testified that Annie J. Coleman, the mother, had never possessed a bright mind and was not considered intelligent; at times she

was flighty; and that she did not have the capacity to make a deed. There was also evidence to the effect that the mother was given whisky occasionally; but it is not shown that she was ever intoxicated. Two or three witnesses testified that she looked like a morphine eater. On cross-examination it was developed that the facts upon which the witnesses' conclusions as to the mental infirmity of the mother were based were rather vague and nebulous; and judging these witnesses from the standpoint of their own statements, and the reasons which they gave for their opinions as to Annie J. Coleman's lack of mental capacity, it may be seriously doubted if the witnesses themselves were competent to judge of the matters concerning which they gave their testimony.

The testimony for appellees conduces to show that Annie J. Coleman was a bright, intelligent woman, and had sufficient mind to attend to and conduct her own business. As a matter of fact, she had a better mind than many of the witnesses who testified to her mental infirmity. The strongest testimony for appellees was given by W. J. Poteet, who was then county clerk of Mercer county. After detailing the circumstances of his employment to write the deed, he testified that he explained to Annie J. Coleman fully the effect of the deed which she had written; that he was very particular in his explanation; that Annie J. Coleman sat up in bed and made her mark or signed her name to the paper, he was not positive which; that she talked very freely about the deed; that she said that Mary Parker (Simms) was her sister, and had been very kind to her and attended her in her illness; that she did not know how long she would be sick and in that condition; that she wanted her sister to be rewarded at her death—wanted her to have her property; that he did not observe anything wrong with her mind; that she talked as if she understood fully what she was doing.

It further appears from the evidence that the two sisters, Annie J. Coleman and Mary Parker, had lived together for several years and were devoted to each other; that Mary Parker had been very attentive to her sister during her illness. The property, a half interest in which was conveyed by the deed which was sought to be set aside, was owned by the sisters jointly, and had been inherited by them from their father. The mother only saw her daughter at rare intervals. During the last few months of her life Add Coleman, the father, who, after his divorce from his wife, married again, would bring the daughter occasionally to her mother's house. It is not surprising, therefore, that Annie J. Coleman should have preferred to reward her sister for the care and attention which she had received, rather than the daughter, who visited her only at

rare intervals, and who had spent almost her entire life with the father, from whom she (Annie J. Coleman) had been divorced.

We do not think that the deed itself evidences any fraud on the part of appellees. In addition to the consideration of love and affection, it was provided that the grantee should take care of Annie J. Coleman as long as she lived. In case the grantee died before the grantor, the property was to revert to the grantor. The land itself was of small value, and the contract on the part of the grantee to support the grantor as long as the latter lived, although she may have died shortly thereafter, amply protected the rights of the grantor.

While the evidence is conflicting, and appellants have furnished a larger array of witnesses than have the appellees, yet when their testimony is considered in the light of the reasons for their opinions, as given upon cross-examination, we are unable to say that the chancellor erred in his conclusions.

Judgment affirmed.

BATES et al. v. BURT & BRABB LUMBER CO.

(Court of Appeals of Kentucky. Dec. 1, 1908.)

LOGS AND LOGGING (§ 3*)—SALE OF STANDING TIMBER—DUTY OF PURCHASER.

A purchaser of standing timber, who has left the tops and debris of timber felled so as to damage the land, is liable to the owner.

[Ed. Note.—For other cases, see Logs and Logging, Dec. Dig. § 3.*]

Appeal from Circuit Court, Letcher County.
"To be officially reported."

Action by the Burt & Brabb Lumber Company against Mary J. Bates and others. From the judgment, both parties appeal. Affirmed on cross-appeal, and reversed on original appeal, with directions.

See, also, 86 S. W. 550.

R. O. Brashears, for appellants. James H. Jeffries and D. D. Fields, for appellee.

O'REAR, C. J. This is the second appeal of this case. The merits of the case, as presented by the somewhat imperfect record before us, impress us that appellee, who sues upon a breach of warranty, did not show itself entitled to recover for a greater number of trees than were admitted in appellants' answer. On the other hand, the damage done to appellants' lands unnecessarily by appellee's agents in removing the timber, and the value of the trees taken by them that were not branded, as found by the circuit court, practically offset the value of the trees lost to appellee by the failure of the title to part of the branded timber. In addition, we think appellants should be allowed for the damage done by appellee's leaving the tops and debris of the timber felled by them. The sale of standing timber

includes the right to remove it in a judicious manner, but does not include the right to cut it down and leave it, or any part of it, so that it will do damage to the lands of the grantor or owner of the principal estate. On the whole, we think the accounts of the parties are about equal. Limitation on appellants' account is saved by the disability of the female appellant.

Judgment affirmed on the cross-appeal, and reversed on the original appeal, with directions to the lower court to dismiss the petition. Each party will pay their own costs in this court.

BAKER v. KASH.

(Court of Appeals of Kentucky. Nov. 25, 1908.)

1. HOMESTEAD (§ 80*)—EXEMPTION—PROCEEDS OF SALE—REINVESTMENT.

A person who owns a homestead may sell the same and reinvest the proceeds in another homestead, which will be exempt to the same extent from forced sale for debts as would the homestead that was sold.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 112; Dec. Dig. § 80.*]

2. HOMESTEAD (§ 80*)—EXEMPTION—SALE AND REINVESTMENT—TIME.

A debtor cannot sell his homestead, retain or reinvest the money, and after the expiration of several years buy other land and assert a homestead in it as against debts created before the later purchase.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 80.*]

Appeal from Circuit Court, Clay County.

"Not to be officially reported."

Action by S. H. Kash against Anderson C. Baker. From a judgment for plaintiff, defendant appeals. Affirmed.

A. B. Hampton and A. W. Baker, for appellant. W. W. Rawlings, for appellee.

CARROLL, J. The appellee, S. H. Kash, having recovered a judgment in the Clay circuit court against the appellant, Anderson C. Baker, brought this action upon a return of "No property found" and sought to subject to the satisfaction of the judgment a tract of land owned by appellant, who resisted a sale of the land upon the ground that he was entitled to it as a homestead.

In 1897 the appellant sold his old homestead in Perry county, Ky., for \$1,000 in cash. The debt of Kash upon which the judgment was obtained was created in 1888. The land sought to be subjected in this action was purchased by appellant in 1904 for \$385. It will be observed that the land was purchased subsequent to the creation of the debt, but appellant's contention is that he purchased and paid for the land now claimed as a homestead with a portion of the proceeds received from the sale of his homestead in 1897. We gather from the record and chiefly from the testimony of appellant that in March, 1897, he sold the homestead

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he then owned and a few articles of personal property to A. L. Howard for \$1,000 in cash. Five hundred dollars of this money he handed to his brother, Gardner Baker, to keep for him. With the other \$500, or a large part of it, he established himself in the saloon business in Manchester, Clay county, remaining there in that business for several months. During the time that he lived in Manchester, he and his wife were divorced, and their children were placed by him in the custody of his wife's mother, who lived at Barbourville, Ky. After leaving Manchester in the winter of 1897-98, he enlisted in the army and remained in the service about 10 months. When he was discharged, he went to Indiana, and soon afterwards married in that state. After his marriage, he and his wife traveled extensively, living in probably a dozen different states. His wife died about 1901, and after her death he continued his travels, going to various places in different states. During his travels, he sometimes boarded, and at other times kept house, and occasionally worked. Finally he returned to Kentucky in 1904, after being absent from the state some 7 years, and says that upon his return he went to see his brother, Gardner Baker, who gave him the identical money that he had left in his possession in 1897, and with a part of this money he purchased the homestead sought to be subjected, and was living on it with his third wife when this action was instituted.

The law is very well settled that a person who owns a homestead may sell the same and reinvest the proceeds in another homestead, and the homestead thus purchased will be exempt to the same extent from coercive sale for the payment of debts as would the homestead that was sold; the purchase of the new homestead being regarded as merely the continuance of the original homestead right, and not the acquiring of a new homestead. *Lee & Hester v. Hughes*, 77 S. W. 386, 25 Ky. Law Rep. 1201; *Green & Son v. Pennington*, 123 Ky. 837, 97 S. W. 766; *Collins v. Collins*, 99 S. W. 653, 30 Ky. Law Rep. 816. But, under the application of this rule, it is necessary that the debtor, to preserve his right to a homestead in the new tract of land, should purchase and occupy it as a homestead within a reasonable time after selling his first homestead. A debtor cannot sell his homestead, put the money in his pocket, or otherwise invest it, and after the expiration of several years, or an unreasonable length of time, buy other land and assert a homestead in it as against debts created before its purchase. The establishment of a rule like this would be a perversion of the beneficial purposes of the homestead statute and enable persons not entitled to its protection to avail themselves of its provisions. *Fitch v. Duckwall*, 78 S.

W. 185, 25 Ky. Law Rep. 1535; *Caldwell v. Selvers*, 85 Ky. 38, 2 S. W. 651.

We are of opinion that appellant is not entitled to a homestead in the land sought to be subjected, and the judgment of the lower court is affirmed.

McALLISTER'S ADM'R v. BRONAUGH.

(Court of Appeals of Kentucky. Nov. 27, 1908.)

1. WILLS (§ 68*)—CONTRACTS TO MAKE—ACTIONS FOR BREACH—EVIDENCE—SUFFICIENCY.

Evidence in an action for breach of contract to make a will, devising to plaintiff's wife one-half of decedent's estate in consideration of furnishing decedent board, lodging, and fuel and giving her the attention required, examined, and held to establish the contract sued upon.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 63.*]

2. WILLS (§ 58*)—CONTRACTS TO MAKE—VALIDITY.

A contract to make a will, devising to the other party's wife one-half of decedent's estate in consideration of his furnishing her board, lodging, and fuel, and giving her the attention required, was valid, and a recovery may be had for a breach as in other cases of a violation of a contract.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 164; Dec. Dig. § 58.*]

3. WILLS (§ 68*)—CONTRACTS TO MAKE—ACTIONS FOR BREACH—INSTRUCTIONS.

An instruction, in an action for breach of a contract to devise to plaintiff's wife one-half of decedent's estate in consideration of his furnishing her support and the attention required, that if decedent agreed with plaintiff that, if he would furnish her support and such attention as she required, she would pay him \$10 a month, and at her death would devise to plaintiff's wife one-half of her estate, and, if plaintiff rendered such service and it was reasonably worth more than \$10 a month, then to find for plaintiff such sum as the services were worth over \$10 a month, and unless the jury so believed to find for defendant, fairly presented the only issue in the action.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 63.*]

Appeal from Circuit Court, Lincoln County.
"Not to be officially reported."

Action by R. H. Bronaugh against the administrator of the estate of Catherine McAllister, deceased, for breach of a contract to make a will devising to plaintiff's wife one-half of decedent's estate. Judgment for plaintiff, and defendant appeals. Affirmed.

F. F. Bobbitt and G. D. Florence, for appellant. M. C. Saufley, for appellee.

CARROLL, J. Catherine McAllister, a very old lady, who had an estate valued at about \$2,000 and no children, entered into a contract with appellee R. H. Bronaugh in September, 1901, by which it was agreed that Bronaugh should furnish her board, lodging, fuel, and the attention a person of her age required, and in consideration thereof she was to pay him \$10 per month, and make her will devising to his wife, who was her niece, all of her estate. Some time after—

wards this contract was modified to the extent that Mrs. McAllister was only to devise to Bronaugh's wife one-half of her estate. There was no relationship except by marriage between Mrs. McAllister and Bronaugh. She continued to live with him from the time this contract was made until her death in 1904, and during this period paid him \$10 a month, but died without leaving a will. This action was brought by Bronaugh against her administrator to recover damages for the breach of decedent's contract in failing to make a will devising to his wife one-half of her estate. He alleged that the damages he sustained were equal to the value of the services rendered her from September 4, 1901, to August 21, 1904, independent of the sum of \$10 a month for board and lodging, and that the value of such service was reasonably worth the sum of \$15 a month, amounting in the aggregate to \$501.50. Other appropriate pleadings completed the issues; and upon a trial before a jury appellee recovered the full amount sued for, less two admitted credits.

No complaint is made about the contract for \$10 per month, but it is insisted for appellant that there was not sufficient evidence of the contract to devise to authorize a submission of the case to the jury or to warrant a recovery. Upon this point, Mrs. Mary E. Bronaugh testified, in substance, that she was well acquainted with Mrs. McAllister, who told her some time after she commenced to live with Bronaugh that she had agreed to pay \$10 per month board, and that she intended to make her will and devise to Vina Bronaugh, the wife of R. H. Bronaugh, one-half of her estate; that Mrs. McAllister at another time said to her that she had told R. H. Bronaugh that she would make this devise, that she knew the \$10 per month was not enough, but that it was enough to buy coal and furnish her incidental attention. On another occasion she said that R. H. Bronaugh had agreed to board, lodge, furnish fuel, and give her incidental attention for the low sum of \$10 per month on her promise to him that she would will all of her estate to his wife. And at still another time she said that it was agreed between herself and Bronaugh that she might give half of her estate to her niece Katie Scott. The testimony of this witness is not contradicted, and we think it clearly establishes the contract sued upon. A contract of this character is valid and enforceable, and, if it is broken, a recovery may be had for the breach as in other cases for violations of contracts. *Myles v. Myles*, 6 Bush, 237; *McGuire v. McGuire*, 11 Bush, 142; *Thomas v. Feese*, 51 S. W. 150, 21 Ky. Law Rep. 207. There is also evidence that Mrs. McAllister was in delicate health, and suffered from an ailment that required unusual attention, and that Bronaugh and his family faithfully performed their part of the contract. Upon the

question of the physical condition of Mrs. McAllister, and the amount of care and attention she required, there is sharp conflict; but this issue is really not material, as the case turns upon the question whether or not the contract sued upon was made.

The court instructed the jury as follows: "If you believe from the evidence in this case that Catherine McAllister made an agreement with plaintiff, R. H. Bronaugh, that, if plaintiff would furnish her with board, lodging, fuel, and such incidental attention as was necessary for the comfort of a person of her age and condition, she would pay him \$10 per month, and at her death she would devise to plaintiff's wife one-half of her estate, and that plaintiff rendered or caused to be rendered through his family such service, and that it was reasonably worth more than \$10 per month, then you will find for the plaintiff such sum as you may believe from the evidence the service was worth over and above \$10 per month, not exceeding \$501.50, the amount claimed. Unless you so believe, you will find for the defendant." This instruction fairly presented to the jury the only issue in the case.

The petition stated a cause of action, the evidence supported it, and, the jury under appropriate instructions having returned a verdict in favor of plaintiff, the judgment of the lower court awarding to him the amount claimed is affirmed.

COLE'S ADM'R v. CHESAPEAKE & O. RY. CO. et al.

(Court of Appeals of Kentucky. Nov. 25, 1908.)

1. CARRIERS (§ 282*)—INJURIES—PERSON ACCOMPANYING PASSENGERS.

A carrier is not liable for the death of one who falls from a moving train after accompanying a passenger into the car, in the absence of evidence that its servants had either actual or constructive notice that deceased intended to leave the train and did not intend to take passage thereon.

[Ed. Note.—For other cases, see Carriers. Cent. Dig. §§ 1111, 1112; Dec. Dig. § 282.*]

2. CARRIERS (§ 318*)—PERSONS ACCOMPANYING PASSENGERS—INJURIES.

In an action for the death of plaintiff's intestate, who was killed while alighting from a moving train after entering a car with a passenger, evidence held insufficient to show that defendant's servants had actual or constructive notice that the deceased intended to get off the train before it started.

[Ed. Note.—For other cases, see Carriers. Cent. Dig. § 1307; Dec. Dig. § 318.*]

Appeal from Circuit Court, Greenup County.
"Not to be officially reported."

Action by A. B. Cole's administrator against the Chesapeake & Ohio Railway Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

W. T. Cole and Allan D. Cole, for appellant. W. D. Cochran and Le Wright Brown, for appellees.

CARROLL, J. In this case, upon the conclusion of the evidence for the appellant, who was plaintiff below, the court instructed the jury to return a verdict for appellee, so that the only question we are called upon to consider is the correctness of this ruling. The facts, about which there is no substantial dispute, are as follows: On the evening of January 10, 1907, the deceased, A. B. Cole, his daughter, Mrs. Chestnut, and his nephew, A. D. Cole, went to the Market Street Station of the appellee company in Maysville, Ky., at which place Mrs. Chestnut intended to take an east-bound accommodation train on her way home. When the train arrived, it was sometime after dark; and the brakeman, with a lantern in his hand, got off of the train and stood near the steps of the car into which Mrs. Chestnut desired to go. Her baggage consisted of a heavy suit case, and a large basket containing flowers and other articles. The brakeman did not offer to assist in putting her baggage on the train, nor does it appear that he was requested so to do. In fact, no conversation took place between the brakeman and the parties named. The decedent, who did not intend to take passage on the train, took his daughter's basket in the car. Mrs. Chestnut immediately followed, and when she reached the platform of the car A. D. Cole lifted her suit case and placed it beside her on the platform. The deceased entered the open car door, and walked about two-thirds of the length of the car, placing the basket in or beside a vacant seat, and then turned around and walked towards the door for the purpose of getting off of the train. On his way to the door he passed his daughter, who at that time had gone inside of the car, but did not stop as he passed her. When he reached the door, it was closed. The brakeman who followed Mrs. Chestnut up the steps of the car closed it after she walked in, and then went into the front car. About the time Mrs. Chestnut got inside the car, the train started; and when the decedent opened the door and walked out on the platform and down the steps, for the purpose of getting off, the train had increased somewhat in its speed, and when he stepped or fell off it had run 226 feet from the point at which it started. He fell or was violently thrown to the ground, and, from the injuries and shock received, died within a few days thereafter.

There was no evidence that any of the trainmen had actual notice that the deceased went into the car only for the purpose of assisting his daughter with her baggage, or that he did not intend to take passage on the train; nor was there any evidence that any of them had actual notice that he intended to get off of the moving train. It is contended, however, that the facts heretofore related, together with some circumstances that will be noticed, were sufficient to put the persons in charge of the train upon notice that the deceased did not intend to take passage, but

only went into the train for the purpose of assisting his daughter, and that he intended to get off as soon as he could get out of the car. From this it is argued that the persons in charge of the train had constructive notice of his purpose, and were guilty of negligence in not affording him a reasonable time to leave the train before starting it, and that this character of notice was sufficient to authorize a submission of the case to the jury. It is argued by counsel for appellant that constructive notice may be inferred from the following circumstances that we give in the language of counsel: 'First. There is the fact and circumstance that, after the passengers in the rear coach had alighted, the brakeman who was standing by the coach steps was confronted by a party of three—a woman and two men; that he must have known, and certainly ought to have known, that she could not, unassisted, have ascended the steps and platform and at the same time have carried the baggage. When the brakeman thus forced her father to assist her, and when he indicated that he would do so, and ascended the steps ahead of her, the brakeman must have known that a man who was getting on the cars as a passenger would not likely be carrying a basket of plants and flowers, especially at that season of the year, but that they belonged to a woman, and that he would return again as soon as he took them to a seat. Second. The brakeman must have known from the fact that with A. D. Cole using both hands lifting Mrs. Chestnut's heavy suit case from the ground to the car platform where she was standing, that she needed assistance, and from her remarks in the brakeman's presence about her visit that she was also being assisted by the other member of the party who preceded her. Third. As the brakeman ascended the steps, he could see through the car window the deceased coming towards the door, and when he reached the door and closed it he must have known, when the deceased hastily passed her and thus approached the door, that he was endeavoring to get off the train, and he should then either not have closed the door or have pulled the bell rope and stopped the train. Fourth. But for the closed door, deceased could easily have reached the bottom step and alighted before the engine gave a sudden jerk upon the viaduct.'

The difficulty with these circumstances is that there is no evidence upon which to base them. There is no evidence that the brakeman had any notice whatever of the relationship between the parties, or that he had any acquaintance with any of them, or that he saw the deceased through the car window coming towards the door, or that he had any cause to suspect that deceased intended to get off, or that he had any notice from any source or in any manner that deceased was not a passenger, or that he went into the car merely for the purpose of assisting his daughter. In truth, the circumstances re-

lied upon by counsel to bring home to the brakeman constructive notice are mere surmises, that may or may not be so. We think that in cases like these the trainmen must have actual, or at least sufficient constructive, notice to put a person of ordinary understanding upon notice that a person who enters the car to assist a passenger intends to get off before the train starts. The character of constructive notice that would bind the company we do not deem it necessary to discuss in this case, because there are no facts or circumstances disclosed by this record upon which we could base an argument along this line.

Wherefore the judgment is affirmed.

**NEW ENGLAND MUT. LIFE INS. CO.
v. SPRINGGATE.**

(Court of Appeals of Kentucky, Dec. 2, 1908.)

INSURANCE (§ 392*)—LIFE INSURANCE—FORFEITURE—RECOVERY OF PREMIUM.

Where a life policy provides that it shall be void if any premium note is not paid when due, insured, after the maturity of a premium, demanding payment thereof, is estopped to insist on a forfeiture of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1058-1070; Dec. Dig. § 392.*]

"To be officially reported."

On petition for rehearing. Overruled.

For former opinion, see 112 S. W. 681.

HOBSON, J. The general agent for the state represented the insurance company. His act in demanding the premium was the act of the company. It could not on one hand demand the premium and on the other insist on the forfeiture. Estoppels arise by operation of law. The acts of the insurance company here estop it from insisting on the forfeiture.

Petition overruled.

LAWRENCE COUNTY v. LAWRENCE FISCAL COURT.

(Court of Appeals of Kentucky, Nov. 24, 1908.)

1. COUNTIES (§ 150*)—PUBLIC DEBT—LIMITATION ON AMOUNT OF INDEBTEDNESS.

Under Const. § 157, prohibiting a county from becoming indebted in any year in an amount exceeding its income provided for that year, it is not necessary that the county has made provision for the payment of an indebtedness, but only that it shall be able to pay its indebtedness out of its ordinary resources for that year which are reasonably solvent and may be fairly relied on as equivalent to cash.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 215-217; Dec. Dig. § 150.*]

2. COUNTIES (§ 207*)—PUBLIC DEBT—LIABILITY.

The fact that a county lost the money collected for paying its indebtedness for a certain year before paying the debts would not affect

its liability for such debts, but it would remain bound until they were discharged.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 335; Dec. Dig. § 207.*]

3. COUNTIES (§ 150*)—PUBLIC DEBT—LIMITATION ON AMOUNT OF INDEBTEDNESS.

A tax for county purposes of 50 cents on the \$100 was levied for each of the years 1903 and 1904, but the sheriff defaulted as to a part of the taxes collected, so that some claims against the county for those years were not paid out of the current income. In 1906, just after recovery from the sureties of the defaulting sheriff, the fiscal court levied a tax of 50 cents on the \$100 for 1907, and also ordered certain claims allowed in 1903 and 1904, to be paid out of the sum received from the surety until exhausted and the balance thereof out of the 1907 levy. To this order the county attorney objected on the ground that such balance exceeded the income for that year, in violation of Const. § 157, limiting the taxes levied in any year to 50 cents on the \$100, and prohibiting any county from becoming indebted in any year in an amount exceeding the income provided for that year. *Held*, that the amount collected on the sheriff's bond was the legal equivalent of the defaulted taxes for the years 1903 and 1904, and could be applied to the unpaid claims for those years, and that the payment of the balance of such claims out of the 1907 levy, rendering the county unable to pay all of the claims allowed for that year out of the current levy, did not affect the constitutionality of the claims payable out of that levy; the liabilities incurred in any of the years not exceeding the constitutional inhibition.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 215-217; Dec. Dig. § 150.*]

4. COUNTIES (§ 160*)—PUBLIC DEBT—LIMITATION ON USE OF FUNDS.

Const. § 180, requiring every resolution levying a county tax to specify the purpose for which it is levied and prohibiting its appropriation to any other purpose, does not limit the revenues of a year to the payment of liabilities incurred during that year, but only requires that revenues levied for a particular purpose, as for road purposes, be used for that purpose, either in the year levied or some other year.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 219; Dec. Dig. § 160.*]

Appeal from Circuit Court, Lawrence County.

"To be officially reported."

Suit by Lawrence County against the Lawrence Fiscal Court to have an order of the court directing the payment of claims out of certain funds set aside. From a judgment for defendant on demurrer to the petition, plaintiff appealed. Affirmed.

G. W. Skaggs and W. M. Savage, for appellant.

O'REAR, C. J. The fiscal court of Lawrence county levied taxes for county purposes for the year of 1903 as follows: 20 cents on each \$100, as a common fund, which we understand to be the ordinary expenses of the county, such as salaries to officers, and other items of fixed liability, which may include care of the poor; 20 cents on the \$100 as a road and bridge fund; 10 cents on the \$100 as a sinking fund; also a poll tax of \$1.50, to be used as a part of the common

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fund. For the year of 1904 there was levied 50 cents on the \$100 apportioned as follows: 25 cents as the "common fund," and 25 cents as a road and bridge fund, \$1.50 poll tax was also levied, to form part of the common fund. Claims against the county payable out of these respective funds for each of the years were allowed. The sheriff of the county, who was also the collector of the county taxes, defaulted. As a result of the litigation with his surety, the county realized in 1906 the sum of about \$9,000. It is alleged that the claims allowed against the levies of 1903 and 1904 exceeded \$10,000, much of which had been sued on and reduced to judgments against the county. The fiscal court met in 1906 to lay the levy for the year of 1907. The money had just been collected from the surety of the sheriff for the years of 1903 and 1904. The court entered the following order: "The fiscal court met pursuant to adjournment and proceeded to allow the following claims which are payable out of the \$9,058.80 paid by the Aetna Indemnity Company until said sum is exhausted, then balance is to be paid out levy of 1907. The county attorney objected to the above order." The list of claims is not copied into the record. At the October term, 1906, of the fiscal court, an order was made laying the county levy for 1907 as follows: 50 cents on the \$100, divided, namely, 25 cents for road and bridge purposes, 15 cents for the common fund, 10 cents for courthouse fund, also \$1.50 poll tax, to constitute part of the common fund. This suit was brought in the name of Lawrence county by the county attorney against the fiscal court and its members, seeking to have the order made to pay the old debts out of the \$9,058 so far as it would go, and then the balance out of the 1907 levy set aside and adjudged void, on the ground that it exceeded the income of the county for that year, and was therefore in violation of section 157 of the Constitution. Section 157 of the Constitution limits the tax which may be levied in any one year at 50 cents on the \$100, unless it should be necessary to enable the county to pay an indebtedness contracted prior to the present Constitution. It also provides that no county shall become indebted in any manner, in any year, to an amount exceeding in any year the income and revenue provided for such year without the consent of two-thirds of the voters.

Even if it should be conceded that the claims alluded to in the order of the October term of 1906 of the fiscal court which is the subject of this suit were those allowed in 1903 or 1904, it would not follow that the order is void. It is not charged, nor is it pretended, that the claims allowed in 1903 or 1904 were in excess of the income or revenues provided for either of those years. It is not necessary to the validity of a municipal indebtedness that the municipality shall have made provision for its payment. The inhibition is against creating an indebt-

edness in any year that the municipality is unable to pay out of its resources for that year. If the liabilities incurred, say in 1903, did not exceed the income and revenues provided by law—that is, the maximum which under the law the county was authorized to levy in taxes—plus any available funds it had on hands, then nothing subsequently occurring could render the liability void as being in contravention of section 157, supra. If the county had collected the taxes levied for the purpose of paying its liabilities incurred in 1903, but had in some way lost the money before it paid its debts, that fact could not affect its liabilities. It would remain bound until payment, or otherwise legally discharged. So, when the county lost the taxes levied for 1903, as it evidently did, but subsequently recovered some \$9,000 of them, it was proper to say the least of it that the \$9,000 should be applied to the payment of such part of the indebtedness for 1903 as remained unpaid and most pressing, and, as the remainder of the indebtedness was as truly a county liability as that contracted in 1906 payable out of 1907 levy, to order their payment out of that levy. Nor were the current claims allowed in 1906, payable out of 1907 levy, affected as to their constitutional validity by the fact that, owing to an unexpected happening subsequent to their creation, the county would not be able to pay in full as they fell due; that is, out of the current levy. The income and revenues of a year include resources of the municipality which are reasonably solvent, and which in ordinary events may be fairly relied on as equivalent to cash. So, as against the outstanding indebtedness of 1903 and 1904, the county and its creditors had the right to assume that the sheriff's bond, so far as that officer had collected or was liable for the taxes for those years, was a legal equivalent on the county ledger. In that view nothing appears here to indicate that Lawrence county had for any of the years named exceeded the income and revenues of such years.

Appellant also contends that section 180 of the Constitution is violated by the order of the fiscal court which is under investigation, in this: that the provision of section 180 requiring every resolution levying a tax to specify the purpose for which it is levied, and prohibiting its appropriation to any other purpose, means that the levy of 1907 is to pay eo nomine the debts contracted in 1903 payable out of the levy of 1907, and that those revenues cannot be appropriated for any other year. But the Constitution does not confine the revenues of a year to the payment of the liabilities incurred during that year. What section 180 means is revenue raised for road purposes, for example, cannot be applied to educational purposes; and that a tax levied to build a courthouse cannot be used to repair a bridge, unless as in the case of *Fleld v. Stroube*, 103 Ky. 114, 44 S. W. 363. But a fund legally raised in

1906 for bridge purposes may be appropriated by the fiscal court for bridge purposes whenever contracted. The discretion of the fiscal court over such details is left to the good business sense and right judgment of that body. We are of the opinion that the Circuit court properly sustained the demurrer to the petition.

Judgment affirmed.

DAVIS v. GOTT et al.

CRUMP v. DAVIS et al.

(Court of Appeals of Kentucky. Nov. 18, 1908.)

1. SHERIFFS AND CONSTABLES (§ 97*)—DUTIES—DUTY AS TO LEVY OF EXECUTION.

Under Ky. St. 1903, § 1713, providing that it shall be no defense in an action against a collecting officer that plaintiff directed him to stay proceedings unless plaintiff consented to, or required, the stay in writing, only a written consent will excuse the officer's failure to execute a writ, and he must proceed unless directed in writing to stay the execution.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 140; Dec. Dig. § 97.*]

2. EXECUTION (§ 461*)—WRONGFUL EXECUTION—PERSONS ENTITLED TO DAMAGES—EXECUTION DEFENDANT AND MORTGAGEE.

Under Ky. St. 1903, § 1709, providing that, when mortgaged property is sold under execution, defendant's interest must be levied on subject to the incumbrance, and by subsection 4, the purchaser must give a bond payable to the incumbrancer and the owner to preserve the property to answer the incumbrance, and deliver the bond to the officer before possession is delivered to him, where a sheriff did not make his levy on corn subject to a mortgage thereon, nor take a bond from the purchaser as required, he is liable to the execution defendant, and to the mortgagee for any damage sustained by his failure to comply with the statute.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 461.*]

3. EXECUTION (§ 469*)—WRONGFUL EXECUTION—ACTIONS—PARTIES DEFENDANT—PURCHASER.

In actions by the execution defendant and the mortgagee of the property for wrongful execution by levying on mortgaged property after satisfaction of the judgment and without taking a bond to protect the incumbrancer, the purchaser at execution sale should be made a party defendant so as to settle the entire controversy in one suit.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 469.*]

4. EXECUTION (§ 472*)—WRONGFUL EXECUTION—DAMAGES.

Where a purchaser on execution sale of mortgaged property took possession of the entire property without giving bond to protect the mortgagee's interest, he would be liable for its fair value at the time of the conversion, less the amount of his bid.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1403, 1404; Dec. Dig. § 472.*]

5. JUDGMENT (§ 874*)—SATISFACTION—PERSONS TO WHOM PAYMENT MAY BE MADE—PLAINTIFF'S ATTORNEY.

Where the judgment creditor referred the debtor to her attorney to settle with him, and the attorney agreed to stop execution and the debtor deposited the amount of the judgment in his name, the deposit in bank of the amount of

the judgment and the acceptance thereof by the attorney was a satisfaction thereof.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1643; Dec. Dig. § 874.*]

6. EXECUTION (§ 120*)—SATISFACTION—SATISFACTION OF JUDGMENT.

Since writs of execution exist only to enforce judgments, where a judgment is satisfied, the execution issued thereon will also be treated as satisfied.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 120.*]

7. JUDGMENT (§ 874*)—SATISFACTION—PERSONS TO WHOM PAYMENTS MAY BE MADE.

Payment to satisfy a judgment may be made to plaintiff, or one of several plaintiffs, or to the levying officer, or to plaintiff's attorney, except where defendant knows the attorney has no authority to receive it or to a next friend or to his attorney.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1643; Dec. Dig. § 874.*]

8. SHERIFFS AND CONSTABLES (§ 98*)—LIABILITY—EXECUTION AS PROTECTION FROM LIABILITY.

Where a judgment is not satisfied when execution issues, the writ, being fair on its face, protects the officer in case the judgment is afterwards satisfied.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 146; Dec. Dig. § 98.*]

9. EXECUTION (§ 455*)—WRONGFUL EXECUTION—PERSON LIABLE—JUDGMENT CREDITOR.

When a judgment is satisfied, plaintiff must stay execution as required by law, and will be liable to the execution defendant if he allows the sheriff to proceed, so that, where plaintiff permitted the sheriff to levy execution after the amount of the judgment had been paid to her attorneys, she was liable to the execution defendant for the proceeds of the execution sale which were paid to her attorneys, with interest thereon from the time it was paid.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 1382; Dec. Dig. § 455.*]

10. PAYMENT (§ 82*)—SATISFACTION—PAYMENT—OVERPAYMENT.

Where the amount paid in satisfaction of a judgment was in excess of the amount of the judgment, the excess should be returned to the judgment debtor, with interest.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 82.*]

11. SHERIFFS AND CONSTABLES (§ 52*)—COMPENSATION—LEVY OF EXECUTION.

Where a judgment was satisfied by payment of the money to plaintiff's attorney after execution had issued and had been levied by the sheriff, he was entitled to the same commissions as he would be if the money had been paid to him.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 48; Dec. Dig. § 52.*]

12. EXECUTION (§ 120*)—SALE—VALIDITY.

Where a judgment had not been satisfied when execution issued and the execution was not stayed when the judgment was satisfied as required by statute, and the officer did not take a bond from the purchaser to protect the mortgagee of the property sold, the sale was voidable and not void.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 275; Dec. Dig. § 120.*]

13. EXECUTION (§ 286*)—SALE—RIGHTS OF PURCHASER ON AVOIDANCE.

Where a judgment was not satisfied when execution issued and was not stayed upon being satisfied, and the sheriff did not take a bond from the purchaser to protect a mortgagee so that the sale was merely voidable, the purchaser

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er should be allowed the money paid by him in discharge of the sale bond.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 820, 821; Dec. Dig. § 286.*]

14. EXECUTION (§ 462*)—WRONGFUL EXECUTION—PERSONS LIABLE.

Where corn was sold under execution after plaintiff's judgment was satisfied, and the sheriff did not take a bond from the purchaser to protect a mortgagee thereof as between the execution defendant or his mortgagee on one side and the purchaser, the sheriff, and the execution plaintiff on the other, the latter are all liable to the former for the value of the corn, but, as between themselves, the execution plaintiff is primarily liable for the money paid by the purchaser to the sheriff, and by him to her attorney, with interest thereon, and for the balance of the value of the corn the purchaser is primarily liable, then the sheriff, and, lastly, the execution plaintiff.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 462.*]

15. EXECUTION (§ 472*)—WRONGFUL EXECUTION—ACTIONS—DAMAGES.

The measure of damages would be the value of the corn at the time it was taken, less what it brought at the sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1403, 1404; Dec. Dig. § 472.*]

16. EXECUTION (§ 462*)—WRONGFUL EXECUTION—PERSONS LIABLE.

If the purchaser of property which was wrongfully sold under execution caused any damages to the execution defendant in removing the property, he alone would be liable therefor, and not the sheriff or execution plaintiff.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 462.*]

Appeal from Circuit Court, Butler County.
"To be officially reported."

Actions by S. A. Davis against M. A. Gott and others and by Robert Crump against S. A. Davis and others for wrongful levy of execution. From judgments dismissing the petitions, plaintiffs appealed. Judgments reversed and remanded for further proceedings.

D. W. Wright and W. A. Helm, for appellants. Gore & Bunch, for appellee M. A. Gott. N. S. Howard, for appellee Holman.

HOBSON, J. S. A. Davis rented of Mrs. M. A. Gott her farm in Butler county for the year 1906, agreeing to pay her therefor as rent \$600, for which he executed to her a note due December 15, 1906. He raised on the farm a large crop of corn, which he sold before it was gathered to Robert Crump, who advanced him on the purchase \$654.30. After this had been done, a large part of the corn was washed away or injured by a flood, and the trade with Crump was rescinded by mutual consent, Davis executing to Crump his note for \$654.30 on December 13, 1906, and a mortgage on 500 barrels of corn, which was then in the crib; it being agreed between Davis and Crump that he would sell Crump enough of the corn which he had at 40 cents a bushel to pay the debt. Mrs. Gott's rent note not having been paid, she on January 8, 1907, brought suit against him on the note in the Butler circuit court, and

took out an attachment which was levied on the corn. On January 15th Davis paid her \$400 on the note, and on February 7th judgment was entered by default in her favor against Davis for the balance of the debt and cost. The attachment was sustained, and the sheriff of Butler county was ordered to sell the property attached, or enough of it to pay the debt and the cost, and he was allowed in the judgment \$7.50 for his services in making the sale. No sale was made of the attached property under the judgment, but on March 4th an execution was issued on the judgment which was placed in the hands of the sheriff and levied by him on the corn, which was advertised for sale under the execution on March 16th. On March 15th Davis deposited to the credit of Mrs. Gott's attorneys in the Citizens' National Bank at Bowling Green \$242.20, which was the amount due upon the execution as figured by the sheriff. The plaintiff's attorneys were Gore and Bunch. He thereupon called them up over the telephone. Mr. Gore was out, and Mr. Bunch answered the phone. Davis told him that he had deposited the money in the bank to the credit of Mr. Gore, and asked him to stop the sale of the corn. He said: "All right, Mr. Davis, I will do it. I will stop the sale." He immediately went over to the sheriff's office and told him what had occurred, and that he had better stop the sale. The sheriff's statement as to what occurred is as follows: "Mr. Bunch came up to the courthouse, and told me that Mr. Davis said he had deposited the money in some bank in Bowling Green and to stop the sale. That was about 4 o'clock in the afternoon, and the water was up so I could not get over there." The execution was in the hands of a deputy, who was not informed by the sheriff of what had occurred. He went on the next day and made a sale of enough of the corn to pay the debt; R. S. Dunn being the purchaser of 900 bushels of corn at 26 cents a bushel. This was the same corn that Davis had agreed to sell to Crump in December at 40 cents a bushel, and it was then worth in the market 50 cents a bushel. Davis was not present, and did not know of the sale. The Bowling Green bank sent the money which had been deposited there to the bank in Morgantown with which Mr. Gore did business, and it was deposited there to his credit. When Mr. Gore learned what had occurred, he wrote R. S. Dunn the following letter: "Dear Sir: Mr. Davis put the money in the bank for me at Bowling Green Mch. 15, and called me over the phone. I was away and received the notice this morning. Also learned from Cardwell that he had sold the corn to you. This places everything in a bad shape, and, if you will release your sale, everything will be all right. I hope you will do this. Yours, N. W. Gore. 3/10, '07." Dunn declined to give up his bargain. The sheriff

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

collected the sale bonds, and paid the money over to the plaintiff's attorneys. It is said in the briefs that Mr. Gore tendered back to Davis the money which he had deposited in the bank, but this fact is not shown by the record. It appears from the record of the telephone company that the message sent over the telephone was sent at 1:50 p. m. on the 15th, and that there was a telephone connection from Morgantown; where the sheriff was, to the neighborhood where the corn was to be sold. Davis brought suit against Mrs. Gott and the sheriff, charging that, after the execution had been satisfied, the sheriff wrongfully went on and made the sale, to his damage in the sum of \$572. Robert Crump also brought a suit in equity against Davis and Mrs. Gott to enforce his mortgage, and to recover for the corn which had been sold and taken away after the execution had been satisfied; his mortgage being of record at the time. The issues were made up upon the pleadings, and, the facts as we have stated them being shown, the circuit court dismissed both petitions, and the plaintiffs appeal.

It is insisted for the sheriff that he is not liable because no written order was given him to stay proceedings on the execution as provided in section 1713, Ky. St. 1903. "It shall be no defense to an action or motion against a collecting officer for failure of duty of himself or deputy that the plaintiff directed said officer to delay or in anywise stay proceedings thereon, unless said defense is supported by the written consent or request of said plaintiff, his agent or attorney, so to do." In *Ridgway v. Moody*, 91 Ky. 587, 16 S. W. 526, the court said that the statute was enacted for the purpose of shutting out contradictory evidence as to whether a verbal consent had been given. In other words, the purpose of the statute is to provide that only written consent may be shown as a reason for the failure of the officer to proceed with the execution of his writ. No written consent or written direction of the plaintiff's attorney was shown here, and therefore the sheriff would not be liable if nothing more appeared. There is much force in the position that the sheriff might waive the written request; and, where he does this, he should be held liable to the execution defendant. But it cannot be the contemplation of the statute that the sheriff shall be liable to the execution defendant if he proceeds with the writ and also liable to the plaintiff in the writ if he does not proceed with it; and we conclude that the just effect of the statute is that the sheriff must proceed with his writ, unless he is directed in writing to stay the proceedings; the purpose of the statute plainly being that the officer must obey his writ unless he has written authority otherwise. But the corn was mortgaged to Crump. By section 1709, Ky. St. 1903, when mortgaged property is sold under execution, the interest of the defendant in

such property may be levied on and sold subject to the incumbrance. The purchaser at the sale acquires a lien on the property for the purchase money with interest at 10 per cent. from date of sale until paid, subject to the prior incumbrances; and, if the defendant does not redeem the property, the lien may be enforced in a court of equity. Subsection 4 of that section is as follows: "The purchaser of incumbered moveable property must, before possession thereof is delivered to him, give an obligation, with good surety, payable to the incumbrancer and the owner, stipulating that the property shall not be removed out of the county, and shall be preserved and forthcoming, unavoidable accidents excepted, to answer the incumbrance, and for redemption, and deliver the obligation to the officer, to be returned with the execution." The sheriff did not levy on the corn subject to the mortgage, he did not so sell it, and he did not take bond from the purchaser as required by the statute. He is therefore liable to the defendant Davis, the defendant in the execution, for the damages which Davis may have sustained by reason of his failure to comply with the statute, and he is also liable to Crump for any damages he may have sustained thereby. On the return of the case to the circuit court, the plaintiffs will make Dunn, the purchaser, a party to these actions, that the entire matter may be settled here. As Dunn took and converted the corn when he had no right to it, except a lien on it, he is answerable for its fair value at the time of the conversion less the amount of his bid; and, if he does not pay, the sheriff will be answerable for the reason that he failed to take the bond required by law.

It is insisted for Mrs. Gott that she is not liable, as she had nothing to do with the transaction. It appears from the uncontradicted proof that Davis went to see Mrs. Gott, and that she told him to pay her lawyer and settle with him. He then telephoned to the lawyer as above stated. The lawyer represented his client. What he did was the act of his client. When he accepted the deposit in the bank, and agreed to stop the sale, the judgment was satisfied. In *Freeman on Execution*, § 442, the rule is thus stated: "As writs of execution exist only for the purpose of enforcing judgments, it is evident that, whenever a judgment is by any means satisfied, the writ which is issued for its enforcement must also be treated as satisfied. * * * The first question in regard to payment made by or for the defendant is this: To whom may the payment be made? The answer is that it may be to the plaintiff, or to one of several plaintiffs, or to the officer holding the writ, or to the plaintiff's attorney, except where the defendant knows that the attorney has no authority to receive it, or to a *prochein ami*, or the attorney of such *prochein ami*." To same effect, see 17 Cyc. 934, 1387. In *Freeman on*

Judgments, § 466, it is said: "The fees of the sheriff on execution are no part of the judgment. They constitute a demand against the party for whom the services are performed. If the judgment be paid, the sheriff's authority is extinguished; and he cannot lawfully proceed to levy upon property to enforce the collection of his costs." The rule announced in these authorities was followed by this court in *Chiles v. Bernard*, 3 Dana, 35, where an execution issued on a judgment after it had been satisfied. The court held the sale void, and that the purchaser, though innocent, took no title. Where the judgment is not satisfied when the execution issues, the writ, being fair on its face, protects the officer, in case the money due on the judgment is afterwards paid to the plaintiff or his attorneys. It then becomes the duty of the plaintiff to stay the execution in the manner provided by law, and, if he allows the sheriff to proceed by failure to do this, he will be liable to the defendant in the execution for such damages as he thereby sustains. The money made on the execution sale having been paid over to Mrs. Gott's attorney, she is liable to Davis for this money with interest from the time it was paid, for the reason that the judgment had been satisfied before the sale, and it was incumbent upon her to stay the sale before it was made. As matters now stand, she has received satisfaction twice of her judgment. As between her and the sheriff, the latter is primarily responsible for all damages which Davis sustained by reason of Dunn's taking and hauling away the corn, for it was incumbent upon the sheriff to follow the law in executing his writ. On the return of the case either party will be allowed to take further proof. As we figure it, the judgment of Mrs. Gott against Davis with interest and all costs did not amount to as much as \$242.80; and, if it shall turn out that more was collected than was due, the excess also with interest should be returned to Davis, and he may amend his petition if he desires to do so, so as to set up this matter. When, after the execution had been placed in the hands of the officer and levied by him, the judgment was satisfied by payment of the money to the plaintiff's attorney, the officer is entitled to the same commissions as he would be if the money had been paid to him; for he cannot be deprived of his commissions by the fact that the money is paid to the plaintiff's attorney rather than to him. As the judgment had not been satisfied when the execution issued, and it was not stayed as provided by the statute, the proceeding, which the officer was required to take for the protection of his sureties, should be regarded as voidable rather than void, and the purchaser should be protected in the money paid by him in discharge of his bond. As between Davis or his mortgagee, Crump, on the one hand, and the pur-

chaser, Dunn, the sheriff, Holman, and Mrs. Gott on the other, the latter are all liable to the former for the value of the corn converted; but, as between themselves, Mrs. Gott is primarily liable for the money paid by the purchaser to the sheriff, and by him to her attorneys for her with interest, and for the balance of the value of the corn the purchaser is primarily liable, then the sheriff, and lastly Mrs. Gott, the measure of recovery being the value of the corn at the time less what it brought at the sale. If the purchaser by his negligence in removing the corn did Davis any damage, he alone is responsible for this.

Judgment in each case reversed, and cases remanded for further proceedings consistent herewith.

PENNEBAKER BROS. et al. v. BELL CITY MFG. CO.

(Court of Appeals of Kentucky. Nov. 24, 1908.)

1. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—PROCESS—SERVICE.

Civ. Code Prac. § 51, subsec. 3, provides that in an action against a private corporation a summons may be served in any county on defendant's chief officer or agent who may be found in the state, and section 72 declares that, if an action against a corporation is on a contract, it may be brought in the county in which the contract was made or to be performed. *Held* that, where a foreign corporation had filed no designation of an agent in the office of the Secretary of State on whom process might be served as required by St. 1903, § 571, the court in an action against a corporation to restrain the collection of certain notes and for breach of warranty acquired jurisdiction by service on the corporation's state agent in the county where the contract was made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2622; Dec. Dig. § 668.*]

2. CORPORATIONS (§ 641*)—FOREIGN CORPORATIONS—STATUTES.

Ky. St. 1903, § 571, requiring foreign corporations to file designation of an agent on whom process might be served, should be construed to provide an additional person on whom process might be served, and did not repeal Civ. Code Prac. § 51, subsec. 3, and section 72, providing for service of process on nonresident corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2604; Dec. Dig. § 641.*]

3. SALES (§ 442*)—BREACH OF WARRANTY—DAMAGES.

Where plaintiffs executed notes for a threshing machine purchased by them under defendant's warranty that the machine would operate satisfactorily, which notes defendant assigned to a bona fide purchaser for value, the machine proving utterly worthless, plaintiffs were entitled to recover from the seller as damages the amount of the notes and freight paid on the machine.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284, 1290; Dec. Dig. § 442.*]

4. CANCELLATION OF INSTRUMENTS (§ 31*)—GROUNDS—FAILURE OF CONSIDERATION.

Where a buyer of a threshing machine executed notes for the price, which were immediately transferred to an innocent purchaser, the buyer could not obtain a cancellation of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

notes on rescinding the sale because the machine was worthless.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 48; Dec. Dig. § 31.*]

5. PLEADING (§ 248*) — AMENDMENT — NEW CAUSE OF ACTION.

Where, in a suit to compel the cancellation of notes given for a machine which though warranted to work satisfactorily was in fact worthless, it appeared that the notes had been transferred to a bona fide purchaser, the court properly permitted complainants to file an amended petition, claiming damages for breach of warranty, without additional process.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686-700; Dec. Dig. § 248.*]

6. SALES (§ 441*) — WARRANTY — ACTION FOR BREACH—EVIDENCE.

In an action for breach of warranty in the sale of a machine, evidence held insufficient to sustain a finding that the machine was sold to B., and not to plaintiffs.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 441.*]

7. SALES (§ 427*)—BREACH OF WARRANTY.

Defendants sold a thresher to plaintiffs under a warranty that it would operate satisfactorily. Plaintiffs gave notes for the price, which defendant immediately transferred to B. in exchange for B.'s notes. The machine was worthless, and plaintiffs abandoned it in a place directed by defendant's agent. Held, that defendant, having received the amount of plaintiffs' notes from B. was properly compelled to indemnify plaintiffs for the loss they sustained arising from the breach of warranty.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 427.*]

8. APPEAL AND ERROR (§ 199*)—OBJECTIONS WAIVED.

Where a suit for the cancellation of certain notes was permitted to remain on the equity docket after the petition had been amended, so as to state a cause of action for damages for breach of warranty and the case was tried as in equity, it is too late for appellee to raise on appeal the question whether the trial court erred in not transferring the cause to the law docket, and to complain that defendants did not move for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1149; Dec. Dig. § 199.*]

Appeal from Circuit Court, Mercer County.
"To be officially reported."

Action by Pennebaker Bros. and others against the Bell City Manufacturing Company. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

E. H. Gaither, for appellants. C. E. Rankin, for appellee.

SETTLE, J. Appellee is a corporation engaged in the business of manufacturing and selling threshing machines; its manufacturing plant and principal place of business being in the state of Michigan. The appellants, Pennebaker Bros. and Strader Bros., each a firm engaged in the business of farming in Mercer county, this state, together made an effort to purchase a threshing machine of appellee through George Bohon, of Harrodsburg, its then local agent. For some reason unexplained, Bohon did not make the

sale, but turned the matter over to one C. L. Dawes, appellee's state agent, who went to see appellants, and, after some negotiation, sold them a machine, and took their order for it upon a blank form furnished by appellee and attested by Dawes as agent which contained the usual warranty as to the quality of the machine and the character of work it was claimed by the seller it would perform. The agreed price to be paid by appellants for the threshing machine was \$625, for which they were to give two notes bearing date of June 27, 1906, for \$312.50 each, one payable October 1, 1906, and the other October 1, 1907. Appellants were unwilling to execute these notes until the machine should be delivered by appellee and an opportunity afforded them of ascertaining whether it would do its work as warranted; but, upon the representation of Dawes that he was anxious to close the transaction and get away and that he would leave the notes with Bohon, the local agent, until the threshing machine should prove satisfactory, appellants consented to and did execute and deliver to Dawes the notes in form and amount each as stated. Instead of depositing the notes with Bohon according to the agreement under which he received them, Dawes in his capacity of agent sold, assigned, and delivered them to Bohon at a discount of 10 per cent., accepting for them Bohon's note payable to appellee, which he forwarded to the latter by mail. Upon receiving the threshing machine from appellee's manufactory, appellants paid the freight upon it, amounting to \$25. Appellee's agent Dawes at that time set up the machine on the Pennebaker farm, and attempted to operate it, but without success. Subsequently an expert machinist by appellee's direction attempted to adjust and make it work, but he, too, failed, and declared that it could not be made to run at all. Thereupon appellants offered to return the machine to appellee, and made a tender of it to appellee through its local agent, Bohon, at the same time demanding the return or cancellation of the notes they had executed for it. The notes were not returned, but the thresher by direction of Bohon as agent was stored under a shed on the Pennebaker farm, where it has since remained without use by appellants. Shortly thereafter this action in equity was brought in the court below by appellants against appellee and its agents Dawes and Bohon to obtain a cancellation of the notes in question, upon the ground that they were without consideration; it being alleged that the machine for which they were executed was worthless. Later an amended petition was filed setting up the warranty of the machine in the contract of sale, alleging its breach, and asking a judgment against appellee for damages. Appellee, before answering, entered a motion to

quash the summons and return, which was overruled. It thereupon answered, denying the jurisdiction of the Mercer circuit court, specifically traversing the averments of the petition as amended, and averring that it sold the threshing machine to Bohon, who sold it to appellants. The plea to jurisdiction was overruled by the court, and, following the taking of proof by the parties, judgment was rendered dismissing the action, of which judgment appellants complain; hence this appeal.

The motion to quash the summons and plea to the jurisdiction of the court were both properly overruled. The summons was served upon Dawes, in Mercer county, and the return of the sheriff thereon shows that he was the sole agent of appellee in that county. Appellee had no officer in Kentucky, and Bohon, its former agent in Mercer county, was not its agent at the time of the institution of the action, nor had it, as required by section 571 of the Kentucky Statutes of 1903, filed in the office of the Secretary of State a statement signed by its president or secretary, giving the location of its office in this state or the name of its agent thereat upon whom process could be served. Dawes was at that time its managing or chief agent in the state, and its only agent in Mercer county, and, according to his testimony, his duties were to make sales of the threshing machine manufactured by the appellee, to assist local agents in making such sales, settle with local agents as to their commissions on sales, collect for machines sold, and act as expert in setting up and repairing machines. It is true that from and after September 16, 1906, Dawes worked for appellee upon commission, instead of a regular salary as theretofore; but that fact did not make him any less an agent of appellee. He was therefore an agent, as he acted for and stood in the place of appellee in the business in which he and it were engaged, and whatever contract he made in the apparent scope of his agency appellee was bound by. He was in Mercer county when the suit was instituted and upon the trial admitted that he sold the threshing machine to appellants, that he warranted it as charged, and that such warranty was expressed in the written contract of sale. Section 51, subsec. 3, Civ. Code Prac., provides: "In an action against a private corporation, the summons may be served, in any county, upon the defendant's chief officer or agent who may be found in this state, or it may be served in the county wherein the action is brought, upon the defendant's chief officer or agent who may be found therein." The contract between appellant and appellee was made in Mercer county, and was to be performed in that county. The service of the summons upon Dawes as agent was also proper under section 72, Civ. Code Prac.,

which provides with reference to the venue of an action against a corporation such as appellee that, "if it be upon a contract, * * * it may be brought in the county in which the contract is made or to be performed." *Newport News, etc., Ry. Company v. Thomas*, 96 Ky. 613, 29 S. W. 437; *New South Brewing Company, etc., v. Price*, 50 S. W. 963, 21 Ky. Law Rep. 11. In enacting section 571 of the Statutes of 1903, it was not the intention of the Legislature to repeal the sections of the Code, *supra*, providing for the service of process in the case of non-resident corporations, but to provide an additional person upon whom process might also be served. *Paducah Cooperage Co. v. Commonwealth*, 122 Ky. 755, 93 S. W. 12.

The claim of appellee that it had discharged Dawes as agent the day before summons in this case was served upon him was not in our opinion made in good faith. It has too much the appearance of a subterfuge, and was not sustained by the testimony of Dawes himself. Indeed, it was contradicted by him.

We are also averse to placing any reliance upon the further contention of appellee that the purchase by appellants of the threshing machine in controversy was made of Bohon and the machine sold Bohon by it. This, too, appears to us in the light of the facts presented by the record to be a mere subterfuge. Bohon, like Dawes, was a mere agent of appellee; the only difference being that the former was a local agent, whose agency was confined to the county of Mercer, while the latter was the agent or general supervisor of appellee's business for the entire state. As a matter of fact, Bohon, the local agent, was applied to by appellants as agent of appellee for the machine. The latter, for some reason, referred the sale to Dawes, and it was made and consummated by Dawes, acting for and on behalf of appellee, the manufacturer. The order for the machine and the contract with reference to its purchase, including the warranty given by the appellee, were all made upon and contained in a form of contract furnished by appellee; and the transaction as a whole shows conclusively that it was a sale made by appellee in the usual course of business. This being true, and there having been a breach of the warranty of sale, appellee will not be permitted to dodge responsibility by shielding itself behind such a subterfuge as attempted. To permit it to do so would be repugnant to our sense of justice, and to the law as well. The proof overwhelmingly shows the breach of warranty complained of by appellants. This is not a case in which the machine purchased merely failed to operate satisfactorily, and was nevertheless kept and used by the purchaser. It proved at once to be utterly worthless, because it did not perform at all. Therefore appellants should have been allowed upon the facts of the case to recover damages as claimed by them.

The court below could not grant a cancellation of the notes as they had passed into the hands of an innocent purchaser, who recovered judgment against appellants for the amount of them. Nor does it matter that Bohon was the party who purchased these notes, as the sale of the machine was not made by him to appellants but by appellee's agent Daves, and it does not appear that Bohon was in any way connected with the wrong done appellants in the sale of the machine. In any event, appellee is responsible to appellants upon the warranty contained in the contract of sale. Therefore the court properly allowed the amended petition to be filed by which appellants claimed damages by reason of the breach of the warranty, and no additional process was required thereon.

It is claimed by appellants, and not denied by appellee, that the judgment of the lower court was based on the theory that the threshing machine was purchased by appellants of Bohon, and not of appellee. As already indicated, we think this conclusion unwarranted by the testimony, the weight of which shows the contrary. Indeed, we may say that the whole of it, when properly analyzed, supports appellants' version of the contract of sale. Appellee was paid the amount of appellants' notes by Bohon, and it cannot complain at being compelled to indemnify and reimburse appellants for the loss they sustained arising from the breach of warranty. It can yet repossess itself of the threshing machine as it is where it was left by order of its agent when appellants offered to return it.

We see no force in appellee's contention that there should have been a motion for a new trial in the case. It is true that the filing of the amended petition entitled either party to have the case transferred to the ordinary docket, and tried by a jury as a common-law action; but neither party made such a motion. By acquiescence, or common consent, it was allowed to remain upon the equity docket, the proof was all taken by depositions, and the case allowed to proceed in all respects as a cause in equity. This being true, it is too late for appellee to raise in this court, and for the first time, the question of whether the lower court erred in not transferring it to the law docket; and likewise too late to complain that appellants did not enter a motion in the court below for a new trial, following the rendition of the judgment appealed from.

For the reasons indicated, the judgment is reversed and cause remanded, with directions to the lower court to enter a judgment in appellants' behalf for the damages claimed, not to exceed the amount of the notes they executed to appellee and freight paid by them upon receiving the machine.

WIBURG & HANNAH CO. v. U. P. WALLING & CO.

(Court of Appeals of Kentucky. Nov. 27, 1908)

1. SALES (§ 119*)—RESCISSION BY BUYER—DEFECTS AS TO QUALITY.

The buyer of goods of a specified quality and description may refuse to accept the entire shipment, unless all of it corresponds with the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 293; Dec. Dig. § 119.*]

2. SALES (§ 178*)—PERFORMANCE BY SELLER—ACCEPTANCE BY BUYER.

Where lumber in car load lots is ordered and delivered, the purchaser does not accept the lumber by unloading it for inspection.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 451; Dec. Dig. § 178.*]

3. SALES (§ 177*)—PERFORMANCE BY SELLER—INSPECTION AND MEASUREMENT.

Where the buyer of lumber agrees to accept the same on the seller's inspection, he cannot reject the lumber on the ground of defects as to quality, unless there is such a substantial difference between the lumber contracted for and that delivered as to raise the inference of fraud on the part of the seller.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 177.*]

4. APPEAL AND ERROR (§ 1009*)—REVIEW—CONFLICTING EVIDENCE.

In an action for the price of lumber, the evidence being conflicting, a finding by the chancellor that there was not such a substantial departure from the contract as to warrant the inference of fraud on the part of plaintiff will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

5. SALES (§ 407*)—REMEDIES OF BUYER—BREACH OF CONTRACT—ESTOPPEL.

An agreement by the buyer of lumber to accept the same on the seller's inspection and measurement did not estop the buyer from suing for breach of contract as to quality of the lumber, though such breach might not have been ground for rejection of the lumber.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 407.*]

6. APPEAL AND ERROR (§ 1033*)—REVIEW—HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT.

Appellant cannot complain that the trial court granted him relief for which he did not ask.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4060; Dec. Dig. § 1033.*]

Appeal from Circuit Court, Taylor County.
"Not to be officially reported."

Action by the Wiburg & Hannah Company against U. P. Walling & Co. From a judgment for plaintiffs, defendants appeal. Affirmed.

C. W. Wright, Jno. T. Moss, and W. M. Jackson, for appellants. Lindsay & Edelen, Jno. A. Wolford, and B. A. Rice, for appellees.

CARROLL, J. The appellants are dealers in and manufacturers of hard woods in Cincinnati, Ohio, and the appellees are dealers in hard woods in Taylor county, Ky.

The litigation between these parties grows out of an alleged breach of contract on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

part of appellees in failing to furnish to appellants the kind and quality of lumber purchased by them. The contract was made by the following correspondence: "Campbells-ville, Ky., Jany. 18, 1907. The Wiburg-Hannah Co., Cincinnati, O.—Gentlemen: At the earnest request of Mr. S. J. Stultz, we quote you as follows: [Then follows a description of the size of lumber, which was all poplar.] We ship on our own inspection and measurement. Would be pleased to ship you all or any part of above in car lots." In reply to this, appellants wrote: "We have just received your letter of January 18, and wish to thank you for the same. We inclose herewith our order No. 115 for all the stock which you offer at the prices named in your letter. Please ship in to us at once the half car each 4-4 and 8-4 1s and 2s poplar, making a car load shipment of the two lots. The other stock kindly hold for a few days until you hear from us further." The order accompanying this letter described the lumber the same as the letter written by Walling & Co.; but at the foot of the order are these words "National Hardwood Lumber Association rules to govern." In reply to this letter and order, Walling & Co. wrote: "Replying to yours of 1-19, we will accept your order No. 115 on the condition named in ours of 1-18. If this is not satisfactory to you, we will return the order as there are others that want the stock." Wiburg & Hannah Company then wrote: "We are just in receipt of your letter of the 21st stating that you will accept our order No. 115 on the condition named in your letter of Jan. 18th. Your letter of the 18th stated that you would ship this stock enumerated on your own inspection and measurement. We assume, as a matter of course, that your inspection and measurement would not be lower than that of the National Hardwood Lumber Association Rules, and we therefore sent you our order on that basis. We would not care to have the order filled, unless you are willing to abide by the National Rules. We understood your letter to mean that settlement was to be made on your own measurement and inspection under these rules." In reply to this letter, Walling & Co., sent the following letter: "In reply to yours of 1-23, we ship on the National Rules as we interpret them." Wiburg & Hannah Company then wrote: "We have concluded to cancel our order No. 115, which covers four car loads of poplar. Kindly return the order to us." On the following day Wiburg & Hannah Company wrote: "We beg to confirm telegram which we sent you this morning as follows: 'Waive cancellation yesterday on order No. 115, and let stock come forward.' Please disregard our letter of yesterday requesting you to return the order. We hope you will get this stock loaded out as quickly as possible, and oblige." On February 4, 1907, Walling & Co. wrote Wiburg & Hannah Company the following: "Reply to yours of 2-2, we un-

derstand this to mean that you take this stock as quoted or on our own inspection and measurement. If this is not correct, wire us on receipt of this and we wont ship it. We will commence loading as soon as R. R. Co. will allow us to load to your city." Wiburg & Hannah Company on February 5, 1907, sent the following letter to Walling & Co.: "We are in receipt of your favor of the 4th, in regard to the matter of inspection of the stock purchased from you, and beg to say that all we ask is that you inspect the cars as they should be inspected according to the National Hardwood Lbr. Ass'n's Rules. We assume that you will not take advantage of our permitting you to ship them on your own inspection and measurement, if we thought you would, we certainly would not take the stock."

It will be observed that in the first letter written by Walling & Co., they said, "We ship on our own inspection and measurement," and that, although Wiburg & Hannah Company insisted that the "National Hardwood Lumber Association Rules should govern," Walling & Co., declined to make the shipment unless the lumber was accepted upon their inspection and measurement under the hardwood lumber association rules as they interpreted them. It will be further noticed that Wiburg & Hannah Company finally consented to this condition, and thereupon three car loads of lumber were shipped to them. When the lumber was delivered in their yards at Cincinnati, it was inspected by one of their employes, who reported that it did not come up to the contract, and then Wiburg & Hannah Company had it inspected by an inspector employed by the National Hardwood Lumber Association, of which they were members. This inspector confirming the report made by the private inspector, Wiburg & Hannah Company refused to receive the lumber, which had been unloaded from the cars and was in their yards, held by them as they informed Walling & Co., subject to the order of the latter. Failing to make any adjustment of the matter, Walling & Co., brought this suit to recover the contract price of the lumber.

Wiburg & Hannah Company in an answer averred that they purchased the lumber upon the faith of the contract tendered them by Walling & Co., and with the agreement that the lumber should fulfill the contract; that, when the cars containing the lumber arrived at their yards, they had the same inspected, and the inspection disclosed that the lumber was not of the kind, description, or quality specified in the contract; that, upon ascertaining this fact, they at once wrote to Walling & Co., informing them that they would not accept the lumber, and that it was held subject to their disposal. They further averred that it was necessary to remove the lumber from the cars in order that it might be inspected, but that the removal for this purpose did not amount to an ac-

ceptance of the lumber by them or a waiver of their right to rely upon the contract right of rejection if the lumber did not come up to the contract. They therefore prayed that the petition be dismissed, and did not ask any damages for a breach of the contract. Upon the pleadings and evidence the case was heard by the chancellor, who rendered a judgment in favor of Walling & Co. for the full amount claimed, less \$100 which he allowed Wiburg & Hannah Company as damages upon the ground that the lumber did not fulfill the contract.

The actual amount in controversy is not large. Wiburg & Hannah Company testify that the three cars of lumber were worth only \$180 to \$200, less than the value of the lumber ordered; but they insist that, having bought a certain quality of lumber at a specified price to be delivered to them in Cincinnati, they were not obliged to accept lumber of any other quality, kind, or description than that specified in the contract; and that, as the lumber delivered to them did not comply with the contract, they rejected, as they had the right to do, the whole of it, and the petition should have been dismissed. As a legal proposition, it is well settled that, when a person contracts for the delivery to him of goods or property of a certain quality and description, he may refuse to accept any part of the property or goods received unless all of them are in accordance with the contract. We should also say that in a case like this, where lumber in car load lots was ordered and delivered, that the purchaser would not be held to have accepted it or waived his right to reject it merely because he took it out of the cars for the purpose of inspection, as it could not be inspected without being removed from the cars, and each piece of lumber examined. *Jones v. McEwan*, 91 Ky. 373, 16 S. W. 81, 12 L. R. A. 399; *Munford v. Kevell*, 109 Ky. 246, 58 S. W. 703; *Somers Fiber Co. v. Walker*, 109 S. W. 883, 33 Ky. Law Rep. 153; *Ewing v. Hauss*, 50 S. W. 249, 20 Ky. Law Rep. 1883; *Duckwall v. Brook*, 65 S. W. 357, 23 Ky. Law Rep. 1459; *Albin Co. v. Kentucky Table Co.*, 67 S. W. 13, 23 Ky. Law Rep. 2261; *Vogel v. Moore*, 84 S. W. 557, 27 Ky. Law Rep. 94; *O'Bannon v. Relf*, 7 Dana, 320; *Dana v. Boyd*, 2 J. J. Marsh. 587. So that, if the facts authorize the application of this principle, the contention of appellants would be correct; but they do not. Appellants agreed to accept the lumber as inspected and measured by appellees; and, having thus contracted, they are bound, with the exceptions hereafter noticed, by the terms of the contract, and could not reject the lumber unless there was such a substantial difference between the lumber contracted for and that

delivered as to manifest fraud or lack of good faith on the part of appellees. The evidence as to the kind and quality of the lumber is conflicting. Appellants and their witnesses testified that there was some *gray lynn*, and *buckeye* in the shipment, and that the poplar did not comply with the contract. On the other hand, appellees introduced a number of witnesses who testified that they inspected and handled the lumber, and that it in every respect fulfilled the contract. That there was no material difference is made manifest by the fact that there was only \$180 or \$200 difference in the value of the lumber ordered and that shipped, according to the testimony of appellants. Under these circumstances, we do not feel authorized to say that there was either fraud or bad faith on the part of appellees.

The argument for appellees is made that as appellants agreed to accept the lumber by their inspection and measurement, that they were obliged to take the lumber unconditionally, and that the court should not have allowed the appellants any damages. Upon this theory a cross-appeal was prosecuted, but afterwards abandoned. We may say, however, that, although appellants agreed to take the lumber according to the inspection and measurement of appellees, this contract would not estop them from asserting a claim for damages for a breach of the contract if it appeared that the lumber did not fulfill the contract. In cases like this, although the evidence may not authorize the buyer to rescind the contract or reject the property, he may yet maintain an action for damages growing out of a breach of the contract, although he left the selection of the kind and quality of the articles purchased to the seller. Under such contract, the seller is under an obligation to furnish the kind and quality of goods or property that he contracted to furnish, and the mere fact that the selection is left to him does not authorize him to impose upon the buyer goods or property of another kind or quality, or estop the buyer from seeking redress for a violation of the contract, although the facts might not warrant a rescission or rejection. *Baird v. Mathews*, 6 Dana, 129; *Munford v. Kevell*, 109 Ky. 246, 58 S. W. 703. In disposing of the case, although the chancellor granted appellants relief they did not ask, they are not in a position to complain of the judgment for this reason. If the judgment had not allowed any damages to appellants, we could not under the conflicting facts say that it was erroneous.

Upon the whole, we are satisfied that the chancellor did substantial justice between the parties, and the judgment of the lower court is affirmed.

GIRDLER v. GIRDLER et al.

Court of Appeals of Kentucky. Nov. 24, 1908.)

WILLS (§ 467*) — CONSTRUCTION — STATEMENT AS TO INTENTION—"WILL."

Testator devised certain property absolutely to certain of his sons, with a provision that it was his "will and desire" that none of the real estate so devised should be sold until the oldest son was 35, etc. *Held*, that the word "will" in such connection amounted to a restriction equivalent to the expression "I direct," and that he devisees were therefore incompetent to convey the property prior to the time specified, though their interest was subject to their debts as expressly provided by St. 1903, §§ 1681, 1685.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 954; Dec. Dig. § 467.*

For other definitions, see Words and Phrases, vol. 8, pp. 7461-7463.]

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by L. D. Girdler against George O. I. Girdler and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James Denton, for appellant. M. G. Colton, for appellees.

CLAY, C. J. H. Girdler departed this life in Pulaski county, Ky., in the year 1888, leaving four children, to wit, J. E. Girdler, A. M. Girdler, George O. H. Girdler, and L. B. Girdler. He left a will, which was duly probated by the Pulaski county court, and is now on record in the county clerk's office of that county. Those provisions of the will necessary to be considered in the decision of the questions before us are as follows:

"I give, devise and bequeath to my younger sons, George O. Hayden Girdler and Lee Brent Girdler, and their heirs or assigns forever, my store house on the south side of the public square in Somerset. The lot and the houses thereon, known as the Wm. F. Davis property on Main street, and the western half of the George W. Singleton lot, as divided by line from north to south, through the middle of the cutting room in the barn,—but here it must be remembered that on or about the first day of March, 1883, by verbal contract, sold to one Puss Long, part of this lot in the N. W. corner thereof, at the price of seventy-five dollars, with interest till paid, but no part of said price as been paid. Now, if the heirs, at law, of said Puss Long pay the price and the interest thereon, on or before the first day of March, 1888, I direct my executors to pay said price and interest for other real estate with title to these boys, and to make title to said fraction of said lot to the legal heirs of said Puss Long. If said purchase price is not paid on or before the said first day of March, 1888, I direct that Charles Long and the children of said Puss Long be permitted to occupy the house thereon, up to said time in compensation and satisfaction for the house and fencing by her placed

thereon. I also give, bequeath and devise to my said younger sons my farm on the Cincinnati Southern Railway, known as the Crawford place, and my farm on the Somerset and Mount Vernon road, known as the Stone land, and a tract of land lying in Whitley county, known as the land deeded to me by Frank Sears, near the mouth of Laurel river. And the sum of seven hundred dollars to be paid out of my bank stock in the National Bank of Somerset. All of these bequests to my said younger sons, I estimate to be of the value of forty-six hundred dollars, and of equal value with the property given to my elder sons.

"It is my will and desire that none of the real estate given and devised to my sons, George O. H. and Lee Brent, shall be sold or alienated by them or any one for them otherwise than is here directed, until the time that the oldest one, George O. H., becomes thirty-five years of age, but they may have, receive and enjoy the use, rents and incomes of said real estate after they each arrive at the age of twenty-one years, and before that time for necessary support and education."

At the time of the death of J. H. Girdler, L. B. Girdler was five years of age and George O. H. Girdler seven years of age. At the time of the institution of this action they were aged 26 and 24 years, respectively. They are both married men, and the plaintiff, L. B. Girdler, is now living in the city of Louisville, Ky. Plaintiff, L. B. Girdler, is indebted to the firm of Girdler Bros. in the sum of \$480.27 and certain interest. He has no property or assets out of which said debt can be made except the property devised to him by J. H. Girdler. All the city property devised, except the building on the south side of the public square, is old, dilapidated property. After paying the expenses of insurance, taxes, and repairs, the property yields to the owners, L. B. and George O. H. Girdler, but very little revenue; it not being sufficient to pay a fair rate of interest on the value thereof. The farm property is of such a character and in such a state of repair and cultivation that it produces no revenue. The property on the south side of the public square is under 10 years' lease, and the joint owners, George O. H. and L. B. Girdler, derive no revenue from the same, and will not do so until September 12, 1914, at which time the lease will expire. This lease was given in consideration of the erection of the building now located on said lot. On the 12th day of March, 1908, the plaintiff, L. B. Girdler, and the defendant George O. H. Girdler, entered into an agreement by which L. B. Girdler agreed to sell and convey to George O. H. Girdler his entire interest in the lands devised to him by his father for the sum of \$3,000. L. B.

Girdler has tendered a deed of the property to George O. H. Girdler, but the latter has declined to receive it, on the ground that L. B. Girdler had no power to make the conveyance. The above facts appear from the agreed statement. The question involved was submitted to the court, which held that L. B. Girdler had no power to convey his interest in the property in question, and entered judgment accordingly. From that judgment, L. B. Girdler prosecutes this appeal.

This court in a long line of decisions has held such limitations as that embraced in the language of the will before us for consideration to be reasonable, and therefore valid. In the case of *Stewart and Wife v. Brady*, 3 Bush, 623, the language is almost identical with that in the Girdler will; the provision being: "The forty-two acre tract shall, in no way, be disposed of, by deed of gift or sale, by her, until she arrives at the age of thirty-five years." It was held that the limitation on the use was not inconsistent with the fee, and was therefore valid. In the case of *Wallace, etc., v. Smith*, 113 Ky. 263, 68 S. W. 131, the language of the will was: " * * * But he shall not pledge mortgage, or sell the eighty acres of land hereby given to him, nor any part thereof, until he is thirty-five years old." The court, after referring to the case of *Stewart v. Brady*, supra, held that the limitation was not void. To the same effect is *Stewart v. Barrow*, 7 Bush, 368.

Counsel for appellant, while admitting the doctrine in this state to be as announced above, contends that it is against the great weight of authority to hold that, after property is deced or devised in fee simple, any restriction on the use or alienation thereof can be imposed, and now asks this court to adopt the latter view. It is true the doctrine contended for by counsel for appellant is upheld by many courts; but we are not prepared to say that it is either more reasonable or more just than the rule in force in this state. It cannot be doubted that in many instances a limitation of the kind contained in the will before us is a great protection to the devisee. In a majority of cases, where a reasonable restriction is imposed, it is better to trust to the good sense of him whose sound judgment and energy enabled him to acquire the property, rather than to turn it over absolutely to those whose business capacity has not been ripened by many years' experience. Furthermore, the rule in question is one affecting property rights. And, where such rule has been long established and is known by bench and bar, and is acted upon by the public, we do not think it should be lightly disturbed, especially in view of the fact that in nine cases out of ten it serves a beneficent purpose in preventing the dissipation of property, or, at least, its premature sale by those who, if older or more ex-

perienced, would not have consented thereto.

But it is earnestly insisted that the language, "It is my will and desire," is not in effect a restriction, but merely a request as the part of the testator. While there may be some question as to whether the expression, "It is my desire," amounts to a positive restriction, there can be no question that the phrase, "It is my will," does amount to a restriction and is equivalent to the expression, "I direct."

It is also insisted that, because under Ky. St. 1903, §§ 1681, 2355, and the authority of *Smith v. Smith*, 115 Ky. 329, 73 S. W. 1028, the property involved in this action could be subjected to the payment of appellant's debts, the court should hold that appellant has the right to make a voluntary sale of the property, as he would be apt to secure a better price therefor under such circumstances. The right, however, to subject the property, is not given because of any defect in the restriction contained in the will. The right is found purely in the statutes. The fact that the statutes subject the property to the payment of the devisee's debts cannot give to the devisee the power of voluntary alienation within the time prohibited by the will. Under some circumstances it might be best that he have the power of voluntary alienation where it is necessary to sell the property to pay debts; but, where the will provides to the contrary and the restriction is not unreasonable, the courts have no power to nullify the provisions of the will.

Being of the opinion that the trial court properly held that appellant had no power to convey the property at the time he made the deed in question, the judgment should be affirmed; and it is so ordered.

BOZEMAN'S ADM'R v. PRUDENTIAL INS. CO. OF AMERICA.

(Court of Appeals of Kentucky. Nov. 20, 1906)

1. INSURANCE (§ 368*) — LIFE POLICY — EXTENDED INSURANCE.

A life policy gave insured the privilege of borrowing from it, according to tables following, on the security of the policy; then provided that if the policy, after being in force three years, lapsed or was forfeited for nonpayment of a premium or a note given for a premium or loan, it might be surrendered for a paid-up life policy as specified in the following table, and that, if the policy so lapsing or forfeited was not surrendered for a paid-up life policy, the company would write in lieu of it, and, without any action by insured, a paid-up term policy "for the full amount insured by this policy, and to continue in force for the term indicated by the following table of extended insurance. the paid-up term policy, however, to provide that, in case of death of insured within three years from such lapse or forfeiture, there shall be deducted from the amount payable by the company all premiums that would have become due on the policy up to insured's death had the policy been continued in force, and any indebt-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ness due the company on the policy at the late of such lapse or forfeiture; then made provisions for surrender of the policy for cash, according to the following table, at the end of five years, or at certain other times, and then, under the head of "Tables Above Referred To," provided that any indebtedness placed on the policy would operate to reduce the benefits. *Held*, that the amount, otherwise available for purchasing extended insurance, and so fixing the period of such extended insurance, was not to be diminished by any indebtedness of insured to the company; the policy under the head of such insurance otherwise providing the manner of payment of the indebtedness.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 936; Dec. Dig. § 368.*]

2. INSURANCE (§ 179½*)—LIFE POLICY—LOANS TO INSURED.

Where a life policy provides the terms on which insured may borrow of the company, a more onerous condition in the contract under which he did borrow of it is void; there having been no further consideration for it.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 179½.*]

3. INSURANCE (§ 179½*) — LIFE POLICY — LOANS TO INSURED—FORFEITURE FOR NON-PAYMENT.

Even if valid, in view of provisions of the policy, the provision in a contract of loan by a life insurance company to a policy holder that if the loan, with accumulated interest, shall equal the legal reserve for the policy, the company may demand immediate payment, and, if payment is not made, may cancel the policy, is available only where there is no balance of reserve above the loan and interest.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 179½.*]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by Charles J. Bozeman's administrator against the Prudential Insurance Company of America. Judgment for defendant. Plaintiff appeals. Reversed, with directions.

Hendrick, Miller & Marble, for appellant. Price & Ross, for appellee.

NUNN, J. On the 22d day of July, 1899, appellee issued and delivered to James Edgar Bozeman an ordinary life policy for the sum of \$1,000, payable, first, to Bozeman Bros., and afterwards changed, about which there is no dispute, and made payable to his brother, Charles J. Bozeman. He paid two premiums of \$35.26 each in cash, but failed to pay the third premium when due, and the policy lapsed July 22, 1901. Appellee insisted that he pay the premium and be reinstated, and finally wrote him that it would loan him the money to pay it and take an assignment of the policy as security. In the month of April, 1902, he borrowed \$32 from appellee, and assigned the policy to secure the loan and paid \$1.60 interest in advance on the loan, and the difference between the amount borrowed and the premium he paid in cash and was given a receipt for the amount of the premium, \$35.26. When the next premium fell due, July 22, 1902, he

paid it in cash, and also paid the interest for one year in advance, to wit, \$1.60, on the loan note. He failed to pay the next premium, which fell due July 22, 1903. Bozeman lived until the 1st of December, 1905; and his brother, the beneficiary, died about three weeks afterwards. Appellant was appointed and qualified as the administrator of Chas. J. Bozeman, and instituted this action to recover the amount of the face of the policy. The issues were formed by the pleadings, and the case, by agreement, was transferred to the equity docket. The court heard the case and dismissed appellant's action, from which ruling he appeals.

Indorsed on the back of the policy in print are certain privileges, conditions, and tables. Appellant contends that these extend the policy, for the full amount thereof, until more than one year after the date of the death of the insured. Appellee's contention is that the policy, for its face value, was not extended by the privileges, conditions, and tables indorsed thereon until the date of the insured's death; but that the policy ceased some time in the month of June, 1905. We copy the indorsements on the policy that have application to the issues presented. They are as follows:

"Privileges.

"Cash Loans.

"If this policy is continued in force, the insured may borrow from the company the amount specified in the following table, by making written application for the loan and assigning the policy to the company as security in accordance with the terms of the company's loan certificate; provided five per cent. interest on the whole amount of the loan is paid annually in advance.

"Paid-Up Life Policy or Extended Insurance.

"If this policy, after being in force three full years, shall lapse or become forfeited for the nonpayment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, it may be surrendered for a nonparticipating paid-up life policy as specified in the following table; provided the policy is legally surrendered to the company within three months after such lapse or forfeiture. If this policy, having lapsed or become forfeited as above, is not surrendered for a paid-up life policy, the company will write in lieu of this policy, and without any action on the part of the insured, a nonparticipating paid-up term policy for the full amount insured by this policy, and to continue in force for the term indicated by the following table of extended insurance. The paid-up term policy shall provide, however, that in case of the death of the insured within three years from the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

date of such lapse or forfeiture there shall be deducted from the amount payable by the company the sum of all the premiums that would have become due on this policy up to the time of the death of the insured if the policy had been continued in force, and any indebtedness due the company on this policy at the date of such lapse or forfeiture. The paid-up term policy will be delivered on the legal surrender of this policy.

"Or Cash Surrender Values.

"If this policy is legally surrendered to the company within three months from the end of five years from its date or of any five-year period thereafter, and all premiums to the end of that period have been paid in full, the company will pay therefor the sum indicated by the following table of cash surrender values. Or, if this policy is legally surrendered to the company within three months from the end of twenty years from its date or of any five-year period thereafter, and all premiums to the end of that period have been paid in full, the cash value of the policy may be applied to purchase an annuity payable during the life of the insured.

"Tables Above Referred To.

"The benefits stated in the following tables apply to the original sum insured only. Any indebtedness placed on the policy will operate to reduce the benefits."

The tables referred to in the above quotations are on the back of the policy, and show that, when three premiums have been paid, the insured is entitled to borrow \$37, and when four have been paid he has the right to borrow \$49, and is entitled to a non-participating paid-up life policy, when three premiums have been paid, of \$105, and, when four have been paid, of \$138, and, when three premiums have been paid, he is entitled to extended insurance for the face of the policy for 2 years, 326 days, and, when four premiums have been paid, for 3 years, 271 days; and is entitled to named amounts at the end of five-year periods.

Appellee's contention is that, when four premiums were paid, he was not entitled to have the policy extended 3 years and 271 days, because when the policy lapsed for the nonpayment of the premium of July 22, 1903, he owed appellee the \$32 note; that it should have been deducted from the legal reserve due the insured, and the balance of the reserve would have only extended the insurance to June, 1905, four or five months before the death of the insured, and cites the cases of *Mutual Benefit Life Insurance Co. v. First National Bank of Louisville*, 115 Ky. 757, 74 S. W. 1066, *Emig's Adm'r v. Mutual Benefit Insurance Co.*, 106 S. W. 230, 32 Ky. Law Rep. 484, and *Jagoe v. Aetna Life Insurance Co.*, 123 Ky. 510, 96 S. W. 598, as sustaining its contention. This position would be correct if we were construing a

policy containing provisions like unto those in the cases referred to. The policies before the court in the *Emig and Bank Cases* were issued by the same company, and provided that "when after two full annual premiums shall have been paid on this policy it shall cease or become void solely by the nonpayment of any premium when due, its entire net reserve by the American Experience Mortality and interest at 4 per cent. yearly (provided there be no loan on the policy) shall be applied by the company as a single premium at the company's rates published and in force at this date." And then continues, giving the different options that the insured may avail himself of. Another paragraph of the policy is as follows: "If there be any loan on the policy, such indebtedness shall be paid off out of the cash value and the remainder paid in cash by the company, or a value will be allowed by the company in the form of extended or paid-up insurance, as above provided, the amount to be applied to the purchase of such insurance being correspondingly reduced in the ratio of the indebtedness to the full cash surrender value." Thus it will be seen that the policies under consideration in those cases expressly provided that the loan to the insured should be deducted from the legal reserve, and the remainder was to purchase extended insurance. That is to say, it expressly provided that any indebtedness by the insured to it should first be deducted from any option proffered by the policy chosen by him. The policy in the case of *Jagoe v. Aetna Life Ins. Co.*, supra, in terms is substantially like those of the *Mutual Benefit Ins. Co.*; but it further provides, as construed by this court, that if the insured was indebted to the company when the policy lapsed for nonpayment of premiums, no extended insurance was allowed. So it will be seen that the construction placed on the policies in those cases have but little application to the policy in the case at bar. The terms are different.

The policy in the case at bar provides expressly that if the policy should lapse or become forfeited by reason of the nonpayment of any premium or loan, and the policy is not surrendered for a paid-up policy, the company will write, in lieu of it, and without any action on the part of the insured, a non-participating paid-up term policy "for the full amount insured by this policy," and it shall continue in force for the term of 3 years, 271 days. This paid-up term policy shall provide, however, that, in case of death of the insured within three years from the date of such lapse or forfeiture, there shall be deducted from the amount payable by the company the sum of all the premiums that would have become due on the policy up to the time of the death of the insured if the policy had been continued in force, and there should, also, be deducted from the face of the policy any indebtedness due the company on

he policy at the date of such lapse or forfeiture. Thus we see that the contract the insured had with appellee provided how the indebtedness of the insured should be settled in case of extended insurance; that is, it should be deducted from the face of the policy, and not as in the cases referred to deducting it from the legal reserve. There is not an intimation in the contract before us that authorized the company to first deduct the indebtedness of the insured to the company from the legal reserve, and apply the remainder to purchase extended insurance, as in the cases referred to; but by express terms this policy provides that such indebtedness should be deducted from the amount named in the policy, to wit, \$1,000. If appellee's contention be sustained, and the loan be deducted from the legal reserve and the balance used to carry extended insurance, and then also deduct it from the face of the policy, if the insured dies within three years from the lapse, the result would be to make him pay the loan twice, and contrary to the terms of the policy. Appellee contends that the following words: "Any indebtedness placed on the policy will operate to reduce the benefits"—which are found under the expression "Tables referred to," authorized the deduction of the indebtedness from the legal reserve of the policy, and the balance only could be used to purchase extended insurance. The last quoted words are in harmony with the words quoted above with reference to extended insurance. The indebtedness of the insured does operate to reduce the amount that would be received otherwise. It is not reasonable to suppose that those words were used with the intention of changing the provision with reference to what should be the disposition of the indebtedness of the insured to the company in the case of extended insurance; for that had already been especially provided for. The only reasonable inference and construction that we can place upon the words last quoted, to wit, "any indebtedness placed on the policy will operate to reduce the benefits," is that the policy in the case at bar provides that the full amount of cash that will be loaned on the policy, when four premiums have been paid, is \$49, and, when a like number of premiums have been paid, a paid-up nonparticipating life policy for \$138 would be issued; and the tables referred to in the clause under title, "Cash Surrender Values," fixed the amount that the insured would be entitled to receive at the periods named, and the language used was for the purpose of requiring that the amount of the indebtedness of the insured should be deducted, in case of a loan, from the \$49, and, in case of the paid-up life policy, the indebtedness should be deducted from the \$138, and the policy issued for the balance. In addition to the above, it will be seen from the provisions of the policy that there were four methods by which to settle the policy in the lifetime

of the insured: First, cash loan privileges; second, by the issuing of a nonparticipating paid-up life policy; third, extended insurance; fourth, by the insured receiving certain stated sums at the end of five-year periods—in none of which were there any provisions stating how the indebtedness of the insured to the company should be settled, except the one with reference to extended insurance. Hence the necessity for the clause with reference to the indebtedness operating to reduce the benefits that it might apply to those options not provided for; and to accentuate the fact, as had already been provided, it provided that the indebtedness of the insured should be deducted from the face of the policy. There is no other construction that can be placed upon this language without making the last quoted words conflict with the previous language of the policy dealing, especially, with the matter of extended insurance, and as to what disposition should be made of the indebtedness of the insured to the company. This court has frequently said, in construing such contracts as this one, that the insurance companies prepare their policies, which are printed mostly in small type, and, if there are any ambiguities or seeming inconsistencies, that that construction of the contract which is most favorable to the insured should prevail. The reasonable presumption is that, when Bozeman read and accepted the policy, he understood from the provision with reference to extended insurance that it meant that, if he did not elect to take one or the other of the options provided for in the contract, the company was bound, without any action on his part, to provide for him, after he had paid four premiums, a policy of extended insurance for the face value of the policy for 3 years, 271 days; and that his beneficiary would receive the full face value of the policy, except the premiums that he would have paid from the date of the lapse of his policy to his death, and any indebtedness that he owed the company; and that the deduction of benefits referred to in the first clause had reference to the matters above stated.

To construe this policy as contended for by appellee, we would have to interpolate words and phrases, and the words used would have to be given a meaning that was not intended, or, at least, that the insured never thought of when he entered into the contract. Appellee claims that, when the insured borrowed the \$32 from it, he executed an obligation by which he agreed that it might declare the policy forfeited and void upon his failure to perform certain conditions therein named, and he failed to perform the conditions, and appellee declared the policy at an end, and it ceased to be binding upon it. The obligation referred to is as follows: "This is to certify that I, the undersigned, James E. Bozeman, the insured on whose life ordinary policy No. 161006 was issued by the

Prudential Insurance Company of America, have this day borrowed from the said Company the sum of thirty-two ——— 00/100 dollars and hereby assign, transfer and set over unto the said company, its successors and assigns, the said policy and all profits and benefits now due or which may hereafter become due thereon as herein provided. It is understood and agreed: First. That the said sum borrowed as aforesaid shall bear interest at the rate of five per cent. per annum, payable in advance, and that said interest unless duly paid shall be added to the above loan and bear interest at the same rate and on the same conditions. Second. That any dividend declared on said policy may be applied by the company toward the payment of said loan and any unpaid interest, anything to the contrary in the policy notwithstanding. Third. That if said policy shall become forfeited in any manner, the amount of said loan, with interest accumulated and accrued thereon, shall be deducted from the cash value of any allowance guaranteed by the terms of said policy in case of such forfeiture. Fourth. That if said policy shall mature before said loan, with the interest accumulated and accrued thereon, shall have been fully paid, the total amount thus due the company shall be deducted from the amount otherwise payable by the company. Fifth. That if the said loan with the accumulated interest shall become equal to the legal reserve for the said policy, the company may demand immediate payment of said loan—or any part thereof—with all interest accumulated and accrued thereon, and if the same be not paid to the company within thirty days after due notice by mail or otherwise, the said policy shall be and become entirely forfeited and void." It will be seen that clauses numbers 1, 2, 3, and 4 in the loan obligation conform to the provisions of the policy; but the fifth enters upon a new field, and prescribes conditions not mentioned in the policy. The insured had paid for the right to borrow \$49 upon the conditions named in the policy, which do not include the conditions or provisions mentioned in the fifth article of the loan contract. Appellee in its answer relies on the cancellation of the policy under the conditions stated in the fifth clause of the loan contract. It is our opinion that the additional and more onerous provisions incorporated in that clause are not binding, because, as stated, the insured had purchased the right to borrow \$49 upon the conditions stated in the policy. It is not pretended that appellee paid the insured any consideration for the right to forfeit his policy on any other conditions than those named therein.

The cases of *New York Life Ins. Co. v. N. L. Curry*, 115 Ky. 100, 72 S. W. 736, 61 L. R. A. 268, 103 Am. St. Rep. 297, and *Emig's Adm'r v. Mutual Benefit Ins. Co.*, supra, sustain this position, and the last case cited overrules the case of *Mutual Benefit Life Ins. Co. v. First National Bank of Louisville*, su-

pra, to the extent that it opposes this principle. If, however, we are in error as to this, appellee had no right, under the fifth clause of the loan agreement, to declare, when it did, on June 29, 1905, that the insurance of Bozeman was at an end. The language of that article is to the effect that if the loan, which was \$32, with the accumulated interest, should become equal to the legal reserve for the policy, then, in that event, the company might demand the immediate payment of the loan and the accumulated interest, and, if not paid, it reserved the right to cancel the policy. Appellee's actuary, the only witness who testified on the subject, stated that the amount of the reserve which had accumulated on the policy of the insured was \$82.30. The interest which had accumulated on the loan to the time when appellee canceled the policy in July, 1905, could not have been more than two years, as it is agreed that he had paid the interest to July 22, 1903, and this added to the loan of \$32 makes \$35.35, which did not equal the legal reserve for the policy. The reserve, as stated without contradiction, was \$82.30. But appellee wants the words "the balance" inserted in the fifth clause of the loan agreement, so that it will read: "If said loan with the accumulated interest shall become equal to the balance of the legal reserve for the policy," etc. Even if this was allowable, the loan with its interest would not equal the balance of the reserve, for such balance at the time they canceled the policy amounted to \$46.95, nor would it have equaled the balance of the reserve at the time of the insured's death, nor at this time. It is contended that this construction of the policy operates as a hardship upon appellee; that the policies under consideration in the cases cited by appellee were otherwise construed. In answer to this it is enough to say that the provisions of the policies referred to are different from the provisions of the one now under consideration. The terms of the policies in the cases referred to seemingly made it a hardship upon the insured; but the court determined that they made the contracts and were bound thereby, notwithstanding it seemed to be a hardship upon them. We have construed the policy in the case at bar in accordance with the provisions contained in it. To construe it as contended for by appellee, the wording would have to be changed. Doubtless appellee obtained insurance by showing and explaining to persons the advantages contained in its policy over the policies of other companies, and it must abide by the terms therein. It took the chance of the insured living beyond the 3 years, 271 days. If he had, it would have retained all that he had paid, to wit, \$112.24, and the right to collect the loan of \$32 with its interest from the insured. It is true that after that its collateral would have been worthless, but it would have had the right to

collect its debt if he was solvent or ever became so.

For these reasons, the judgment of the lower court is reversed with directions for the court to deduct from the face value of the policy the sum of the premiums that would have become due on the policy up to the time of the death of the insured, and the amount of the loan obligation of \$32 with its interest due at the date of the death of the insured, and render judgment in favor of appellant for the balance, with interest from the date when the policy was due and payable.

FARMERS' HOME INS. CO. v. CAREY et al.
(Court of Appeals of Kentucky. Nov. 25, 1908.)

1. INSURANCE (§ 197*)—MUTUAL FIRE INSURANCE—LIEN—NOTICE.

Under Ky. St. 1903, § 712, giving a co-operative insurance association a lien upon property insured to secure assessments, and providing that on loss the subsequent purchaser or junior lienholder shall be entitled to the benefit of the insurance, the lien operates against a subsequent purchaser, though without notice thereof at the time of purchase.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 437; Dec. Dig. § 197.*]

2. INSURANCE (§ 197*)—MUTUAL FIRE INSURANCE—LIEN.

Ky. St. 1903, § 712, giving a co-operative insurance company a lien on the property insured to secure assessments and calls made under the contract, does not provide a lien for membership fees, but simply for assessments and calls.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 197.*]

3. PLEADING (§ 8*)—PETITION—CONCLUSIONS.

Allegations in an action by a co-operative insurance association to recover a delinquent assessment, and enforce its lien therefor on the property insured, that insured was indebted to the association in a certain sum, it being his pro rata of the association's indebtedness at the time of the cancellation of his policy, and that the proportion of the debt of the association to the amount of insurance carried by insured calculated as required by law was a certain sum, were mere conclusions of the pleader, and insufficient to state a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12, 13, 15, 18, 19; Dec. Dig. § 8.*]

4. INSURANCE (§ 197*)—MUTUAL FIRE INSURANCE—ASSESSMENTS—ACTIONS—PETITION—SUFFICIENCY.

To subject insured property to the payment of the pro rata of insured of the indebtedness of a co-operative insurance association, the petition must allege that such pro rata is based upon calls or assessments, and set up the facts showing the same to have been legally made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 447; Dec. Dig. § 197.*]

Appeal from Circuit Court, Mercer County
"To be officially reported."

Action by the Farmers' Home Insurance Company against Leantie G. Carey and others. Judgment for defendants, and plaintiff appeals. Affirmed.

C. E. Rankin, for appellant.

CLAY, C. Plaintiff, 'Farmers' Home Insurance Company, is a co-operative fire insurance association organized under chapter 32, subd. 5, Ky. St. 1903. It insured the property of J. E. Donovan and Artemesia Donovan, located in Cornishville, Ky., for the sum of \$400. Thereafter the Donovans sold the property to Leantie G. Carey. Plaintiff instituted this action to recover certain sums due by the Donovans at the time their policy was canceled. It also seeks to enforce its lien given by the statute on the property purchased by Leantie G. Carey and described in the petition. The petition, after setting forth very fully the provisions of the Kentucky Statutes applicable to co-operative insurance associations, its by-laws, and the provisions of the policy, seeks to recover the sum of \$2.87, being the amount of membership fee due by the Donovans and evidenced by their note of April 28, 1902, payable on June 28, 1902. It then sets forth certain calls or assessments made by the executive committee of the company, but leaves the amount of such calls or assessments blank. The petition further states: "Plaintiff, further pleading, says that the defendant is indebted to said company in the further sum of \$17.49, it being the defendant's pro rata of the company's indebtedness at the time of the cancellation of his policy." The petition also seeks judgment for interest on the note given for membership fee, amounting to 95 cents, and interest on the pro rata of indebtedness, amounting to \$3.15; the entire interest amounting to \$4.10. It also seeks to recover the penalty of 50 per cent. on the amounts due provided by the statute in case an action has to be brought for the collection of such sums. Leantie G. Carey and her husband demurred to the petition, and their demurrer was sustained. Thereupon plaintiff filed an amended petition stating that the defendants' (Donovans') note for \$2.87 was given for their membership fee. After setting out other matters, which it is not necessary to mention, the amended petition also states that "the proportion of the indebtedness of the association, to the amount of insurance carried by the defendants, calculated as is required by law, was the sum of \$17.49." The defendants, Leantie G. Carey and her husband, demurred to the amended petition, and, their demurrer being sustained, the petition and amended petition were dismissed, and plaintiff appeals. No brief is filed by counsel for appellees but counsel for appellant states that the lower court sustained the demurrer to the petition and the amended petition because it was not alleged that the defendants, Leantie G. Carey and her husband, had notice of the existence of a lien at the time they purchased the property.

The first question to be considered is whether or not such notice was necessary in order that appellant's claim for assessments and

calls against the Donovans might be enforced against the property purchased. The case of *Kentucky Farmers' Mutual Insurance Co. v. Mathers, etc.*, 7 Bush, 23, 3 Am. Rep. 286, involved the question whether or not appellant's charter gave to it a lien on property subsequently purchased by a party without notice. In that case the provision of the statute was as follows: "All buildings insured by and with said company, together with the right, title, and interest of the assured to the lands on which they stand, shall be pledged to the company, and the company shall have a lien thereon against the assured during the continuance of his or her policies." This court held that there was nothing in the charter of appellant in that case from which it could be inferred that it was designed that the lien should operate against a subsequent purchaser, unless the latter should choose to continue the policy by taking an assignment of it in the manner prescribed. The present statute (being a part of section 712, Ky. St. 1903) goes far beyond the provision of the charter under consideration in that case. Its language is as follows: "The corporation shall have a lien upon property insured to secure the payments of such assessments and calls as may be legally made under the contract of insurance, and in case of loss, the subsequent purchaser, or junior lienholder, shall be entitled to the benefit of the insurance, and to the rights, benefits and privileges of the original insurer to the extent of his interest in the property." Here the Legislature has plainly indicated that the lien provided should extend to the property even in the hands of a subsequent purchaser or junior lienholder. Protection is afforded the subsequent purchaser by providing that the rights, benefits, and privileges of the original insurer should inure to the benefit of the subsequent purchaser. We therefore conclude that the lien was given without reference to whether or not the subsequent purchaser had notice of the existence of the policy or of the fact that a lien was claimed. That this view is correct we think may be gathered from the character of the insurance association contemplated in the act of the Legislature. Such insurance companies are purely mutual and co-operative. The only funds which they have arise from the assessments and calls which may be legally made upon the members. If these assessments or calls could be defeated by a sale of the property, it would not be long before such a company would necessarily become insolvent. We think the statute itself is sufficient notice of the fact that a lien on the property purchased may be claimed, and that a subsequent purchaser buys the property with the risk of having it subjected to the payment lawfully due the insurance company by his grantor by reason of calls or assessments

that have been legally made. So far, then, as the question of notice is concerned, we are of opinion that the petition and amended petition stated a cause of action against appellees.

However, we are of opinion that the petition and amended petition are defective in other respects. The statute does not provide a lien for membership fees. It simply provides a lien for such assessments and calls as may be legally made under the contract of insurance. As stated above, in alleged circumstances under which the calls or assessments were made, the amount of the calls or assessments was left blank. Furthermore, the allegations of the petition and amended petition with reference to the Donovans' pro rata of the company's indebtedness at the time of the cancellation of the policy, as set out above, are mere conclusions of the pleader, and do not state facts sufficient to constitute a cause of action. *Acton v. Farmers' Home Insurance Company*, 124 Ky. 677, 40 S. W. 955. In addition to this no lien is given for mere pro rata of indebtedness not founded upon calls or assessments legally made. In order to subject the property of appellees to the payment of the Donovans' pro rata of indebtedness at the time of the cancellation of the policy it should have been made to appear in the petition or amended petition that such pro rata of indebtedness was based upon calls or assessments that had been legally made and the facts showing that the calls or assessments were legally made should have been fully set forth.

As the statute does not provide a lien for membership fees and as the pro rata of indebtedness is not shown to have been based upon calls or assessments which were legally made it necessarily follows that the appellant has not shown itself entitled to a lien upon the property purchased by Leante G. Carey. For these reasons then the trial court properly sustained a demurrer to the petition and amended petition.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. DALTON.

(Court of Appeals of Kentucky. Dec. 2, 1906.)

1. RAILROADS (§ 394*)—INJURIES TO PERSONS ON TRACKS—ACTIONS—PLEADING—SUFFICIENCY OF ALLEGATIONS—NEGLIGENCE.

In an action against a railroad company for injuries to a person on the track, it is not necessary that the petition should allege the specific acts constituting defendant's negligence, and a petition charging that defendant negligently ran its engine upon plaintiff was not defective because not alleging that plaintiff was upon the track where he had a right to be, and that the engineer saw him in time to save him from injury by the exercise of ordinary care.

[Ed. Note.—For other cases, see *Railroads* Cent. Dig. §§ 1332, 1335; Dec. Dig. § 394.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

2. RAILROADS (§ 394*)—INJURIES TO PERSONS ON TRACKS—ACTIONS—PLEADING.

Even if plaintiff were a trespasser, if those in charge of the train negligently injured him, defendant would be liable; but if he was injured at a place where no lookout was required, and those in charge of the train did not discover him in time to save him from injury, that would be matter of defense.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1332, 1335; Dec. Dig. § 394.*]

3. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR—REFUSAL OF REQUESTS.

In an action against a railroad for injuries to a person on the track, the refusal to charge that plaintiff was a trespasser, and those in charge of the train owed him no duty until they discovered his peril, was not prejudicial, where it appeared that the engineer saw plaintiff when he was more than 200 yards ahead of the train, and no warning was given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1066.*]

Appeal from Circuit Court, Lincoln County.
"Not to be officially reported."

Personal injury action by William Dalton, by his next friend, against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Benjamin D. Warfield and J. W. Alcorn, for appellant. T. H. Shanks, W. S. Burch, M. C. Saufley, and G. B. Saufley, for appellee.

NUNN, J. The judgment for \$500 appealed from in this case was rendered in favor of appellee, a boy about 12 years of age, who was struck and injured by one of appellant's engines in the town of Rowland, a place of 100 or 400 inhabitants.

The first reason assigned by appellant for reversal is that the petition did not set forth a cause of action, and the court erred in not sustaining its motion for a judgment notwithstanding the verdict. It was alleged in the petition that "the defendant, while engaged in the business of managing, running, and operating an engine and train of cars attached thereto on its line of railway in Lincoln county, Ky., and while actively running, managing, and operating said engine and train, negligently and carelessly ran its engine upon and against plaintiff, William Dalton, thereby inflicting serious and painful injuries upon his person," etc. The point made is that it is not alleged in the petition that William Dalton was on appellant's track at a place where he had a right to be, and that it is not alleged the engineer in charge of the engine saw him in time to have saved him from injury by the exercise of ordinary care. Appellee charged in general terms that his injuries were due to the negligence and carelessness of the appellant. This court has often decided in actions of this character that it is not necessary, in order to state a good cause of action, that the petition should allege the specific acts constituting the negligence; that a general allegation of neg-

ligence is sufficient. *L. & N. R. Co. v. Wolfe*, 80 Ky. 82; *L. & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706; *Newman on Code Pleading* (Rev. Ed.) § 324. Conceding Dalton to have been a trespasser at the time he was injured, the persons in charge of the train had no right to negligently and carelessly injure him, and, if they did, they, with their master, are liable to him in damages. If Dalton was at a place on the track where no lookout duty was required of those in charge of the train, and they did not discover his presence in time to have saved him from injury, then they would not have been guilty of negligence. Under such a state of facts, the negligence and carelessness charged in the petition would have been refuted. We are therefore of the opinion that the court did not err in refusing to give a judgment for appellant non obstante verdicto.

The testimony of appellant shows that appellee was walking on the railroad of appellant in the town of Rowland, between the Goshen and Craborchard crossings; that this part of the railroad was customarily used by persons walking, and this fact was known to the persons in charge of the engine that struck appellee. In fact, the engineer so testified, and that he was keeping a lookout and saw appellee when the engine was near Goshen crossing. Several witnesses for appellee stated that they were near the Craborchard crossing and saw the boy coming towards them, walking on the ends of the ties and the train following him, coming down-grade, the steam shut off, and was "rolling" at the rate of 15 or 20 miles an hour; that the engineer was at his post of duty, with his head out of the window, looking forward in the direction of appellee; that the whistle was not blown nor the bell rung for the crossings or to give the boy warning of the approach of the train until about the time it struck him; that the reason they knew this they listened and wondered why the whistle was not sounded or the bell rung to give warning to appellee of the approach of the train. Appellant complains because the court refused to instruct the jury that appellee was a trespasser on its track, and those in charge of its train owed him no duty until they discovered his peril. Even conceding that, under the proof in this case, they owed appellee no lookout duty, the refusal to give such an instruction was not prejudicial, for the testimony showed that the engineer saw appellee when he was more than 200 yards in advance of the train—this the engineer admits—and no warning of any kind was given of the approach of the train. That there was no warning given the engineer disputes, but the preponderance of the evidence is against him on this point. The testimony, however, is conflicting on the question of whether or not appellee was a

trespasser on appellant's track at the time he was hurt. Much of it conduced to show that appellant's track between the crossings named was, and had been for many years, constantly used by the traveling public, and by persons the back of whose premises abutted the right of way of appellant, and this was so open, notorious, and continued for such a length of time as to create a presumption that it was with the knowledge and acquiescence of appellant. Under the facts in evidence the court properly instructed the jury. *I. C. R. R. Co. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729, 11 L. R. A. (N. S.) 352; *Rader's Adm'r v. L. & N. R. R. Co.*, 104 S. W. 774, 31 Ky. Law Rep. 1105; *L. & N. R. R. Co. v. McNary's Adm'r's*, 108 S. W. 898, 32 Ky. Law Rep. 1266.

For these reasons, the judgment of the lower court is affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. JOHNICA'S ADM'R.

(Court of Appeals of Kentucky. Nov. 27, 1908.)

1. MASTER AND SERVANT (§ 265*)—INJURY TO EMPLOYÉ—BURDEN OF PROOF.

In an action for death of an employé, the burden is upon plaintiff to make out his case, and, if upon the evidence introduced by him the presumption in favor of the conclusion that decedent was killed as claimed is no stronger than the presumption that he was killed in some other way, the burden is not sustained.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 894-908; Dec. Dig. § 265.*]

2. MASTER AND SERVANT (§ 276*)—DEATH OF EMPLOYÉ—EVIDENCE.

In an action for death of an employé, plaintiff's evidence held not to show with any certainty how decedent came to his death.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 276.*]

Appeal from Circuit Court; Grant County.
"Not to be officially reported."

Death action by William E. Johnica's administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John Galvin and A. G. DeJarnette, for appellant. A. S. Hagan, Clore, Dickerson & Clayton, and W. M. Beckner, for appellee.

HOBSON, J. William E. Johnica was a brakeman on a freight train of the Cincinnati, New Orleans & Texas Pacific Railway Company. He lost his life while in the service of the company, and this suit was brought by his personal representative to recover for his death, on the ground that the loss of his life was by reason of the negligence of the company. On a trial of the case in the circuit court a verdict and judgment were rendered in favor of the plaintiff for \$7,000, and the defendant appeals.

The only question we find it necessary to consider on the appeal is whether the court

should have instructed the jury peremptorily to find for the defendant. The proof introduced on behalf of the plaintiff was, in substance, as follows: John J. Johnica testified that he was a brother of the deceased, who was 21 years old at his death; that he was earning \$70 or \$80 a month, and was in good health. J. N. Underwood testified that he was the conductor of the train on which Johnica was killed; that the train left Cincinnati at 10:20 p. m. on September 25, 1907. The train consisted of 35 cars, 2 engines, and a caboose. William Johnica was the front brakeman, L. B. Wells was the rear brakeman, and Underwood was the conductor. When the train had reached Crittenden it was discovered that a brake beam had worked off the top of a wheel of one of the cars, causing fire to fly from it. The train was stopped south of Crittenden for the purpose of adjusting the trouble shortly after midnight. It was a dark, rainy night. After the train stopped, Johnica went under the car with a lantern for the purpose of adjusting the beam. At this point the plaintiff turned the witness over to the defendant to cross-examine; and on cross-examination he stated that he was on the first engine; that there were three cars between him and the next engine, and the car where the trouble was was seven cars back of the second engine; that he went back to this car and he and Johnica both went under it, after giving the engineer a signal to stand still, and sending the flagman back; that Johnica, when they found they needed some tools, went to the second engine for a hammer and came back with it; that they then got the brake beam out, and Johnica took the hammer back to the engine, while he took the pieces of iron they had taken off from under the car. Johnica returned and got up on the train with his lantern, and he returned to the engine after signalling to the engineer to call in the flagman. When he reached the engine, Johnica gave a signal from the top of the car for the train to go forward. The train moved forward 12 or 15 car lengths, and then stopped because the flagman had not come in. The flagman came in, and a signal was given them to go ahead from the top of the car. They then went ahead. He saw Johnica no more, and, when they reached the next station, Johnica was missing. The plaintiff then introduced O. Vallandingham, who stated that he was an undertaker, and that the next morning between 5 and 6 o'clock he found the remains of William Johnica near the Henderson Rouse crossing near Crittenden. His head was between the rails. His body was cut in two at the small of the back. The face was down, the lower part of the body was just a little way from the rail, and appeared as though he was on his knees. His toes did not seem to be touching the ground. His feet were sticking out towards the gutter.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

but they were not straightened out. Near his body he saw something like a crowbar or a long wrench, something of that kind, about two feet long. North of his body, and a few feet from it, was his lantern setting between the rails. The globe was broken. Henderson Rouse then stated that he lived about 50 or 60 feet from the line of the railroad, and a short distance south of the crossing referred to; that in the night he heard a train stop there, heard it back up and a good deal of loud talking, heard the train jerk and pull up and back. They were there for a considerable while. He could not tell whether they were backing or pulling. He could tell they were jerking the cars. They did that several times before they pulled out. They pulled up and stopped for a while, and then backed and then, when they pulled up, he could hear the cars jerk and then they pulled out and went on. About 3 o'clock he learned a man had been killed and went out on the railroad. His hat was lying on the ties about two ties north of him. The lantern, with the globe broken, was two or three ties north of his hat. The body was on the west rail, or next to his house, and about seven rails from the crossing just at the north edge of his yard. He did not see any tools or wrench or crowbar or anything of the kind. R. H. Wild testified that he reached the scene of the accident shortly after Rouse, and described what he saw substantially as Rouse did. L. B. Wells, the flagman, testified that he was sent back to flag when the train stopped, and that, when they gave the signal for the flagman to come in, he started to the train, but, before he got up to it, the train started on; that he then signaled them to stop, and, when the fireman saw his signal, the train was stopped, and he got aboard of the train. He did not see any light on the train as he came up. If he had been looking, that he might have seen a light, but that he was not paying attention to see whether there was anybody on top or not. He was signaling them down as he went along, and when he got on the caboose, he gave the signal for them to go ahead, and heard somebody in front halloo, "That will do." Ed. McGuire testified substantially as Rouse and Wild to seeing the body when they got there, but he did not see any wrench or other tool. On this proof the plaintiff rested his case. The defendant thereupon moved the court to instruct the jury peremptorily to find for it. The court overruled the motion, and the defendant introduced the other men on the train, who testified substantially as the conductor; the engineers on both the engines testifying to seeing a light on top of the car, and the engineer and the fireman on the second engine testifying to Johnica coming up to that engine and borrowing a hammer and bringing the hammer back after he and the conductor had finished the work under the car. At the conclusion of all the evidence the defendant again moved the court to instruct the jury

peremptorily to find for it, and the court overruled the motion.

It is insisted for the plaintiff that the proof warrants the conclusion that the train stopped but once, and that Johnica was killed at the place where this stop was made when going under the car for some purpose connected with the work to be done under there, and that the positive testimony of the conductor to the effect that he went up on the cars after he had finished the work under the car cannot be believed in view of the testimony of Rouse and the other facts shown. It is also insisted that, when we look at the evidence introduced in behalf of the defendant, there are contradictions in the evidence making it proper that the case should be left to the jury. The burden of proof is upon the plaintiff to make out his case and, if upon the evidence introduced by him the presumption in favor of the conclusion that Johnica was killed as claimed by him is no stronger than the presumption that he was killed in some other way, the plaintiff fails. The trouble with the plaintiff's case is that when we reject the testimony of the conductor, and the other witnesses who were present, we have no evidence as to how Johnica was killed. If we credit their testimony, he evidently fell from the top of the car, in the dark and in the rain, about the time that it started up after the flagman got in. He might have fallen from the car in this way, and been killed just as he was found; for it must be remembered that a long train of cars had passed over him after he fell and before he was found. If he was not killed after he reached the top of the car, as stated by all the witnesses who were there and saw him, then there is a failure of proof to show how he was killed. We do not see that the testimony of Rouse contradicts substantially the testimony of the railroad witnesses. If the train stopped, as they say, the front of it would not have been very far from Rouse's house. Fifteen car lengths would be less than half the length of the train, and, as he was in his house and in bed, he could not tell very accurately just where the train was, and he does not undertake to do so. We think his testimony does show that there was more than one stop of the train and more than one starting. But we do not rest our judgment here. We rest our judgment on the fact that, when we reject the positive testimony of the witnesses on the ground, there is nothing in the case to show with any certainty how the deceased came to his death. In *Wintuska's Adm'r v. L. & N. R. R. Co.*, 20 S. W. 819, 14 Ky. Law Rep. 579, no one saw how the deceased was killed. He was missing from the train. Some of the trainmen went back, and found his body in the cut where a ledge of rock projected. A man going down the side of a ladder would be in danger of coming in contact with the rock. There was a wound upon the right side of his head, which would be the side next to the

rock if he was going down the ladder, and his coupling stick was found upon a projecting part of the ledge about 10 feet up from the ground, where it was supposed he probably threw it by the action of his hands when he came in contact with the rock. The court said that it was as reasonable to suppose that he became dizzy and stumbled in the darkness or in some other manner fell from the top of the car, and sustained the circuit court in giving the jury a peremptory instruction. In *Hughes v. Cincinnati Railroad Company*, 91 Ky. 526, 16 S. W. 275, after a freight train had passed through several tunnels in close succession, a brakeman was found on one of the box cars in a dying condition. There were some loose timbers hanging from the roof of one of the tunnels, and the plaintiff insisted that his intestate was struck by these timbers; but there being no evidence that he was in fact so struck, and it being equally probable that he had been struck in one of the other tunnels, a peremptory instruction was approved, on the ground that circumstances were merely presented upon which one might theorize as to the cause of the accident, but which did not show with any certainty how the accident occurred. In *Early's Adm'r v. Louisville, etc., R. R. Co.*, 115 Ky. 13, 72 S. W. 348, the deceased was found dead on the railroad track; but, the evidence not showing whether he was walking on the track or attempting to cross it or lying on it, it was held that a peremptory instruction for the defendant was properly given. To same effect, see *L. & N. R. R. Co. v. Vittitoe's Adm'r*, 41 S. W. 269, 19 Ky. Law Rep. 612; *Morris' Adm'r v. L. & N. R. R. Co.*, 61 S. W. 41, 22 Ky. Law Rep. 1593. This case falls squarely within the rule laid down in the above cases, and on the plaintiff's evidence the court should have instructed the jury peremptorily to find for the defendant. The defendant's evidence did not strengthen the plaintiff's case in any way; on the contrary, taken as a whole, it confirmed the testimony of the conductor, and there is no such inconsistency in the testimony of the witnesses as to render their testimony unworthy of credit. But, if we reject altogether the testimony of the railroad men and assume that the deceased was killed while crawling under the car and at the point where it first stopped, still there is no evidence to show under what circumstances he so went under the car or to charge the men controlling the train with notice of his perilous position or to impute to them negligence in moving it as they did. None of the witnesses who were first at the body saw the crowbar or wrench seen by the undertaker, and there is no evidence whatever that the deceased at any time had such a tool.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

JENKINS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 24, 1908.)

1. CRIMINAL LAW (§ 1159*)—PLEA—REVIEW—EVIDENCE.

A conviction will not be reversed as contrary to the weight of the evidence, when there is any evidence to show accused's guilt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. 3074-3083; Dec. Dig. § 1159*.]

2. CRIMINAL LAW (§ 1134*)—PLEA—NEW TRIAL—DENIAL—REVIEW.

Under Cr. Code Prac. § 281, providing that the decisions of the court on motion for a new trial should not be subject to exception, the Court of Appeals has no power to review the action of the trial court in denying a new trial in a criminal case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2587, 3067-3071; Dec. Dig. § 1134*.]

Appeal from Circuit Court, Jefferson County, Criminal Branch.

"Not to be officially reported."

Harry Jenkins was convicted of murder, and he appeals. Affirmed.

E. E. McKay and W. H. Sweeney, for appellant. James Breathitt, Atty. Gen., and T. B. Blakey, Asst. Atty. Gen., for the Commonwealth.

NUNN, J. Appellant, a man about 25 years of age, was indicted with Willie Little, a boy about 16 years of age, for the murder of Frederick Baker, which was alleged to have been committed about June, 1906. He was convicted and given a life sentence. The appeal has been pending since November, 1907, and was submitted only a few days ago, and then without any brief in the record for appellant. We have examined the record with care to see if any errors were committed by the lower court which would authorize a reversal for appellant. The instructions given by the court to the jury were as favorable to appellant as he was entitled to. There were no errors committed by the court in the admission and rejection of testimony which were objected to by appellant. There was testimony introduced by the Commonwealth by two persons who professed to be eyewitnesses to the killing, whose testimony, if true, and the jury had the right to believe them, showed the killing of Baker by appellant was willfully and maliciously done, and without any reasonable excuse. There was testimony to the contrary introduced by appellant; but we have no power to reverse when there is any evidence conducing to show the guilt of the accused. The jury's province is to pass upon the weight of the evidence.

Appellant moved for a new trial in the lower court upon the ground of newly discovered evidence, and claimed that one of the witnesses who testified for the Commonwealth was of such bad character that she was not entitled to credit, and that the coroner who held the inquest over deceased would have testified that the bullet which

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

killed Baker was of a different size than some of the evidence produced upon the trial showed had been used in inflicting the death wound. The matter of refusing or granting a new trial is within the discretion of the lower court, and we cannot disturb its finding in any case, except when it be made plain that it has abused its discretion; but in a criminal case it seems that by section 281, Cr. Code Prac., we are altogether prevented from disturbing the action of the lower court in the refusal of a new trial.

For these reasons, the judgment of the lower court is affirmed.

CINCINNATI, N. O. & T. P. RY. CO.
v. FORTNER.

(Court of Appeals of Kentucky. Dec. 1, 1908.)

1. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where, notwithstanding an employé who was injured while approaching the time check window, with several hundred other employes, by his foot striking a box filled with hot water and acid used for cleaning lubricators, knocking off the lid, and being immersed therein, knew the position of the box, he did not know that the top was not securely fastened and thought that it was, and the employer's rules required him, in company with the other employes, to come daily in close proximity to the box, and they habitually walked over it, he was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 107*)—DUTY OF MASTER—SAFE PLACE IN WHICH TO WORK.

Where the lid of a box filled with hot water and acid used for cleaning lubricators is so constructed and maintained that it does not afford reasonable protection to employes required to be near or about it, the employer is liable for injury to an employé because of such unsafe construction or maintenance.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 107.*]

3. DAMAGES (§ 95*)—INJURIES TO SERVANT—DAMAGES.

An injured employé may recover such sum as will reasonably compensate him for loss of earnings and pain and suffering of mind and body, not exceeding the amount claimed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 222-224; Dec. Dig. § 95.*]

4. MASTER AND SERVANT (§ 229*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An employé is bound to exercise ordinary care for his own protection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 674; Dec. Dig. § 229.*]

5. MASTER AND SERVANT (§ 227*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Notwithstanding an employer may have been negligent, if the employé was also guilty of negligence without which the accident would not have occurred, there can be no recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 668; Dec. Dig. § 227.*]

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action for personal injuries by John Fortner against the Cincinnati, New Orleans &

Texas Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

E. J. Tracy and Galvin & Galvin, for appellant. Walker C. Hall and S. W. Adams, for appellee.

BARKER, J. At the time of the accident involved in this litigation, the appellant, Cincinnati, New Orleans & Texas Pacific Railway Company, in and about its shops and yards at Ludlow, Ky., employed a large number of men. Under a rule of the company these men were required to apply at a certain window in the south wall of the engine room for what are called in the record "time checks," and, when they quit work, they were required to deposit these time checks at the same window. In this way the employes came to the window in question several times each day. Near the check room window, up against the south wall of the building, was placed an iron box about 3 feet long, from 15 to 18 inches wide, and about 15 inches deep. This box was filled with hot water and some kind of acid, and was used for the purpose of cleaning lubricators and other like instruments, which for that purpose were sunk in the hot acid. The box was placed in the ground, but projected above the level of the earth from one to four inches. It was covered by a flat piece of sheet iron laid over it; and this cover or top was fastened by an "L" slot, which fitted around a pipe going down into the box or tank. The appellee had been in the employ of the company some 10 or 12 months, and, with the other employes, had regularly each work day applied for his check at the window, and knew of the position of the box, but did not know that the top could be knocked off by being struck with the foot. On the occasion when he was injured, the appellee, and several hundred other employes, were approaching the window for their time checks. The appellee's foot struck the box in question, knocking off the lid, and his foot was immersed in the hot acid, burning it most severely. To recover damages for this injury he instituted this action, charging negligence on the part of the appellant company in failing to afford him a safe place in which to do the work at which he was engaged. The appellant answered, denying all the material allegations of the petition, and affirmatively pleading the contributory negligence of the plaintiff. The issues were completed by reply, and a trial resulted in a verdict in favor of the plaintiff for \$1,000.

It is insisted on this appeal that the trial court erred in refusing to grant the defendant company a peremptory instruction to the jury to find a verdict in its favor; it being said in support of this position that

the evidence showed that the employé knew the box was there, and by his own negligence he walked over it, kicked off the lid, and injured himself. It is true the plaintiff in his testimony shows that he knew the position of the box, and perhaps knew the contents of it; but it utterly fails to show that he knew the box top was not securely fastened so as to prevent an inadvertent step from removing the top and precipitating the foot of the unwary employé in the highly dangerous fluid contained therein. On the contrary, we think the evidence shows without contradiction that the appellee thought the box was securely fastened. The men habitually walked over it, and there is testimony in the record that more than once before the accident in question the top had been knocked off by some employé's foot inadvertently coming in contact with it, although the appellee did not know of this. This case does not come within the principle announced in *Wilson's Adm'r v. Chess & Wymond Co.*, 117 Ky. 567, 78 S. W. 453. There the employé knew the pool in which he was dipping kegs was unprotected, and was full of hot water. He also knew there was a rim of ice around the pool; and with this knowledge he went to the edge of it, slipped upon the ice, and fell into the hot water, and was injured. The case we have here is very different in principle from that above cited. Here the employé knew the position of the box, but he saw it was covered and apparently secure. The business of his employer, and its rules, required him, in company with several hundred other employés, to come daily in close proximity with this box. He had a right to assume that so dangerous a thing was securely fastened. Now, if this box had been open and fully exposed to view, with hot steam arising from the acid, bringing home to the employé the danger of stepping in it, then the case would be within the principle announced in *Wilson's Adm'r v. Chess & Wymond Co.*, supra; but here, with the top on and apparently secure, the box constituted a veritable trap for the foot of the unwary workman whose duty called him about it. The evidence shows without contradiction that the employés walked over this box constantly. One of the witnesses being asked the height of the box above the surface of the earth said that it was an inch above ordinarily, but that the feet of the men constantly walking over it sometimes wore the earth away so that the box projected as much as four inches above the surface of the earth. We think the court correctly overruled the motion for a peremptory instruction.

The court instructed the jury as follows:

"(1) The jury is instructed that it is the duty of the master to furnish the servant with a reasonably safe place in which to perform the work assigned to him, and a reasonably safe means of ingress and egress to and from such place, and, if the jury believe from all the evidence that the lid of the box described in the proof was so constructed and maintained that it did not afford reasonable protection at the place and for the purpose for which said box was designed and used to the plaintiff and other employés required by their employment to be near or about said box, and if they further believe from the evidence that such construction or maintenance of said lid was not such as ordinarily careful and prudent men in the same or similar circumstances would use, and if the jury further believe that the plaintiff was injured by reason of the unsafe construction or maintenance of said box, if either there was, and the plaintiff himself was in the exercise of ordinary care for his own safety, then they shall find for the plaintiff; otherwise, for the defendant.

"(2) The court instructs the jury that, if they find for the plaintiff herein, they will award him such sum in damages as will reasonably compensate him for his loss of earnings, if any, resulting immediately from the injuries received, not exceeding the sum of \$90, and for such further sum as will reasonably compensate the plaintiff for his pain and suffering of mind and body, if any, the immediate and direct result of the injuries received, not exceeding in all the sum of \$1,990, the amount prayed for in the petition.

"(3) The court instructs the jury that the defendant in the operation of its business had the right to place the box and the contents thereof, described in the proof, in the place described in the proof, and that it was only required to exercise ordinary care to have said box and place in a reasonably safe condition, and that the plaintiff was bound to exercise ordinary care for his own safety and protection in or near the vicinity of said box.

"(4) The court instructs the jury that even if they should believe that the defendant was negligent in regard to said box under any of the other instructions given to you herein, and also believe that the plaintiff was guilty of negligence contributing to said accident, and without which the said accident would not have occurred, then your verdict must be for the defendant."

These instructions correctly presented the law of the case, and we think the facts fully justified the verdict of the jury.

Judgment affirmed.

BEST et al. v. HOUSE et al.

(Court of Appeals of Kentucky. Dec. 2, 1908.)

1. DEEDS (§ 211*)—PARTIES—CAPACITY TO CONVEY—EVIDENCE.

Evidence held to sustain a finding that a grantor had sufficient mental capacity to make a conveyance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 638-642; Dec. Dig. § 211.*]

2. DEEDS (§ 68*)—GRANTOR'S MENTAL CAPACITY—EXTENT.

Where a grantor had sufficient mental capacity to make a will, he had sufficient capacity to execute a deed, to take effect after his death, vesting in his daughters an estate for life, remainder to their children.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 149-155; Dec. Dig. § 68.*]

3. DEEDS (§ 196*)—UNDUE INFLUENCE—PRESUMPTIONS.

Where a grantor had no legitimate children, and was under a moral obligation to provide for the grantees, his illegitimate daughters, the fact that he had illicit relations with the grantees' mother, and that she did not testify in a suit to set aside the deeds, was insufficient to create a presumption of undue influence on her part.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 587; Dec. Dig. § 196.*]

4. BASTARDS (§ 16*)—SUPPORT—OBLIGATION OF PARENT.

Where a father knows with certainty that he is the father of illegitimate children, a natural obligation rests on him to provide for them, which is greater than any obligation owed by him to collateral kin.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 21-23; Dec. Dig. § 16.*]

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by Lucy Best and another against Emma House and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. J. Bronston, A. R. Burnam & Son, J. Tavis Cobb, and J. A. Sullivan, for appellants. Smith & Smith and Grant E. Lilly, for appellees.

NUNN, J. This is an appeal from a judgment of the Madison circuit court, rendered in an action in equity, by which appellants sought to have a deed, conveying about 380 acres of land to appellees, Emma House and Commie Osborn, canceled. The deed was executed to them by their father, T. C. Bronston. The daughters, Emma House and Tommie Osborn, took a life estate under the deed with the remainder to their children.

Appellants assail the conveyance upon three grounds: First, mental incapacity on the part of T. C. Bronston; second, undue influence exercised by the grantees in obtaining it; third, groundless prejudice against appellants by the grantor.

The issues having been formed, the parties took the depositions of about 60 witnesses. Appellants took 14 of the depositions, and appellees the remainder. The testimony of appellants' witnesses tended to show that T.

C. Bronston was about 82 years old at the time he executed the deed; that the weight of age and the ravages of dissipation had impaired his intellect; that the last three or four years of his life he was constantly under the influence of strong drink, and the most of the time drunk; that he suffered his farm to go to wreck and grow up in weeds; that he had many cattle, hogs, horses, and mules; that some of the horses and mules were five or six years old, and had never been broken, and that he failed to sell his stock, although offered good prices for it. About two-thirds of appellants' witnesses gave it as their opinion that Bronston's mind was so weak that he could not protect himself in any business transaction, and the other third seemed to be unable to express an opinion upon the subject of the condition of his mind. The most of appellees' witnesses, some of them being physicians, stated that they were well acquainted with Bronston to the date of his death, and gave it as their opinion that he was fully competent to transact business, and that he fully understood what he was doing when he executed the conveyance. One or two of appellees' witnesses stated that Bronston had told them, years before his death, and when he was not feeble, that he intended to give his home to his daughters, appellees. The lawyer who wrote the deed for Bronston testified that he prepared the deed under his directions, and that the first one he wrote and read to Bronston was found by him not to be correct, for by it the fee was conveyed to appellees when his intention was to convey to them a life estate with remainder to their children, and the deed was prepared to meet this view. Bronston carried the deed to the county court clerk's office, and there acknowledged it. The lawyer, the clerk, and his deputy all testified that Bronston appeared to be sober, and fully competent to understand exactly what he was doing. They all stated that neither appellees nor any one else was present when the deed was prepared and executed. In view of this evidence we are of the opinion that the lower court was correct in determining that Bronston had sufficient mental capacity, at the date of the execution of the deed, to bind himself and his heirs by the conveyance.

Appellants' counsel concede that he might have had capacity sufficient to make a valid will at the date of the conveyance, but contend that he did not have to make a deed, and cite many cases showing that it requires more mental capacity to make a deed than it does to make a will. The cases in effect hold that a vendor must have mental strength and understanding to compete with his business antagonist and to protect his own interest; but the testator has no antagonist to meet, and is not called on to consider whether or not he will be benefited or injured by the act in which he is engaged; that the ordi-

many business affairs of life involve a contest of reason, judgment, experience, and the exercise of mental powers not necessary to the testamentary disposition of property. See *Bramel v. Bramel*, 101 Ky. 75, 89 S. W. 520; *American & English Ency. of Law*, vol. 28, p. 74, and *Ring v. Lawles*, 190 Ill. 520, 60 N. E. 881. These authorities do not aid appellants in this case, for the reason that the conveyance executed by Bronston, and which is assailed, partakes of a testamentary document. Like a will, the conveyance did not take effect during the life of the grantor. It gave to his daughters, appellees, the land for their lives, and then to their children, reserving to the grantor the use and control of the farm during his life; and, in the execution of it, it did not require any more reason, judgment, experience, and the exercise of mental powers than if he had at that time executed a will instead of the conveyance.

The proof shows that Bronston's wife died 15 or 20 years before he did, that he never had any legitimate children, and that appellants are his collateral kindred. It is admitted in the record that Bronston, for more than 30 years before his death, sustained immoral relations with Maria Lakes, the mother of appellees, Emma House and Tommie Osborn; that they were the children of T. O. Bronston, and were so recognized by him from their births to his death; that he treated them as such, furnished them with the necessities of life, and aided in their education. The charge by appellants that the execution of the deed was unduly influenced by appellees and their mother is without support in the testimony; there not being the slightest testimony that they exercised any influence whatever in obtaining the conveyance. Appellants contend, however, that as Bronston assumed immoral relations with appellees' mother, Maria Lakes, the presumption is that she unduly influenced him to execute the conveyance, and that, as Maria Lakes failed to give her deposition, the presumption referred to was sufficient to authorize the court to cancel the deed upon that ground. We cannot agree with this proposition, viz., that a deed should be canceled upon such presumption. Bronston was under a moral obligation to provide for appellees, and there was no proof that they importuned or attempted to influence him in any manner to make the conveyance, and it will not do to cancel a deed, made under such circumstances, upon a presumption arising from the mere fact that their father had illicit relations with their mother. There was no evidence introduced showing any prejudice of any character by Bronston towards appellants, except at one time he had not felt kindly towards one of his nephews on account of some trivial matter. We approve the following language of the lower court, to wit: "When the father knows with certainty that he is the father of illegitimate chil-

dren, a natural obligation rests upon him to make provision for them, and when, as in this case, there are no legitimate issue, that natural obligation is greater than any obligation to his collateral kin."

For these reasons the judgment of the lower court is affirmed.

MOSEBY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 1, 1908.)

CRIMINAL LAW (§ 534*)—EVIDENCE—CONFESSIONS—CORROBORATION.

Ky. St. 1903, § 1162, makes it an offense to break into an outbuilding and steal chickens therefrom. Cr. Code, Prac. § 240, provides that a confession by one accused of crime will not warrant a conviction, unless accompanied by other proof that the offense was committed. *Held*, that a confession by one charged with a violation of section 1162 will not support a conviction, where there is no evidence other than the confession that there were chickens in the building at the time of defendant's entry therein.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 534.*]

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Will Moseby was convicted of breaking into an outbuilding and stealing chickens therefrom, and appeals. Reversed, and new trial granted.

J. Franklin Wallace, for appellant. Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

O'REAR, C. J. Appellant was indicted and convicted, charged with feloniously breaking into an outbuilding in connection with another's dwelling house and stealing therefrom three chickens, of the value of \$1.50. He was sentenced to five years' penal servitude.

While he confessed, out of court, to having committed the offense, though denying it at the trial, there is no other evidence that the act charged was committed. To complete the offense charged two facts must be established: (1) The felonious breaking into the house; (2) and stealing some article of property therefrom. There was other evidence that the henhouse had been broken into, and as it was in the nighttime it is fairly inferable that the intent was felonious. There is also other evidence that the prosecutrix's chickens had been taken, but when is not shown. There is no other evidence that the chickens were, or ever had been, in the chicken house. Section 240, Code Cr. Prac. reads: "A confession of a defendant unless made in open court will not warrant a conviction, unless accompanied with other proof that such an offense was committed." As under section 1162, Ky. St. 1903, under which appellant was being prosecuted, it was essential to establish both the breaking and the taking before he could be found guilty. A

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

failure by the commonwealth to establish the taking was as fatal as would have been her failure to show there had been a breaking into the outhouse. There was not then other evidence that the offense charged had been committed. In that state of the record the court should have peremptorily instructed the jury to find the defendant not guilty.

Other matters complained of, being questions of practice that may not rise again, are not passed upon.

Judgment reversed, and cause remanded for new trial consistent herewith.

HESSIG v. HESSIG'S ADM'R et al.

(Court of Appeals of Kentucky. Nov. 27, 1908.)

APPEAL AND ERROR (§ 14*)—RIGHT OF REVIEW—CROSS-APPEALS—PERSONS NOT PARTIES IN APPELLATE COURT.

Under the express provisions of Civ. Code Prac. § 755, an appellee may obtain a cross-appeal at any time before trial by an entry on the records of the Court of Appeals, but a cross-appeal can only be granted as against an appellant who brings the original appeal to the Court of Appeals, since parties not before the court on appeal are not affected by cross-appeals, and, if it is desired to have the judgment reviewed as to other parties, the complaining party must prosecute an original appeal which he may do notwithstanding the pendency of the appeal between other parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 47; Dec. Dig. § 14.*]

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action between H. T. Hessig and Catherine Hessig's administrator and others. From the judgment, there was an appeal and cross-appeal. On motion to extend the order granting a cross-appeal so as to grant a cross-appeal against a person not a party on appeal. Denied.

D. G. Park, for the motion. Wheeler, Hughes & Berry, opposed.

O'REAR, C. J. The circuit court rendered a judgment partially in favor of Hessig's guardian and partly disappointing to him. Both parties took exception to the judgment, and each prayed an appeal to this court. Appellant prosecuted the appeal in due season: Thereupon appellee, Hessig's guardian, prayed and was granted a cross-appeal against the appellant. He now complains because the order did not also grant a cross-appeal against the Fidelity & Deposit Company, who was also a party in the circuit court, and who was a surety it is alleged upon the obligation in suit.

By section 755, Civ. Code Prac., the appellee may obtain a cross-appeal, at any time before trial, by an entry on the records of the Court of Appeals; but a cross-appeal can only be granted as against the appellant who brings the original appeal to this court. Par-

ties not before this court on the appeal are not affected by a cross-appeal. *Davless County v. Howard*, 13 Bush, 101. If other parties are concerned, and it is desired to have the judgment reviewed on appeal as against them, the party complaining must prosecute his appeal by original appeal, which he may do notwithstanding the pendency of the appeal between other parties.

Motion to extend the order is denied.

WILSON et al. v. SHUMATE et al.

(Court of Appeals of Kentucky. Nov. 25, 1908.)

1. DEEDS (§ 105*)—CONSTRUCTION—GRANTEES—"CHILDREN."

While the word "children" as a rule is used in deeds and wills as a word of purchase, it is frequently used as a synonym for "heirs," and this may always be shown by or deduced from a consideration of the whole instrument.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 105.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1115-1140; vol. 8, p. 7601.]

2. DEEDS (§ 124*)—CONSTRUCTION—ESTATES CONVEYED—LANGUAGE OF INSTRUMENT—"CHILDREN."

The caption of a deed stated the grantee as "trustee for C. and her children." The granting and habendum clauses stated him as "trustee for C., her heirs and assigns." The warranty was to "C., her heirs and assigns." Held that, in view of the exclusive use of the words "heirs" and "assigns" in all the parts of the deed which conveyed or warranted the estate, the word "children" in the caption, which was merely descriptive personæ of the grantee, was used by the grantors in the sense of "heirs," and the deed conveyed an equitable fee-simple estate to C.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 346-351; Dec. Dig. § 124.*]

Appeal from Circuit Court, Nicholas County.

"To be officially reported."

Action by E. S. Wilson and others against Filmore Shumate and others for the construction of a deed. Judgment for defendants, and plaintiffs appeal. Affirmed.

Morgan & Darragh, for appellants. Holmes & Ross, for appellees.

BARKER, J. The object of this litigation is to obtain a construction of the following deed:

"This indenture made this 18th day of September, 1856, between Wilford N. Rickey and Sallie Rickey, his wife, of the county of Nicholas and state of Kentucky, of the one part, and Lewis Feeback, as trustee for Catherine Shumate and her children, of the county of Bourbon and state aforesaid, of the other part, witnesseth:

"That the said Wilford N. Rickey and Sallie, his wife, for and in consideration of the sum of six hundred dollars in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, and by these presents do grant, bargain and sell unto said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Lewis Feeback, as trustee for Catherine Shumate, her heirs and assigns, all that tract or parcel of land situated, lying and being in Nicholas county, Kentucky, on the waters of Panther creek, and bounded as follows, to wit: [Metes and bounds omitted.]

"To have and to hold the land hereby conveyed with the appurtenances unto the said Lewis Feeback, as trustee for Catherine Shumate, her heirs and assigns forever. And the said Wilford N. Rickey and Sallie Rickey, his wife, for themselves, their heirs, executors and administrators, the aforesaid tract or parcel of land and appurtenances unto the said Catherine Shumate, her heirs and assigns against the claim or claims of all and every person or persons whatsoever, do and will forever warrant and defend by these presents. In witness whereof the said Wilford N. Rickey and Sallie Rickey, his wife, who hereby relinquishes her right of dower in and to the land hereby conveyed in this deed hath hereunto set their hands and seals the day and year first above written.

"[Signed]

W. N. Rickey.

"Sallie Rickey."

The particular question for adjudication is whether or not the grantee, Catherine Shumate (now Ogden), took an equitable estate for life, or in common, or in fee simple. The plaintiffs (appellants) contend for either the first or second construction, and the defendant (appellee) for the third.

Appellants' claim is based upon the fact that the deed in naming the parties thereto states the grantee as "Lewis Feeback," trustee for Catherine Shumate and her children, and they insist that the word "children" as used is a word of purchase, and not of inheritance, and therefore the children of Catherine Shumate were beneficiaries of the trust established by the deed, and either took with her as tenants in common or as remaindermen after the expiration of her life estate. On the other hand, the appellee Filmore Shumate, who is the vendee of Catherine Shumate, insists that, taking the deed as a whole, the word "children" is used as a synonym for "heirs," and is a word of inheritance, and not of purchase, and therefore Catherine Shumate took an equitable estate in fee simple. The granting clause of the deed is as follows: "Do grant, bargain and sell unto said Lewis Feeback, as trustee for Catherine Shumate, her heirs and assigns." The habendum is as follows: "To have and to hold the land hereby conveyed with the appurtenances unto the said Lewis Feeback, as trustee for Catherine Shumate, her heirs and assigns forever." The warranty is to "Catherine Shumate, her heirs and assigns against the claim or claims of all and every person or persons whatsoever." It is insisted that the use of the word "children" in the caption of the deed cannot control the words "heirs" and "assigns" which are used in all those parts which convey or warrant the estate. While the word "children" as a

rule, is used in deeds and wills as a word of purchase, it is not universally so. On the contrary, it is frequently used as a synonym for "heirs," and this may always be shown by or deduced from a consideration of the whole instrument wherein it occurs. The rule on this subject is thus stated in *McFarland, etc., v. Hatchett*, 118 Ky. 423, 90 S. W. 1185: "The word 'children' is a word of purchase, and not of limitation, and therefore, where property is devised or conveyed to a woman and her children, the children take as joint tenants with the mother, where there is nothing to show a contrary intention. [Authorities omitted.] But, where there are other words in the will or deed showing that the word 'children' was used in the sense of heirs, as where they are followed by the word 'forever,' and in other parts of the instrument the words 'children' and 'heirs' are used interchangeably, the term 'children' will be read as meaning heirs, and construed as a word of limitation, and not of purchase. This construction is adopted only to effectuate the intention of the maker when there is enough on the face of the instrument to show that he used the word 'children' in the sense of 'heirs.' [Authorities omitted.] On the other hand the word 'heirs' will be read as synonymous with 'children' and construed as a word of purchase, when necessary to effectuate the intention of the grantor in the deed. *Tucker v. Tucker*, 78 Ky. 503; *Harper v. Wilson*, 2 A. K. Marsh. 465. An exception to the above rule has been made in the case of a deed or will from the husband to his wife and children. These cases are held to constitute a peculiar class, and in such cases it is held that the wife takes the property for life, with remainder to the children." To the same effect is *Williams v. Duncan*, 92 Ky. 125, 17 S. W. 330.

Applying the foregoing principles to the deed under consideration, we are constrained to the conclusion that Catherine Shumate took an estate in fee simple. It will be observed that in the caption the word "children" is used as descriptive personae of the trustee; he being described as trustee for Catherine Shumate and her children. There is no intention shown in this part of the deed to convey an estate to the children of the cestui que trust, Catherine Shumate. So far as anything appears to the contrary, Lewis Feeback may have been trustee for Catherine Shumate and her children; at any rate, the conveyance was to the trustee, and he was the party named as vendee. But, when we reach those parts of the deed wherein the estate is actually conveyed, the word "children" is not used. The beneficial estate is to Catherine Shumate, her heirs and assigns or her heirs and assigns forever, as in the habendum. So that, as said before, taking the deed as a whole, we are of opinion that Catherine Shumate took an equitable estate in fee simple. This conclusion in no wise conflicts with the principle announced in

Bowe v. Richmond, 109 S. W. 359, 33 Ky. Law Rep. 173. In that case the vendees of the deed were described as Caroline Bowe and her children by A. J. Bowe, and afterwards, in the other parts of the deed, the estate was conveyed to Caroline Bowe, her heirs or her heirs and assigns forever (as in the habendum). Clearly the word "children," as used in the caption in the case cited, could not be construed as synonymous with "heirs," because the children named were limited to those begotten by A. J. Bowe, thus excluding the idea that it was used as synonymous with the general word "heirs." In addition, the court, as shown in the opinion, was largely controlled by the fact that it appeared that the father and husband, A. J. Bowe, furnished the consideration of the deed, and it was therefore inferable that he intended to make a provision both for his wife and his children by her. The case cited, therefore, falls within the exception mentioned in the excerpt from *McFarland v. Hatchett*, supra, and, as said before, it is in no wise inconsistent with the conclusion we have reached in the case at bar.

For these reasons, the judgment of the trial court in construing the deed that Catherine Shumate took an equitable estate in fee must be affirmed; and it is so ordered.

HATFIELD et al. v. FOLLOWAY.

(Court of Appeals of Kentucky. Dec. 1, 1908.)

1. MINES AND MINERALS (§ 70*)—COAL LEASE—ROYALTY—EVIDENCE.

In a suit to determine complainant's share of royalty payable under a coal lease, evidence held insufficient to sustain a finding that complainant rented his part of the land for mining purposes in order that his father and mother could rent their land for the same purposes.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 70.*]

2. RELEASE (§ 33*)—CONSTRUCTION.

Where several owners joined in a mining lease, reserving a royalty, and one of them thereafter, in consideration of \$50, disclaimed any interest in and to an advancement of royalty, amounting to \$900, paid by the manager of the lessee company to the lessors, such owner did not thereby disclaim all interest in future accruing royalties.

[Ed. Note.—For other cases, see *Release*, Dec. Dig. § 33.*]

Appeal from Circuit Court, Pike County.
"Not to be officially reported."

Action by John Followay against Albin Hatfield and others. Judgment for plaintiff, and defendants Hatfield appeal. Reversed and remanded.

York & Johnson and J. M. Robertson, for appellants. Roscoe Vanover, for appellee.

CLAY, C. Appellants, Albin Hatfield and John W. Hatfield, each own a tract of coal land on Coon's branch, in Pike county, Ky. Samuel Followay and Esther Followay joint-

ly own a tract of coal land on the same branch. Adjoining the lands of Albin and John W. Hatfield, appellee, John Followay, owns about four acres of land at the mouth of Coon's branch. The four tracts of land above mentioned go to make up the entire territory of Coon's branch. On January 31, 1902, the above-named parties all joined in a lease to A. H. Carr, R. M. McGuffin, A. I. Godfrey, C. W. J. Walker, and E. W. Cooper, by which the lessors leased the entire lands to the lessees for the purpose of mining, shipping, and transporting the coal from said lands. The consideration was the payment of a royalty of seven cents per ton for the coal mined. The lessees further guaranteed a minimum royalty of \$1,500 per year after the third year. The lease did not provide how the royalty should be divided among the lessors. This action was filed in the Pike circuit court by appellee, John Followay, for the purpose of having determined what proportion of the royalty he was entitled to. In his petition he claims to be entitled to one-fourth of the royalty. Samuel Followay and Esther Followay, the parents of appellee, made no defense. Appellants, Albin and John W. Hatfield, defended on the ground that the appellee joined in the lease alone for the purpose of enabling his father and mother, Samuel and Esther Followay, to lease their land. This was denied by reply. The trial court adjudged that appellee was entitled to one-fifth of the royalty, and appellants complain.

It appears that the various tracts of land embraced in the lease were located as follows: Appellee's tract, consisting of four acres, was at the mouth of Coon's branch; next to it lay the Samuel and Esther Followay tract; next to this lay the tract of John W. Hatfield; and in the main head of Coon's branch lay appellant Albin Hatfield's tract. It seems that the lessees would not lease the property embraced in the lease unless they could secure the tract owned by appellee. In addition to the other provisions of the lease, one clause therein is as follows: "The said John Followay agrees and binds himself not to build or allow any one to build any house or houses on said land for store, saloon, or dwelling houses, and make this reservation in the event of the sale of said land." We are of the opinion that appellants failed to show that appellee rented his four acres merely for the purpose of permitting his father and mother to rent the tract which they owned. On the contrary, we think he was given every assurance that he would be treated right by the other lessors.

It is further contended that the following writing is evidence of the fact that appellee disclaimed any interest in the royalties due under the lease: "I, John Followay, one of the original lessors of a deed given by Samuel Followay and wife, John W. Hatfield and wife, Albin Hatfield and wife, and myself and

wife, to A. H. Carr, R. M. McGuffin, A. I. Godfrey, C. W. J. Walker, and E. W. Cooper, bearing date the 31st day of January, 1902, and of record in Pike county, Ky., and assigned by them to the Blackberry, Ky. & W. Va. C. & C. Co., do hereby disclaim any interest in and to the advancement on royalty, amounting to nine hundred (\$900.00) dollars, this day paid by C. W. J. Walker, manager for said company, to said other lessors. This 30th day of April, 1904. [Signed] John Followay." It appears, however, that the lessees did not want to pay the \$900 and thereafter have a question raised as to whether the payment had been made to the proper parties. Therefore the lessees paid appellee \$50 and secured from him the disclaimer set out above. This was done merely for their own protection, and the circumstances under which the writing was signed show that it was executed for no other purpose. There is nothing to show that appellee disclaimed an interest in other royalties, and he received from the lessees the \$50 as a consideration alone for the execution of the writing referred to.

We conclude, from the whole record, that appellee is entitled to a certain portion of the royalty. How much, we think, depends altogether upon the ratio which the value of his property bears to the value of the entire property embraced in the lease. It appears that the other lessors owned about 600 acres of land. This land was worth some \$25 per acre; thus making the value of the 600 acres about \$15,000. The testimony as to the value of appellee's 4 acres of land is very conflicting. It is variously estimated at from \$150 to \$12,000. While there can be no doubt that it is valuable land, and especially so for the purpose of the lease in which it is embraced, we are of the opinion that its value was fixed by appellee's witnesses at a sum far in excess of its real worth. Taking into consideration its advantageous location, and the restriction contained in the lease upon its use by appellee, we are of the opinion that the land, for the purpose of the lease, is worth about \$1,000. This would make the value of the entire property \$16,000. We therefore conclude that appellee is entitled to one-sixteenth of the royalties provided for in the lease.

For the reasons given, the judgment is reversed and cause remanded, with directions to enter a judgment in conformity with this opinion.

CINCINNATI, N. O. & T. P. RY. CO.
v. EARLS' ADM'R.

(Court of Appeals of Kentucky. Dec. 2, 1908.)

1. RAILROADS (§ 359*)—TRESPASSERS—CARE REQUIRED.

If decedent was on a railroad track when he was struck at a place other than a crossing, the railroad company owed him no duty except

to exercise ordinary care, after discovering him in peril, to save him from injury or death.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 359.*]

2. RAILROADS (§ 400*)—CROSSING ACCIDENT—QUESTIONS FOR JURY.

Plaintiff's evidence showed that decedent was killed on a turnpike crossing; that defendant's train was running between 50 and 60 miles an hour; that it gave no signal, except the alarm whistle which was sounded an instant before the accident; and that a person on the engine could have seen decedent where he was killed for more than half a mile. Defendant's evidence showed that all required signals were given; that decedent was seen when the train was half a mile away walking on a different track from that on which the train was running; and that, just before the train reached decedent, he went on the track ahead of the engine, and that it was then too late to stop or check the train. *Held*, that the only questions for the jury were whether, after decedent was at or on the crossing, defendant's servants gave proper signals, kept a lookout, and used ordinary care; whether decedent was on the track not at a crossing; and whether there was contributory negligence, but for which decedent would not have been killed.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Instructions should be confined to the issues presented by the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

Appeal from Circuit Court, Grant County.
"Not to be officially reported."

Action by James Earls' administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

A. G. De Jarnette and John Galvin, for appellant. J. J. Blackburn and Carnes & Ernst, for appellee.

NUNN, J. This appeal is from a judgment for \$3,000 recovered by appellee for the negligent killing of his intestate. According to appellee's evidence, James Earls was killed when on the Covington & Lexington turnpike where it crosses appellant's track, just inside the corporate limits of the town of Williamstown; and appellant's train of cars that killed him was running at the time at a very rapid rate, to wit, 50 or 60 miles an hour, and did not blow a whistle or ring the bell, or give any warning of its approach to that place. There was no evidence introduced by appellee to show any customary use of appellant's track between the pike where Earls was killed and the next public crossing 300 or 400 yards south from which the train approached the pike. There was evidence showing that appellant's track at this point was in a sparsely settled portion of the town. When James Earls was struck

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he was leading a little child, and was either knocked or carried north of the turnpike crossing a distance of about 150 feet, thrown upon the right-hand side of the track, and the little girl was knocked or carried about 35 feet from the crossing, and thrown upon the left-hand side of the track. They were both instantly killed. As stated, appellee's evidence conduced to show that they were at or on the crossing when struck, and that no signals or warnings of any kind were given of the train's approach to the crossing, except the alarm whistle was sounded an instant before they were struck, and further showed that appellant's track was nearly straight for a distance south of the crossing for nearly one-half a mile, and that a person on the engine could have seen Earls at the point he was killed for more than that distance. Appellant's testimony tended to show that Earls was struck by the engine 25 or 30 yards before reaching the crossing, that all the signals for the crossing and for the station in Williamstown were given before Earls was hit by the engine. Those in charge of the engine stated that they saw Earls and the little girl when they were about one-half mile away; that they were then walking on a different track from the one on which the train was on; that, just before reaching them, they left the track and went onto the track the train was on just ahead of the engine; and that, when they discovered their peril, they could not stop or check the train and save them. This testimony was contradicted by appellee's witnesses. There was no evidence to the effect that this was an unusually dangerous crossing.

Under these facts, there were only three questions to be submitted by the court to the jury: First. If Earls was at or upon the pike crossing, did appellant's servants in charge of its train give the proper signals, keep a lookout, and use ordinary care in the approach to the public crossing for the protection of those on the crossing? Second. Was Earls on appellant's track when struck at a place other than the crossing? If so, they owed him no duty other than to use ordinary care, after discovering him and his peril, if they did so, to save him from injury or death. Third. Was there contributory negligence on the part of Earls which so contributed to his injury, and but for which he would not have received same? The instructions given by the lower court to the jury were not confined to these questions, and were therefore erroneous. On another trial, if the testimony is substantially the same, the court will confine itself in its instructions to the questions above indicated.

For these reasons, the judgment of the lower court is reversed, and the case remanded for further proceedings consistent herewith.

LOUISVILLE HOME TELEPHONE CO. et al. v. CITY OF LOUISVILLE et al.

(Court of Appeals of Kentucky. Nov. 20, 1908.)

1. MANDAMUS (§ 1*)—NATURE.

"Mandamus," as defined by Civ. Code Prac. § 477, and the courts, is a writ commanding the performance of some duty, in the performance of which the applicant for the writ is interested, or by the nonperformance of which he is aggrieved or injured.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4323-4330; vol. 8, pp. 7714, 7715.]

2. MANDAMUS (§ 23*)—NATURE—PERSONS ENTITLED TO RELIEF.

A private person, who shows a direct and special interest in himself, may apply for a writ of mandamus to enforce a public duty, though the public may be affected, and it may be the duty of the commonwealth or the public, through its officers, to act in the matter.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 55; Dec. Dig. § 23.*]

3. MANDAMUS (§ 10*)—NATURE OF RIGHTS TO BE ENFORCED.

Mandamus cannot be maintained, unless there is a legal right in the applicant for the writ and a corresponding duty imposed on the respondent.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. § 10.*]

4. NUISANCE (§ 72*)—PUBLIC NUISANCES—RIGHTS AND REMEDIES OF PRIVATE PERSONS.

A private individual can enjoin or recover damages for a public nuisance when he shows injury distinct from that suffered by the public.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.*]

5. MANDAMUS (§ 23*)—NATURE—PERSONS ENTITLED TO RELIEF—"DIRECT AND SPECIAL INTEREST."

The "direct and special interest" of a private individual which entitles him to apply for mandamus to enforce his private right in the performance of a public duty must be independent of and distinguishable from that which obtains to him in common with the general public, though it may not be necessary that such particular interest should be different in kind from that of the general public or peculiar to the individual alone.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.*]

6. MANDAMUS (§ 23*)—NATURE—PERSONS ENTITLED TO RELIEF.

An application by private individuals for mandamus to compel a city's executive board to advertise and sell a telephone franchise as directed by an ordinance providing therefor, which avers that the applicants are taxpayers, and that one of them, who owns an existing franchise, expects to purchase the new franchise, without any showing as to how their property or other legal right, or the city's property or revenue, are injured by the refusal to sell the franchise, does not show that the applicants have such private right as entitled them to the writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.*]

7. MANDAMUS (§ 148*)—PROCEEDINGS—PARTIES.

Mandamus to compel a city's executive board to advertise and sell a telephone franchise as directed by an ordinance providing therefor involves the enforcement of a public

duty, and a private individual, who is a citizen and a resident, engaged in business in the city, and, as such, interested in the execution of the law, is a proper relator to institute such proceedings for the public, when the city attorney or other representative of the commonwealth fails to act in the matter.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 289; Dec. Dig. § 148.*]

8. APPEAL AND ERROR (§ 174*)—PRESENTATION IN LOWER COURT OF GROUNDS OF REVIEW.

The objection that relators, in a mandamus proceeding for the public, did not proceed in the name of the commonwealth cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1124; Dec. Dig. § 174.*]

9. MANDAMUS (§ 154*)—PROCEEDINGS—PARTIES.

An objection that relators, in a mandamus proceeding for the public, did not proceed in the name of the commonwealth may be obviated by an amendment.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 315; Dec. Dig. § 154.*]

10. MUNICIPAL CORPORATIONS (§ 680*)—USE OF STREETS—GRANT OF FRANCHISES.

An ordinance charging the board of public works with the duty of advertising and selling a telephone franchise provided for in the ordinance, is within the power of the city council.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1460; Dec. Dig. § 680.*]

11. MUNICIPAL CORPORATIONS (§ 680*)—USE OF STREETS—GRANT OF FRANCHISES.

A municipality has the power to maintain and operate plants, and use the public streets, for furnishing public utilities, such as water, light, and telephone service, for itself and to its inhabitants, and it may discharge such power by others, upon such terms as may be agreed upon in the form prescribed by law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1460; Dec. Dig. § 680.*]

12. FRANCHISES (§ 1*)—NATURE OF RIGHT.

What is commonly termed the "granting" of a franchise by a city for a public utility, such as a telephone franchise, is in the nature of a contract by the city with the grantee for the performance of a public service, and the primary object is not the revenue to be obtained for the city, but the securing of efficient service upon such terms as will promote the greatest good.

[Ed. Note.—For other cases, see *Franchises*, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2929-2941; vol. 8, p. 7666.]

13. MONOPOLIES (§ 6*)—VALIDITY OF GRANTS—FRANCHISES.

That an ordinance for the public sale of a telephone franchise to the owner of an existing franchise eliminates the owner of another franchise as a bidder at the sale does not render it repugnant to Const. § 164, prohibiting monopolies; the purpose of the ordinance being to preserve effective competition.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 6.*]

14. MUNICIPAL CORPORATIONS (§ 871*)—DEBTS—RELEASE—GRANT OF FRANCHISES—VALIDITY.

The relation between a city and the owner of an existing telephone franchise being quasi contractual for the performance of a service, an ordinance modifying the terms of the franchise for the purpose of securing more effective

service in competition with the owner of another franchise is not invalid as releasing an indebtedness or liability to the municipality in violation of Const. § 52.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 871.*]

Hobson, Nunn, and Carroll, JJ., dissenting in part.

Appeal from Circuit Court, Jefferson County.

"To be officially reported."

Mandamus by the Louisville Home Telephone Company and another against the City of Louisville and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Helm & Helm, Helm Bruce, and Kohn. Baird, Sloss & Kohn, for appellants. A. E. Richards, A. B. Bensinger, and Dodd & Dodd, for appellees.

LINDSEY, J. The case presented by the record is an application by the Louisville Home Telephone Company and John Coleman against the city of Louisville and certain named persons, who constitute the "board of public works" of said city, for a writ of mandamus to compel such "board of public works" to advertise and sell at public sale a certain telephone franchise in said city, claimed to have been provided for, and its advertisement and sale directed to be made by such board, by an ordinance of the general council of said city, alleged to have been duly passed by both boards of the general council of said city, and to have become obligatory without the mayor's signature on May 26, 1908. The plaintiffs or applicants, as required by section 474, Civ. Code Prac., filed a petition stating the cause and ground of the application, to which the defendants or respondents filed general demurrers, and, not waiting the demurrers, also filed answers.

The demurrers to the petition raise primarily the question whether or not the facts stated in that pleading show a right in the applicants to the writ against the appellees, the members of the "board of public works." This question may be considered from two aspects, the one as to the right of the appellants, under the facts, to sue for and obtain the writ, and the other as to the liability, so to speak, of the appellees, constituting the board of public works, to the writ. It is contended for the appellants that they are proper applicants for the writ, not only because of their private right in the relief sought, but also because there is involved a public right, and the object is the enforcement of a public duty. Obviously the determination of the questions presented involves the consideration of the nature and purpose of the writ of mandamus, the character of the right of the applicant entitling him to obtain it, and against whom the writ may issue. Mandamus is, by section 477, Civ. Code

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Prac., thus defined: "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do in act, the performance or omission of which is enjoined by law; and is granted on the motion of the party aggrieved, or of the commonwealth when the public interest is affected." This statutory definition does not differ materially from those given by the law writers and the courts. Ency. P. & P. vol. 13, p. 487; *Legg v. Annapolis*, 42 Md. 203. In the case just mentioned the court concisely said: "It is a writ commanding the performance of some act or duty, therein specified, in the performance of which the applicant for the writ is interested, or by the nonperformance of which he is aggrieved or injured." It is evident, then, that there must be some right which is affected by the performance, or nonperformance, of the act sought to be compelled or restrained; and, if that right is in the public, and the object is the enforcement of a public duty, the commonwealth, or the public in some form, should be the applicant for the writ, but if the right to be affected be merely that of a private person, that person must be the applicant, and that the performance, or nonperformance, as the case may be, of the act must be a duty which the law enjoins upon the respondent to the writ.

As to the interest required on the part of an individual to make him a proper party to apply for such writ, there is some conflict in the authorities. In Ency. P. & P. vol. 13, p. 630, the author writes: "In the greater number of states it is held that a private relator applying for a writ of mandamus must show some special interest in himself." While in the extended note to the case of *Dane v. Derby*, reported in 89 Am. Dec., the annotator, on page 471, says: "The doctrine supported by the great weight of authority is that, where the relief sought is merely private, the relator must show some special interest in the matter; but, where the question is one of public right, and the object the enforcement of a public duty, he need not show that he has any special interest in the result. It is in that case sufficient for him to show that he is a citizen, and, as such, interested in the execution of the laws (citing authorities). Other courts hold that the relator must show a special interest in the subject-matter of the proceedings." And in Ency. P. & P. vol. 13, p. 632, it is said: "In some instances a distinction has been made between public duties due the state in its sovereign capacity and those public duties affecting all, or a large number, of the citizens. When the duty is of the latter kind, it is held that a private citizen may be the relator in a mandamus proceeding to enforce it"—citing, among other authorities, the case of *Union Pac. R. Co. v. Hall*, 91 U. S. 843, 23 L. Ed.

428. In the case last mentioned the Supreme Court wrote: "There is, we think, a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer." It is, we think, definitely settled by the decisions of this court that, though the public interest may be affected, and it may be the duty of the commonwealth or the public, through some of its agencies, to act in the matter, yet, a private person, who can show direct and special interest in himself, may apply for and obtain a writ of mandamus. *Hammar v. City of Covington*, 60 Ky. (3 Metc.) 494; *Trustees of Catlettsburg v. Kinner*, 76 Ky. (13 Bush.) 334; *Register Newspaper Co. v. Yelser*, 117 Ky. 1013, 80 S. W. 478; *Merchants' Police, etc., Co. v. Citizens' Tel. Co.*, 123 Ky. 90, 98 S. W. 642.

As to the character of right entitling an applicant to the writ of mandamus, the authorities are to the effect that it must be a clear, complete, and existing legal right. Ency. P. & P. vol. 13, pp. 496, 497; Cyc. vol. 26, pp. 151, 153, 154. Or in the language of this court: "Mandamus cannot be maintained unless there is a legal right in the appellant, and a corresponding duty imposed by law on the appellee." *Lowe v. Phelps*, Judge, 77 Ky. (14 Bush) 647. When it is considered that the public rights and duties enforceable by mandamus are of such great variety, and that the measure of the interest of a private individual therein to entitle him to invoke that remedy must, of necessity, largely depend upon the nature of the right or duty sought to be enforced in each particular case, it is readily seen why the authorities have not, and possibly cannot, lay down any general rule as to what constitutes an interest sufficient to entitle a private individual to institute mandamus proceedings to enforce a public right or compel the performance of a public duty.

In each of the cases of *Catlettsburg v. Kinner* and *Hammar v. Covington*, supra, the effect of the holding, in an opinion by Lindsay, Chief Justice, was that abutting property holders on a public street, by reason of their peculiar and particular right in the use of the street as a means of ingress and egress to and from their properties, and the apparent danger to their properties, distinguishable from the right in the general public to the use of the street as a highway, had such direct and special interest as entitled them to a writ of mandamus to compel the preservation and repair of the street by those upon whom the law placed that public duty.

The case of *Register Newspaper Co. v. Yelser*, supra, cited in the brief of counsel, was where the newspaper company was, by due selection and appointment, the official newspaper of the city of Paducah, and as such was required and entitled to publish,

at its regular rates for advertising, all ordinances, resolutions, notices, etc., which, under the charter or ordinances of the city, were required to be published. There were certain delinquent tax lists, which the law required should be sold at public auction, the lists and the notice for the sale thereof to be published for at least two weeks in the city's official newspaper. The city official charged with the duty of furnishing such lists and notice for publication failed and refused to do so. This court held that the Register Newspaper Company could, by mandamus, compel the city's official whose duty it was to furnish the delinquent tax lists and notice of sale for publication. Thereby, in effect, holding that the newspaper company had direct and special interest in having for publication and advertisement the delinquent tax lists and the notice; such interest being clearly its legal right to advertise the lists and the notice for their sale, and to receive therefor pay at its regular rates for advertising.

The case of the Merchants' Police & Telegraph Company v. Citizens' Telephone Company, *supra*, was where the appellee had a telephone franchise, obtained from the city in accordance with the provisions of section 164 of the Constitution, and appellants did not purchase a telephone franchise as provided by that section of the Constitution, but was operating its telephone plant in the city without authority of law, under an attempted grant to it by the city council, which, being void, conferred no right whatever. This court held that the appellee, as a citizen and taxpayer in the city, had the right by action to put an end to the wrong so perpetrated by the council, by stopping appellant from further acting under the illegal grant. Why? The court in the opinion gives the answer. The appellee was interested, as was each and every other taxpayer, in preventing loss to the city by the illegal gift of a valuable franchise, which, if sold, would increase the city's revenues and thereby lessen the amount necessary to be raised by taxation.

The relation of private individuals to common or public nuisances may be referred to as analogous to the question being considered. This court has repeatedly held that private individuals can enjoin, or sue to recover, damages for an act constituting a common or public nuisance when they show that they will receive, or have received, injury distinct from that suffered by the public. *Gleason v. Schneider*, 7 Ky. Law Rep. 834. *Maysville & Mt. Sterling T. P. Co. v. Ratcliff*, 85 Ky. 244, 3 S. W. 148. *Beckham, etc., v. Brown, etc.*, 40 S. W. 684, 19 Ky. Law Rep. 519. The rule deducible from these and kindred cases from this court, and sustained, we think, by the weight of authority at large, is that the "direct and special interest" of a private individual, which would entitle him

to apply in his own behalf for and obtain a writ of mandamus to enforce his private right, must be independent of and distinguishable from that which obtains to him in common with the general public or to the mass of the community; though it may not be necessary that such particular interest should be different in kind from that of the general public, or peculiar to the individual alone.

In the case here in hand the "cause and ground" of the application are the averments, in substance, as follows: That each of the applicants is the owner of real and personal property in the city, a taxpayer to the city, and engaged in business therein; that the applicant John Coleman is a citizen and resident of the city, and the applicant the Louisville Home Telephone Company is the owner and operator of a telephone plant in said city; that the ordinance exhibited was duly passed, etc., and became obligatory without the signature of the mayor; that by the terms of such ordinance it is made the duty of the "board of public works" of the city of Louisville to advertise and sell the franchise (in the ordinance provided) for the acquisition and operation of a telephone system in the city; that the applicants have demanded of the defendants, named as the board of public works of the city, "to proceed with the advertisement of sale, and with the sale, and have also demanded of the city, through its chief executive officer, the mayor thereof, to cause said advertisement to be made, but said defendants have refused thus to proceed, and have announced that they do not intend to advertise or sell said franchise"; and that "plaintiff the Louisville Home Telephone Company has a special interest in the sale of said franchise, because it expects and intends to become a bidder for said franchise, when sold by the board of public works," and hopes to become, and believes it will become, the purchaser thereof, and it desires to have the opportunity of thus acquiring the franchise for the operation of a telephone plant in the city of Louisville, in accordance with the terms set forth in the ordinance." Under the rule above stated, do these, the only facts alleged as the "cause and ground" of their application, show any "direct and special interest" in appellants, separate and apart from the general public, in having the telephone franchises contemplated by the ordinance advertised and sold? It is insisted by counsel in argument that they do, because it is alleged that the applicants each are taxpayers to the city, and cite as authority for the contention the cases above referred to, of *Register Newspaper Co. v. Yeiser and Merchants' Police & Telegraph Co. v. Citizens' Telephone Company*. In the first-mentioned of these cases there was no claim of right because the newspaper company was a taxpayer, or a citizen of, or engaged in business in, the city; but, as

stated above, the "direct and special interest" of that company was by reason of its contract right to do the advertising and receive the compensation therefor. In the other case this court held that the party applicant, a taxpayer, was directly interested to prevent loss to the city by an illegal gift of a valuable franchise, which, if sold legally, would increase the city's revenue, and thereby lessen the amount necessary to be raised by taxation.

Here, in the pleading being considered, no averment is made as to how, or fact stated by which, it is made to appear that appellants' property or other legal right, or the property or revenue of the city, are injuriously affected by the failure and refusal of the appellees, constituting the board of public works, to advertise and sell the franchise. It is not even alleged that the sale of the franchise would be of pecuniary benefit to the city. It may be argued that, if the franchise be sold, to the extent of the purchase price it brings the revenues of the city would of necessity be increased, and that thus, under the authority of the case of *Merchants' Police & Telegraph Company v. Citizens' Telephone Company*, the "definite and special interest" of appellants as taxpayers is manifest. But is it true, or is it correct to assume, that by the sale of this franchise, under the terms of the ordinance exhibited, the revenues of the city would of necessity be increased? It appears from the application, and the ordinance exhibited and made part thereof, that the applicant the Louisville Home Telephone Company is now conducting a telephone plant under a franchise purchased from the city, which franchise has yet some years to run, and under the terms of this ordinance, if it becomes the successful bidder for the franchise, the sale of which is now sought to be compelled, then the former franchise is to be void, and all obligations to the city thereunder be also void. And the averment in the pleading being considered is that it, the Louisville Home Telephone Company, "expects and intends to become a bidder for said franchise * * * and hopes to become, and believes it will become, the purchaser thereof." Such being the situation, it will readily be seen that it is altogether problematical as to the effect the proposed sale of the franchise, if consummated, would have upon the revenues of the city. But the pecuniary advantage is not the only, or the most important, consideration in matters like those here under consideration. Efficient and reliable service, at reasonable rates, is far more important, and is the direct object to be obtained rather than the mere purchase price. We do not think that the appellants have by their pleading shown in themselves such private right as entitled them to obtain the writ in this case.

However as has been stated, the appellants contend that, even if they have not the requisite mere private right to entitle them to

the writ sought in this proceeding, they, being citizens and residents of, and engaged in business in, the city, and as such interested in the execution of the law, have the right as relators to bring the matter before the court. Clearly the ordinance exhibited with the petition imposes upon the board of public works of the city of Louisville the duty of advertising and selling at public sale the telephone franchise in the ordinance provided. In this day efficient telephone service is so essential, not only in the conduct of private business in the cities, as well as in the rural districts, but is also so important in the management and conduct of the business and government of cities, that its proper installation and maintenance and service constitute a matter of decided public interest. The question in this case is therefore one of public right, and the object is the enforcement of public duty. And, as we have seen from the authorities quoted supra, in such state of case a relator in a mandamus proceeding need not show that he has any special interest in the result, but it is sufficient for him to show that he is a citizen and resident, and engaged in business in the city, and as such interested in the execution of the law, and that, inasmuch as the public duty here sought to be enforced is not one due to the state in its sovereign capacity, the decided preponderance of American authority is that private persons may move for a mandamus to enforce such public duty. 13 Enc. P. & P. 632; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428; *State v. Weld*, 39 Minn. 426, 40 N. W. 561; *Chicago, etc., R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824. It is true that the Code provision is that the writ of mandamus is granted on the motion of the commonwealth when the public interest is affected. And it is usual for the commonwealth or the public to take action in such matters through its selected officer. But there is no such limitation in the statute. And in the present case the fact that the officer, whose duty it is usually to enforce the public's rights in the city, and represent the same in the courts, is, in the performance of his official functions as adviser of the city officials, and with unquestioned good faith upon his part, placed in the adverse position of attorney for the respondents in this application raises the question, Does the failure or refusal of the city attorney, or other representative of the commonwealth, to seek the enforcement of this public duty preclude its enforcement?

The facts in the case of *People ex rel. Ayres v. State Auditors*, 42 Mich. 428-430, 4 N. W. 274, were, in many respects, similar to the case at bar. There a state statute, it was contended, imposed upon the State Auditors the duty of advertising for and receiving proposals for printing the decisions of the Supreme Court of that state. The auditors thought the statute not operative at the

time. The relator was, by reason of his being engaged in the business of printing, etc., a competent bidder, and desired to become a bidder for the printing and publishing of the reports. It being claimed by the respondents that if they had done any wrong they were guilty of a public wrong, and not a private wrong, and that only the representative of the state could complain of their misconduct, the question arose whether the court would allow a private relator to complain of the alleged omission of duty. The court said in part: "In the present case the officer whose duty it usually is to enforce the rights of the state in this court, in the performance of his official functions as adviser of the state officers, placed himself in an adverse position, and appears for the respondents on this application. Inasmuch, then, as the Attorney General refuses to appear and seek the enforcement of the statutory provision, does his refusal preclude its enforcement? And if not, is the relator authorized to bring the matter before this court? There may perhaps be others who have interests that would justify their appearance, but there is no one else whose duty it is to appear where the Attorney General declines to do so. It cannot be said that relator has any greater legal interest than other citizens, if the application must be made by an interested party. But if any party not actually interested may become relator or reformer, then the fact that he is engaged in business which would make him a competent bidder, and that he desires to become a bidder if the interest is set up for competition, removes him from the position of an officious interloper, and gives sufficient assurance that the controversy is genuine and in good faith. The rule which rejects the intervention of private complainants against public grievances is one of discretion, and not of law. There are serious objections against allowing mere interlopers to meddle with the affairs of the state, and it is not usually allowed, unless under circumstances where the public injury by its refusal will be serious. In the cases of *People ex rel. Drake v. Regents of the University*, 4 Mich. 98, and *People ex rel. Russell v. Inspectors of the State Prison*, Id., 187, the court took pains to guard against any decision that would prevent complaint by a private relator where the public interests require prompt action, and where the public prosecutors will not interfere. There is, as there shown, more liberality in some states than in others. But we find no reason to consider the matter as one lying outside of judicial discretion, which is always involved in mandamus cases concerning the relief as well as other questions."

It may be urged that, even if the appellants are proper relators to institute this proceeding for the public, they should, under the statute, have proceeded in the name of the commonwealth, as the representatives of

the public by them as relators—a form of procedure used in the case last above quoted from. That is a matter of procedure only, objection to which was not made by special demurrer in the court below, where, if deemed necessary, it might have been changed by amendment; and the point should not be regarded in this court. And it seems that in the case of *Union Pac. R. Co. v. Hall*, supra, which had the sanction of the Supreme Court, the form of procedure adopted in this case was used. Concurring in the rule announced by the authorities above cited, this court is of the opinion that the appellants are proper relators in behalf of the public, to apply for the writ of mandamus sought in this case. The enactment of an ordinance of the character of the one presented here was clearly within the province and power of the general council of the city. It was for that body in its discretion to determine, and in such form to promulgate, whether it would sell the franchise, and the terms upon which it should be sold; and it was entirely proper for it, in the ordinance, to charge the board of public works, the city's executive board having charge of and supervision of the use made of the streets and public ways of the city, over which and through which the franchise would have to be exercised, with the duty of advertising and making the public sale as directed.

In considering the demurrer to the petition it remains to be seen if the ordinance contravenes the Constitution in the particulars suggested in argument. It is contended for the appellees that the ordinance is in violation of section 52 of the Constitution, which reads: "The General Assembly shall have no power to release, extinguish or authorize the releasing or extinguishing in whole or in part the indebtedness or liability of any corporation or individual to the commonwealth, or to any county or municipality thereof." The proposition advanced by appellees' counsel is that the published ordinances of the city—of which this court must take notice—show that the appellant telephone company is now operating in the city under a franchise legally obtained, by the terms of which the company is required to pay annually to the city the sum of \$1 for every telephone service or instrument in excess of 6,000, and to furnish telephone service at certain stipulated rates. And this it is argued, constitutes a contract liability, from the company to the city, which the latter is powerless, under the section of the Constitution quoted, to release, that by the terms of the ordinance here involved the appellant telephone company is permitted to become a bidder for the franchise to be sold, and expects to become the successful bidder therefor, and in the event that it does become the purchaser the present franchise, under which it is now operating, is to "become null and void, and be forfeited and

surrendered to the city of Louisville, and all obligations created by the ordinance granting the same, or acceptance thereof, shall immediately cease and determine," and that by this ordinance the telephone rates are materially increased, which will, it is claimed, operate to release a liability from the telephone company to the city. It does not appear from the petition that the company is indebted to the city at present in any amount, or that the company has installed any telephone service or instruments in excess of the 6,000. But it is stated in the brief of counsel, as alleged in the answer, that under that provision in the franchise now being operated under, the city is receiving annually over \$2,000, and the franchise has over 30 years to run. It is also contended that the ordinance here involved contravenes section 164 of the Constitution. The ground of this contention is not made plain, further than it is argued that, because the Bell system of companies, of which the Cumberland Telephone & Telegraph Company, now legally operating in the city, is a constituent member, is excluded as a competitive bidder, a sale of the franchise under the ordinance will not be a public sale within the meaning of the section of the Constitution indicated.

In considering these two propositions it may, we think, be proper to view the relation of a municipality to public utilities such as water, light, and telephone service. Because of their potency and usefulness in promoting and preserving the health, security, and comfort of the public, and of the aid they afford in the conduct of the business and administration of the municipality itself, such utilities have long been regarded as essential governmental agencies and important aids to the police power. A municipality has the power and right to erect, maintain, and operate plants, and use the public streets for furnishing such utilities for the municipality itself and to its inhabitants. Such power or duty it may discharge by having others perform them for it upon such terms as may be agreed upon in the form and manner prescribed by law. What, therefore, is commonly termed the "granting" of a franchise by a city for one of these public utilities is in the nature of a contract by the city with the grantee for the performance of a public service. Such, in part at least, seems to have been the view of this court in the opinion in the case of *Cumberland T. & T. Co. v. City of Hickman*, decided June 10, 1908, 111 S. W. 811, where the court, in speaking of a telephone franchise, said: "This right which is most akin to a right of way, is the subject of grant, which partakes, in turn, of the nature of a contract." From this view of the subject it will readily be seen that the primary object a city would have, in contracting for or securing the service of such utilities, is not the revenue to be obtained for the city, but

the securing of good and efficient service, and upon such terms as will, in the judgment of the city's governing body, promote the greatest good, not alone to those who use the utility, the telephone for instance, but to the entire community, including the city government. For obtaining the end just mentioned, the value of competition in such service to the public is not only recognized, but is emphasized, by this court in *Stites v. Norton*, 101 S. W. 1189, 13 L. R. A. (N. S.) 474, where it was held that it was the duty of the city to establish a competing plant. In that case, as in this, the owner of a then existing franchise was eliminated as a bidder at the proposed sale. This court then said: "This duty was of equal dignity, and as binding upon it [the city] as that of selling the franchise to the highest and best bidder, and it had the right, in our opinion, to so frame the ordinance as to accomplish the purpose of obtaining a competing plant." And again, further on: "Section 164, as construed, is but a part of the general scheme of the Constitution to prohibit and break up monopolies." And we may say in this case that to make competition effective, and in such form preserve it, is as much a duty as to establish it. And as such seems to be the plain purpose in this ordinance, we do not think the ordinance is repugnant to section 164 of the Constitution.

The relation between the city and the appellant telephone company being, as we have seen, quasi contractual and for the performance of a service, can it be said that section 62 of the Constitution, above quoted, prevents the city, with the consent of the company, from so modifying the terms for such service as will, in the judgment of the city's governing body, permit and secure effective service in competition with the Cumberland Telephone & Telegraph Company? We do not think so. This section of the Constitution was before this court for construction in the cases of *City of Louisville v. Louisville Ry.*, 111 Ky. 19, 63 S. W. 14, 98 Am. St. Rep. 387, *Commonwealth v. Tilton*, 111 Ky. 342, 63 S. W. 602, and *Nat. Bank of Lebanon v. Commonwealth*, 118 Ky. 51, 80 S. W. 479, 81 S. W. 686. There the liabilities attempted to be compromised or released were fixed demands; that in the first mentioned case being for taxes, fixed by the regular assessment of property, and in the hands of the collecting officer. The court held that the section of the Constitution forbade a compromise of such fixed moneyed liabilities due to a city, county, or the state. But in the first mentioned of those cases this court expressly said: "We do not mean to hold that an unlimited [unliquidated] demand, by or against the city, cannot be compromised, but we think that, when the liability to the city is fixed, it cannot be relinquished in whole or in part." As said by counsel in the brief, the right of the state, and of its politi-

cal subdivisions, to exercise the right to contract, and to modify or change the contractual relation with the consent of the other contracting party, is an important one, and should not be limited. "That it may be abused is no argument against its existence. It was the exercise of this power which was upheld by this court in the case of *Cumberland T. & T. Co. v. City of Hickman*," supra. An examination of the proceedings had in the constitutional convention, as shown by the published debates (volume 3, pp. 3896, 4313; volume 4, pp. 5564, 5686, 5687), resulting in the adoption of the section as it now reads, discloses that section 52, as originally drafted and proposed, inhibited the release or extinguishment, in whole or in part, of "the contract, indebtedness, liability, or obligation, of any corporation or individual to the state, or to any county or municipality thereof." Subsequently, on revision, the words "contract" and "obligation" were stricken out, by which the restriction of the power of release or extinguishment was limited to "the indebtedness or liability of any corporation or individual" to the state or county or municipality. And in that form the section was adopted and is now in force.

Aside from the conviction that is impressed upon the mind by the elimination of the words "contract" and "obligation" from the section, that there was no purpose by the language left remaining to limit or restrict the right of the state, the counties, or the cities thereof in the power and right to contract is negated by the intent declared at the time, when in the debates the reason for the change is given in this language: "We did not think it was proper to say that the Legislature should not have the power to release a person from a contract, provided both the Legislature and the other party desired to be released from it. Our intention was to provide that they should not be released from liabilities incurred, whether by contract or subsidy; but we do not believe that, if one Legislature should make an unwise contract, and the people see it was unwise, and that the next Legislature, both the people, through their representatives, and the party with whom the contract was made, desired to be released, it should not be done. In other words, we do not want to get in the fix that they are in in Tennessee. They made a contract, and now both sides are willing to do away with its contract, and yet they cannot." And with that declaration of its purpose, the section was adopted.

As the judgment of the court below was based entirely upon its idea of the insufficiency of the petition, this court has only considered the questions arising upon the demurrer to the petition.

For the reasons stated, we are of the opinion that the court below erred in sustaining appellees' demurrers to the petition, and in dismissing appellants' petition. The judgment appealed from is reversed and re-

manded for further proceedings consistent with this opinion.

Special Judges EDELEN and LINDSEY sat in lieu of Chief Justice O'REAR and Judge LASSING, declining to sit. HOBSON NUNN, and CARROLL, JJ., dissent in part.

CARROLL, J. (dissenting). I concur with a majority of the court in holding that the appellants had a right to institute and maintain this action, and in a proper case obtain the relief sought. But, being of the opinion that the ordinance in controversy is invalid, I have considered it proper, in view of the importance of the public questions involved, to put on record my reasons. An answer as well as an intervening petition was filed, but as the case went off in the court below upon a demurrer to the petition, and the majority opinion only deals with the sufficiency of the petition, I will confine what I have to say to the questions that arise upon a consideration of this pleading. One of these questions—that involving the right of the city council to enact an ordinance relieving the Home Telephone Company of the obligation it assumed, in the franchise granted to it in November, 1900, to pay to the city a stipulated amount upon each telephone in use in excess of 8,000 telephones—was considered by the court, and it was held in the majority opinion that this contract obligation upon the part of the company was not a liability within the meaning of section 52 of the Constitution. Another question presented by the petition is whether or not the ordinance afforded free and equal opportunity, within the meaning of section 164 of the Constitution, to all persons who might desire to bid for and purchase the franchise, and it was ruled that it did. And yet another, the right of the council, independent of the Constitution, to cancel a contract beneficial to the city and its inhabitants. The majority opinion does not discuss the last-mentioned feature of the ordinance, although it is material in the disposition of the case, and may with propriety be considered in determining the sufficiency of the petition, as the courts may take judicial notice of city ordinances.

Section 2775 of the Kentucky Statutes of 1903, which is a part of the charter of cities of the first class, provides in part that: "The courts of this commonwealth shall take judicial cognizance of the ordinances of the city, and the printed copy officially published by the city may be read as evidence in any trial in which the same may be competent evidence without proof of the passage and approval of said ordinance." So that, although the ordinance of November, 1900, granting a franchise to operate a telephone system in the city of Louisville, which franchise was purchased by the Home Telephone Company, is not a part of or noticed in the petition, it may be considered in connection

with it. The franchise purchased by the Home Telephone Company under the ordinance of 1900 gave it the right to maintain and operate in the city a telephone system for a period of 20 years, and among other things, stipulated: "That when the purchaser of said franchise or privilege, or his assigns, in the operation of said telephone plant or system, shall have in use within the city of Louisville six thousand (6,000) instruments furnishing telephone service, to six thousand (6,000) persons, firms or corporations, then the said owner or owners of said telephone plant or system shall pay to the city of Louisville, in addition to all municipal taxes, the sum of one (\$1) dollar per annum for every such additional telephone service or instrument in excess of six thousand (6,000), which payments shall be made semiannually on January 1 and July 1 of each year to the city treasurer, and it shall be the duty of the purchaser or owner of said franchise or privilege, or his assigns, on the first days of January and July of each year, commencing with the first day of January after the completion of said plant and putting the same in operation, to make a report to the city comptroller, which shall be in writing and sworn to by the president of the company or the general manager or the owner of said telephone system, and shall set forth therein the number of its patrons and the number of the telephone instruments it has in use at the date of each of said reports. All rentals shall be payable quarterly in advance." It further fixed the maximum rates which could be charged for the use of telephones, providing in section 6 that: "The rates to be charged by the person, firm or corporation owning or exercising the franchise or privilege aforesaid for the use of their telephones shall not exceed the following schedule, to wit: Forty-eight (\$48) dollars per year for each business telephone on an individual wire with metallic circuit wherever located within the city limits; for each residence telephone on an individual wire with metallic circuit within a radius of one mile from the courthouse in said city, twenty-four (\$24) dollars per year; for each residence telephone on an individual wire with metallic circuit within a radius of two miles of the courthouse and exceeding one mile therefrom, within the city of Louisville, thirty (\$30) dollars per annum; for each residence telephone on an individual wire with metallic circuit within the limits of the city of Louisville and outside of said radius of two miles from the courthouse, thirty-six (\$36) dollars per year. On extension desk telephones the rate shall not exceed twelve (\$12) dollars per annum, and for installing extension bells five (\$5) dollars each." The ordinance in controversy provides in section 6 that: "Should the franchise herein ordered to be sold be at any time acquired by any person who at the time of such acquisition already owns a

telephone franchise previously granted by the city of Louisville, such previously granted franchise shall immediately upon the acquisition of the franchise herein ordered to be sold become null and void, and be forfeited and surrendered to the city of Louisville; and all obligations created by the ordinance granting the same or acceptance thereof shall immediately cease and determine." It is also provided in section 10 that: "The rates to be charged by the owner or operator of such system shall be for a business telephone not more than seven dollars; for a two party line business telephone not more than four dollars; for a single residence telephone not more than three dollars and a half; for a two party line residence telephone not more than two dollars and a half."

It will be thus observed that if the Home Telephone Company should become the purchaser of the franchise under the new ordinance, thereupon, and by reason of its purchase, its obligation and liability, under the franchise that it owns and is now operating, to pay to the city \$1 per annum for every telephone in use in the city in excess of 6,000 would be at once extinguished, and it would be relieved of this burden, and the city deprived of the revenue, whatever it may be, derived from this source. In addition thereto it will be noticed that the old franchise bound it for the term of 20 years to furnish telephones at a price not exceeding \$4 per month to business houses, and at a price not exceeding \$2 per month to residences, while the new ordinance permits the purchaser of it to charge \$7 per month for a business telephone, and \$4 for a residence telephone. So that, if the franchise under the new ordinance is purchased by the Home Telephone Company, the city of Louisville will lose the revenue it may reasonably expect to derive from the use of telephones in excess of 6,000, and the citizens and taxpayers of Louisville will be required to pay almost twice as much for telephone service furnished by the Home Telephone Company as they do under the existing ordinance. It is therefore manifest that the ordinance offering this new franchise for sale was not enacted for the benefit of the city of Louisville or the citizens and taxpayers thereof, but on the contrary, its adoption was detrimental to the city and the citizens. It is further apparent that the only person benefited, or intended to be benefited, by the new ordinance is the Home Telephone Company.

Setting aside for the present the question whether or not the obligation of the Home Telephone Company under the old franchise is a liability within the meaning of section 52 of the Constitution, and the further question whether or not the ordinance is a fair and equal one within the meaning of section 164 of the Constitution, I will take up the proposition whether the municipal boards of

a city that have entered into a valid contract, admitted to be beneficial to the city and its inhabitants, can subsequently, by the consent of the other contracting party, cancel the contract and exonerate the other party from all obligations assumed under it to the city and its people. In support of the proposition that municipal authorities, in the exercise of the power vested in them by the statute to contract and be contracted with, may modify or annul any contract they have made, by the consent of the other contracting party, the argument is made, first, that if it is competent for the municipal authorities to enter into a contract, it is also within their power to annul or modify the contract, with the consent of the other contracting party; and, second, that if this power was denied, a city would be disabled from annulling or modifying, by consent of the parties, a contract that experience or time had proven to be disadvantageous or undesirable to both; that this condition of affairs might impose upon the people of a city onerous burdens, from which they could not be relieved until the expiration of the contract period, although both the contracting parties were willing to make a change. I do not, of course, deny that municipal authorities, within the scope of the power granted to them by the statute, may enter into contracts, nor do I maintain that municipal authorities may not, by the consent of the other contracting parties, modify or cancel a contract that time or experience or other reason has shown to be disadvantageous to the people of the city, or that was entered into under a mutual mistake. And I agree that the presumption must be indulged that the boards will act within their powers for the best interests of the city, and discharge with sound judgment and fidelity the duties of their office, and, further, that the courts ought not to undertake to control their discretion, in municipal affairs, unless it is made clearly to appear that they have exceeded their authority or have acted fraudulently or corruptly. My position is that municipal boards occupy a position of trust; that they are agents and servants of the people of the city, and must perform their duties with fidelity to the welfare and interest of the people they represent for the time being; that their powers are delegated and limited; that although they may enter into contracts and, in certain states of case, cancel or modify them for a valuable and sufficient consideration, or in cases where a mutual mistake was made, yet they cannot modify or cancel to the detriment of the people, whose agents they are, a beneficial or advantageous contract, made with an individual or corporation, solely for the advantage of such person or corporation. To sanction a power like this would be giving to municipal boards authority not granted to any other agent or trustee; and when it is attempted, the courts have the same power to interfere and

control as they do in any case where the trustee or agent is exceeding his power. And I rest my argument on the right of the court to interpose upon the ground that the council, in the enactment of so much of the ordinance as exonerated the Home Telephone Company from its liability and obligation, exceeded its power as much, although in a somewhat different way, as was attempted by the council that undertook to relieve the city railway company from the payment of taxes, but was prevented by this court in the case of *City of Louisville v. Louisville Railway Company*, 111 Ky. 1, 63 S. W. 14 98 Am. St. Rep. 387.

When the bid for the franchise offered for sale under the ordinance of 1900 was accepted by the council, a valid and binding contract was entered into between the city and the Home Telephone Company for a term of 20 years. This contract neither party, under the facts presented, could modify or cancel without the consent of the other. Page of Contracts, § 1756. While admitting the correctness of this proposition, it is nevertheless confidently asserted that, as any kind of a contract may be altered or annulled by the consent of the contracting parties, so may a contract entered into by and with a municipality. Therefore the argument is made that, as the council and the other contracting party have consented to a cancellation of the contract, the courts have no authority to interfere; that the matter is entirely within the power and discretion of the council, and the council is to judge unrestrained of the necessity or reason for its cancellation and its acts are final and conclusive. In support of this contention counsel cite *Bean v. Jay*, 23 Me. 117, *Nelson v. Milford*, 7 Pick. (Mass.) 18, *Meech v. Buffalo*, 29 N. Y. 198, and section 477 of *Dillon on Municipal Corporations*, where the author, supporting his views by the cases supra, states that: "Growing out of its authority to create debts and to incur liabilities, a municipal corporation has power to settle disputed claims against the city, and an agreement to pay these is not void for want of consideration. If it has obtained a contract, which by mistake or a change of circumstances it deems to operate oppressively upon the other party, an agreement to make an additional compensation or to modify or annul it is not invalid for want of consideration." The case of *Meech v. Buffalo* is the only one of the three that is at all in point, and it does not decide the question presented in this case. There it appeared that the city ordered the construction of a sewer, and simultaneously determined that the amount to be assessed for the expense of the same be the sum of \$1,058, and directed the city assessor to assess the same upon the real estate benefited by such improvement, and the amount was so assessed. Afterwards the corporation contracted with one Randolph to construct the sewer for \$1,058.

and Randolph gave security for the performance of the contract on his part. While prosecuting the work, but before its completion, he struck and touched a bed of quicksand below the surface of the earth, of great extent, and directly in the line of the sewer, the existence of which was therefore unknown to both the contracting parties, and could not have been anticipated by either of them. The existence of the quicksand increased the expense of the construction of the sewer to such an extent that it was impossible for Randolph to construct the same for twice the amount of the contract price. Whereupon he stopped working upon it, and petitioned the common council to increase the contract price for building the sewer, to indemnify him for the loss which he would sustain by reason of such quicksand if he should go on and complete the sewer for the contract price. Upon such petition the common council determined to pay and allow to Randolph an additional sum on his contract. Randolph would have abandoned the work in its incomplete and unfinished state unless the additional allowance had been made to him as an indemnity for the loss which he would have sustained by reason of the quicksand, and this intention was known to the common council. Taxpayers of the town resisted the imposition and collection of this \$588, upon the ground that the council had no power to add to the amount for which Randolph had agreed to construct the sewer," but, under the facts, the court held that it was within the power of the council to make the additional compensation. It is evident that the last sentence in the quotation from Dillon was rested upon this case, as no other authority is cited in support of it.

I have made diligent search, but without success, to find any authority supporting the view that a city council without any consideration may surrender or give away valuable property rights secured to the city under a fair contract, entered into by the contracting parties with full knowledge of existing circumstances, and the reciprocal rights and duties assumed. City councils are not invested with supreme power. They are not altogether above judicial control. They have large powers and extensive discretion, but these powers, and the discretion incident hereto, are delegated. They must be exercised within statutory limits, and when these limits are exceeded, their action may be reviewed by the courts. That they did exceed them in this case I have no doubt. The inhabitants of a city, although the principals, and indeed the corporation itself, are necessarily obliged to transact their business through agents appointed or selected for that purpose. And to say that these agents may cancel a contract made between the city and an individual, to the end that the individual may be benefited by the cancellation, and the people of the city damaged by

it, seems to me to be unsound in principle, and entirely beyond the scope of the authority of these municipal agents. In this case the city will secure no consideration for its agreement to relieve the Home Telephone Company from its contract. True the ordinance provides for an upset price of \$5,000 and the free use by the city for a few telephones, but these considerations are a part of the purchase price of the new franchise that any bidder would be obliged to pay and perform, and are not a reward paid to be released from an existing contract. The case before us furnishes a striking example of the necessity for judicial interposition, and illustrates well the evil consequences that would follow from a doctrine declaring that municipal boards had unlimited authority to cancel without consideration any and all contracts entered into between the city and persons or corporations. The telephone is one of the most useful of modern improvements. It has already become almost as essential to the convenience of the people as the common carriers. It is found in every well-appointed home, and it is rarely absent from a place of business. People use it one way or another in all the affairs of life. It is therefore highly important to the people of a city that telephone rates should be fixed at a reasonable price, in order that poor persons and those of moderate means may be able to have it in their homes and places of business. Under the contract made with the Home Telephone Company in 1900 the people of the city of Louisville were assured that for the term of 20 years from that date they would have furnished to them telephone service at reasonable rates. The ordinance provides in section 10: "That the apparatus, instruments, switch boards, appliances and equipment of said telephone system shall be of the best, most modern and approved central energy type, and all switch boards shall be of the multiple form except in subexchanges and shall be maintained during the period and existence of the said franchise or privilege with the best equipment possible, and the telephone service thereby shall be first-class in all respects and continuous and unlimited for twenty-four (24) hours in every day during the entire period for which said franchise or privilege shall be granted, except interruptions from unavoidable causes." But the enjoyment of this reasonable privilege will be taken away without consideration if this ordinance is valid.

It does not appear that any citizen of Louisville is objecting to the rates now charged, or complaining of the services rendered by the Home Telephone Company. But the company, after having operated its plant for several years, concluded that the rates fixed by the ordinance were too low; that the service it rendered to the city and the people was being furnished too cheaply; that the contract by which it assumed to pay a stipulated sum for each telephone in excess

of 6,000 was an onerous burden upon it, and therefore it applied to the council to offer for sale another franchise. I use the expression "it applied to the council" because the ordinance upon its face shows, as I will presently point out, that it was really enacted for the benefit of the Home Telephone Company, and the petition avers that: "The Louisville Home Telephone Company has a special interest in the sale of said franchise, because it expects and intends to become a bidder for said franchise when sold by the board of public works, and hopes to become, and believes it will become, the purchaser thereof; and it desires to have opportunity, and has the right to have the opportunity, of thus acquiring the franchise for the operation of a telephone plant in the city of Louisville in accordance with the terms set forth in said ordinance."

I have heretofore pointed out the material disadvantages that the city and its people will suffer if the Home Telephone Company is permitted by the purchase of the new franchise to relieve itself of the obligations it assumed under the old one. And it is freely admitted by counsel for the company that, if it becomes the purchaser of the new franchise, the contract to pay the city for telephones in excess of 6,000, and to furnish telephones at the rates specified in the old ordinance, will be at once extinguished, except as to such individuals as have contracts, and as to them will terminate when the contracts expire. It therefore seems plain that, if the council can cancel this contract, it has the power to cancel any contract that might be made, by a person or corporation, with the city upon any subject, however injurious to the city and the people the annulment might be. This would result, if allowable, in permitting municipal boards to destroy any advantageous contract the city might make upon the request of the other contracting party who desired to free himself from the burdens or liability assumed when the contract was entered into. It would further result in permitting these boards to grant a gratuity, in the form of exonerations from assumed liabilities, to persons who had contracts with the city. If in and as part of the ordinance offering for sale a new franchise, the city council has the authority to provide that the obligations assumed under the old ordinance shall be extinguished, it would seem to follow that this result could, with as much force of reason and propriety, be arrived at, by simply adopting an ordinance striking from the old ordinance the features thereof objectionable to the Home Telephone Company, or, to put it in another way, if the provision in the ordinance in controversy that, "should the franchise herein ordered to be sold be at any time acquired by any person who at the time of such acquisition already owned a telephone franchise previ-

ously granted by the city of Louisville, such previously granted franchise shall immediately upon the acquisition of the franchise herein ordered to be sold become null and void, and be forfeited and surrendered to the city of Louisville; and all obligations created by the ordinance granting the same or acceptance thereof shall immediately cease and determine"—is valid, then why should not the council repeal by ordinance the features of the old ordinance that imposed upon the Home Telephone Company the obligations that are to be annulled if it purchased the franchise offered for sale under this new ordinance? The effect would be precisely the same. If one can be done, I see no reason why the other may not. But I doubt if the question was presented in this form if the majority of the court would have reached the conclusion that it was competent for the council to thus take away from the city, and the people of the city, valuable rights secured to them under a valid and enforceable contract, or be willing to lay down a rule that would encourage persons to enter into a contract with a city to perform for a consideration some beneficial public service, with the hope and expectation that a more accommodating council would relieve them from the onerous features of a contract that a less agreeable body had exacted. And in the views expressed upon this aspect of the case I find support in the opinion of this court in *Cumberland Telephone & Telegraph Company v. City of Hickman*, 111 S. W. 311, 33 Ky. Law Rep. 730, where it is said: "The grantee had agreed to certain conditions as part consideration for this grant. One of them, the rate of tolls, was of particular interest to the public, in other words, the city. The other condition was as to the time within which work on the plant was to be begun. The latter was not of so much importance to the city, except as a kind of security that the bid was in good faith. It was a condition which the city might have been justified in not exacting the penalty for its breach, if the delay had not been material. Still it was a matter of importance to the grantee, as it weakened his hold upon its franchise. We think it was competent for the city to waive the forfeiture of the franchise because the work had not been begun within six months, in consideration of a reduction of the rates by the owner of the franchise. There was a sufficient consideration moving to the city to support its waiver of the forfeiture; likewise a sufficient consideration moving to the grantee of the franchise to support his agreement to charge patrons within the city, and for whose benefit and welfare the contract had been entered into, a less rate than was originally agreed upon. In doing this the city granted no new or different right in the use of its streets, nor did it abate

any of the original consideration. On the contrary, it gave only what it had originally agreed to grant, and got in exchange a better consideration."

The next question is: Is this ordinance a free and equal one and does it afford a fair opportunity to any bidder to purchase the franchise offered for sale? Section 164 of the Constitution provides that: "No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege or make any contract in reference thereto for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first after due advertisement receive bids therefor publicly, and award the same to the highest and best bidder, but it shall have the right to reject any and all bids. This section shall not apply to a trunk line railway." This section was incorporated in the new Constitution for the benefit of the citizens of municipalities, and not of persons or corporations who desired to purchase the right to operate public utilities. Its adoption, as said in *Hilliard v. Fetter Lighting & Heating Co.*, 105 S. W. 115, 81 Ky. Law Rep. 1330, "was largely due to the fact that prior to the present Constitution the municipal authorities of cities might, and did, grant valuable rights in the streets and public places to individuals and corporations desiring to use them for private gain. No restrictions were thrown around the granting of these privileges to protect the citizens from the cupidity of the council or the greed of a purchaser of a franchise. As a result, the residents and taxpayers of the city found their most valuable streets occupied by corporations, who obtained them as a result of personal favor or private traffic without just or often any compensation to the people who owned them." That it was further intended by this section that no advantage or preference should be shown to any person in the sale of a franchise is illustrated by the care used in providing that: "Before granting said franchise or privilege for a term of years, such municipality shall first after due advertisement receive bids therefor publicly and award the same to the highest and best bidder"—thus throwing around the sale every possible efficient safeguard that might prevent such discrimination or favoritism as would deprive the people of the profit or advantage they might expect to gain from the sale of the franchise. If any preference was allowed or any favoritism permitted, either in the ordinance authorizing the sale, or in the conduct of the sale, or in any manner, by the municipal authorities, it is clear the object of this section would be defeated, and its useful purpose impaired, if not destroyed. As a consequence unscrupulous or favored persons or corporations would be enabled to secure for a trifle privileges that might be worth, and

that in the open market would bring thousands.

The question then arises: In what particular does this ordinance violate the principle of fair, equal and free opportunity to bid and buy the franchise proposed to be offered? In considering this question it is well to keep in mind the fact that the Home Telephone Company at the time this ordinance was enacted was, and had been since 1900, operating a telephone system in Louisville, and that its only competitor in the business was the Cumberland Telephone Company. Both of these corporations were engaged in exactly the same kind of business. Each of them was operating under a franchise granted by the city, and there was a genuine and active competition between them. This being true, it strikes one at first blush as being singular that one of these companies should be excluded from bidding or becoming a purchaser of the franchise. No good reason, nor indeed any reason, in my opinion, is offered to explain why the Cumberland Telephone Company was discriminated against, and the Home Telephone Company favored, in this respect. I am unable to perceive how the purchase of this franchise by the Cumberland Telephone Company would give it any greater monopoly than would its purchase by the Home Telephone Company. If the Cumberland Telephone Company became the purchaser, its purchase would not in any manner interfere with the rights and privileges of the Home Telephone Company under its existing franchise. And so, if the Home Telephone Company should become the purchaser, its franchise would not prevent the Cumberland Telephone Company from competing with it for business under the franchise giving it the right to operate a telephone system. It is, however, said that the preamble to the ordinance sets out the reasons why the Cumberland Telephone Company was excluded. This preamble declares: "Whereas, it is desired to secure for the public more efficient competition with the Cumberland Telephone & Telegraph Company, and whereas, requirements of the telephone franchise heretofore sold for that purpose embraced certain restrictions that make such competition impossible; therefore, be it ordained by the general council of the city of Louisville."

I confess my inability to understand how the restrictions as to rates, imposed upon the Home Telephone Company by the ordinance of 1900, and heretofore pointed out, prevented it from being an efficient competitor of the Cumberland Telephone Company, or how the purchase by it of the franchise offered under the new ordinance would make it a helpful competitor in the interest of the public. The theory of the Home Telephone Company is that, if it is allowed to charge higher rates than its existing franchise permits, it may be a more efficient competitor

than it could under the law rates; but, it seems to me that this reasoning is fallacious. The competition favored by the Constitution is a competition that benefits the public, a competition that reduces rates, and not a competition that enriches the competitors at the expense of the public, or that enables them to charge rates that, compared with existing rates, appear unreasonable. This kind of competition may be desirable looking at the matter from the standpoint of the corporation, but it is clear that it is not the kind of competition that the law regards with favor. But, as authorizing the exclusion of the Cumberland Telephone Company, its counsel relies with great confidence upon the opinion of this court in *Stites v. Norton*, 101 S. W. 1189, 31 Ky. Law Rep. 263, 13 L. R. A. (N. S.) 474. I think the ruling of the court in that case was sound in principle when applied to the facts stated in the opinion, but I am also confident that it should not be extended to embrace the state of case presented by this record. The purpose of that opinion was to encourage real competition, to the end that the people using public utilities might be benefited, and to prevent the creation of a monopoly. It was not the purpose of the court, in excluding the Louisville Lighting Company as a bidder, to encourage favoritism or discrimination without a corresponding benefit to the public. That this is a proper construction of the opinion may be readily understood by carefully considering what was decided. In that case the city offered for sale a franchise to string and maintain wires along the streets of the city for distributing and selling electricity. The ordinance creating the franchise excluded the Louisville Lighting Company, upon the ground that it already had all the privileges conferred by the ordinance; it being admitted that the Louisville Lighting Company and its associated corporations owned and operated, at the time the ordinance was adopted, the only franchise for lighting the city with electricity, and further admitted that, if it or those acting in its interests were permitted to bid at the sale of the new franchise, the purchase would be for the purpose of suppressing and preventing operation under it. Under these facts the court, in sustaining the right of the city to exclude the Louisville Lighting Company as a bidder, said: "The receiving of such a bid would have had the effect to delay, hinder, and possibly prevent the lawful purpose of the council in attempting to relieve the city from extortion. A bid made for such a purpose and with such an intent, is not a bid in the sense and meaning of section 164 of the Constitution. Legislative bodies should be very careful in prohibiting persons or corporations from bidding at such sales; and, if it should be made to appear that bids were rejected by reason of any ulterior, sinister, fraudulent, or unlawful purpose or reason, the court

should grant relief, but when made to appear, as in this case, that the prohibition of a bid was made for the just and lawful purpose of enabling the council to secure to the citizens their rights under the Constitution, the court should uphold rather than condemn its action."

That there is a radical distinction between the facts before the court in the *Stites* Case and the facts exhibited by this record is made manifest by what has been heretofore said. The *Stites* Case presented exceptionally good and strong reasons for the application of the rule announced, none of which exist in this case. That the purpose in excluding the Cumberland Telephone Company was not to benefit the public or give fair competition, but to benefit the Home Telephone Company alone, is manifest. So that the question comes up, Is an ordinance that excludes a bidder, for no other reason than that he is already in competition with the bidder who desires to purchase the franchise, authorized by the Constitution? I think not. If the *Stites* Case should be extended along logical lines, both of these telephone companies should be excluded from purchasing the privilege of establishing a new telephone system; but, clearly one of them should not be. If municipal bodies could thus discriminate between competitors, without any reason except the desire to favor one above the other, the result would be that bribery, corruption, and improper influences would be resorted to by the owners of the competing plants whenever an ordinance for a new franchise was pending, the purpose of each being to exclude the other as a competitor. As a necessary consequence of this, the citizens of the municipality would be denied the right guaranteed to them by the Constitution to have these privileges sold at public outcry, after due advertisement, to the highest and best bidder. If, under circumstances like these, a city council can exclude one competitor from bidding for a franchise granting a privilege in which only two are engaged in the business of conducting, I see no reason why they might not say that only one of four or more persons or corporations, engaged in identically the same business, should be permitted to bid for or purchase a new franchise to conduct a similar business. And so, if this theory of exclusion and discrimination was authorized, a council could virtually award a franchise to its favorite corporation without any excuse or reason except that found in the influence of this councilmanic favorite. It needs no argument or elaboration to show what unfortunate results would follow from such a practice, if legalized. It was surely not contemplated by the Constitution makers that this valuable section, intended to secure competition, prevent discrimination, and deny favoritism, might be made the efficient instrument in the accomplishment of the very ends intended to be prevented. It

would be a most remarkable condition of affairs if A, B, and C, who were engaged in the same identical business, in real competition with each other, and with D, should be denied the right to bid for a franchise permitting the purchaser to conduct the same business they were carrying on, and yet allow D to bid for and buy the franchise. This rule would prevent competition, deny equality, encourage discrimination, and foster favoritism. In short, it would be an active aid in everything that the Constitution was designed to prevent.

The ordinance in question not only excludes the Cumberland Telephone Company, but it also provides that, if the Home Telephone Company is the purchaser, its former franchise shall be at an end. In other words, if the Home Telephone Company purchases the franchise, it will be released from its obligation to furnish telephone service at the present rates, and will be allowed to charge almost double as much for the same service. It will also be released from its obligation to pay the city \$1 each on all telephones over 6,000. If any one else buys the franchise, he will get no more than the privileges granted; but if the Home Telephone Company buys the franchise it will get in addition a release from its present obligations to the city. The bidders, therefore, will not stand upon an equal footing. The provision of the Constitution that the franchise shall be sold to the highest and best bidder after due advertisement is meaningless if such an ordinance as this can be sustained. The purpose of the Constitution is that the franchise shall be sold to the highest and best bidder after due advertisement, so that the city shall derive as much from the sale as can be gotten. The purpose of the ordinance is not to make anything for the city, but to relieve the Home Telephone Company from its present obligations under the form of a sale of a new ordinance. When the ordinance is read in the light of the allegations of the petition that the Home Telephone Company expects to be a bidder at the sale, it is manifest that the ordinance was designed to sell a franchise which only the Home Telephone Company could buy, and that it should be the only bidder at the sale, for no one can compete with it in bidding for this franchise, as no one can get, if he purchases, the same advantages as it will get. Free and equal competition is the fundamental aim of the constitutional provision, and when there is no free and equal competition, the constitutional provision is violated. Here the ordinance excludes from the bidding appellant's only competitor; and then gives it, if it purchases, privileges that no one else gets if he should purchase it. It is uniformly held, under statutes providing for sales to the highest and best bidder, that unless there can be real competition, the statute is violated. *Fairfax v. Hopkins*, 8 Fed. Cas. 955, No. 4,614; *Hart v.*

Buckner, 54 Fed. 925, 5 C. C. A. 1. And where the statute provides for the letting of public improvements to the lowest and best bidder, it is in like manner also held that the proceeding is void where the ordinance prescribes conditions preventing fair and free competition. *Fineran v. Central Bitulthic Co.*, 116 Ky. 495, 76 S. W. 415; *Fishburn v. Chicago*, 171 Ill. 338, 49 N. E. 532, 39 L. R. A. 482, 63 Am. St. Rep. 236; *Diamond v. Mankato*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448. Here we have not a statutory provision, but a mandatory provision, of the Constitution. While the city council has legislative authority, it has this authority subject to the Constitution. Any legislation it makes in conflict with the Constitution is void. The public sale of the franchise in question is but a form of granting a special privilege to the Home Telephone Company, and when such proceedings are sustained, the door is open for all the abuses which the constitutional provision was intended to prevent. The exclusion of the Cumberland Telephone Company from bidding and the favoritism shown the Home Telephone Company were both in violation of section 164 of the Constitution, and for these reasons the ordinance should be declared invalid.

I am further of the opinion that the obligation upon the part of the company, under its contract of 1900, to pay to the city \$1 per annum for each telephone in use in the city, in excess of 6,000, during the life of the contract, which was for a term of 20 years, was a liability within the meaning of section 52 of the Constitution, and the attempt to release the company a violation of the section which provides that: "The General Assembly shall have no power to release, extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness or liability of any corporation or individual to this commonwealth, or to any county or municipality thereof"—and should be given a liberal and not a strained construction. In other words, it should be so interpreted as to give to the city the full measure of protection intended to be conferred by the section. The words "liability" and "indebtedness" used in the section are the leading features of it. The other words merely describe the bodies that may not release or extinguish an "indebtedness" or "liability." It is to be presumed that they were used in the ordinary and usual acceptation of these words. They are not technical, but are commonly employed in the everyday affairs of life. If we say that a person is indebted, or that he has assumed a liability, it will be understood that there is some contract obligation existing under and by virtue of which the liability or indebtedness was created or incurred. The amount of the liability or the extent of the indebtedness is not material. It may be \$1 or \$1,000 or the rendering of service. Nor is it important when the contract was creat-

ed, if it be valid, or when the indebtedness or liability is to be liquidated, or whether it may be paid in installments or as a whole. Webster defines "liability" as the "state of being liable, that which one is under obligation to pay, or for which one is liable." The word "liable" is defined as being "bound or obligated in law or equity, exposed to a certain contingency or casualty, more or less probable." And defines "indebtedness" as the "state of being indebted; that is, brought into debt, being under obligations, held to payment of requital, beholden, placed under obligation for something received, for which restitution or gratitude is due." It will be seen from these definitions that the word "liability" is sufficiently comprehensive to include any kind of legal or equitable obligation to do or perform a certain thing. If it was only intended that the section should be applied to contract obligations to pay a fixed sum of money, there would have been no reason for using the word "liability," as the word "indebtedness" covers and embraces all ordinary debts. It is therefore fair to assume that the word "liability" was added to remove any doubt that might exist as to the intent of the section. It is a word of broader meaning than "indebtedness," and includes matters that the word "indebtedness" might not reach.

There is no dispute about the terms of the contract between the city and the telephone company; nor is there any denial of its validity, so that, the only question to be considered is whether or not it created a liability to the city upon the part of the Home Telephone Company. It was agreed, as a part of the contract, that if the Home Telephone Company put in operation any telephones in excess of 6,000, that it would pay to the city \$1 for each telephone over that number. It is therefore plain that, if the company installed, during the existence of the franchise, over 6,000 telephones, there would not only be a liability to pay the stipulated fee for the excess, but the creation of an indebtedness, upon which the city might maintain an action. But the argument is made that this liability is too contingent to come within the meaning of section 52. That there may or may not be any telephones over 6,000 in use, and hence there may or may not be any indebtedness or liability on the part of the company under its contract. Granting, for the sake of the argument, that the company might not have over 6,000 telephones in use, and consequently not become liable or indebted to the city in any amount, this does not prove that no liability was created. The mere fact that it is contingent in this particular does not take it out of the reach of the constitutional provision. It is not necessary that the extent or exact or approximate amount of the liability be specified, or that

it shall be definitely fixed. It was clearly contemplated by the parties to the contract that at some time during its existence the number of telephones would exceed 6,000, and it was further contemplated that the contract would run for the full term of 20 years. Therefore the city has the right to exact from the company any amount that may become due at any time within 20 years. That this condition was incorporated in the ordinance is some evidence of the fact that the city expected to derive benefit from it. I might add that it is stated in the opinion that there is now in service 8,000 telephones, and that the city is deriving an annual income therefrom of \$2,000, thus making it plain that the contract in this particular is valuable to the city, and creates a liability, as well as an indebtedness, upon the part of the Home Telephone Company that it wishes to be relieved of.

For the reasons stated, the general demurrer to the petition was properly sustained.

I am authorized to say that Judges HOBSON and NUNN concur in this dissenting opinion.

HAGER, Auditor, v. SIDEBOTTOM.

(Court of Appeals of Kentucky. Nov. 27, 1906.)

1. STATES (§ 201*)—ACTION AGAINST—ANSWER—TIME TO FILE.

Mandamus to compel the Auditor of State to issue a warrant to pay a reward offered by the Governor for the apprehension of an offender is practically against the state, and a meritorious defense must be allowed, though not tendered in time fixed by Civ. Code Prac. § 474, whether the defense is governed by the section or not; the state not being affected by the laches of its officers.

[Ed. Note.—For other cases, see States, Cent. Dig. § 193; Dec. Dig. § 201.*]

2. STATES (§ 50*)—OFFICERS—GOVERNOR—PRIVATE SECRETARY OF GOVERNOR—AUTHORITY.

The private secretary of the Governor, employed to assist him in the labors of his office, as authorized by Acts 1906, p. 260, c. 30, is not authorized to discharge the duties of the Governor in his absence.

[Ed. Note.—For other cases, see States, Dec. Dig. § 50.*]

3. REWARDS (§ 4*)—POWER TO OFFER REWARDS—STATUTES.

The Governor, in offering a reward for the apprehension of an offender, as authorized by Ky. St. 1903, §§ 1932, 1933, must exercise discretion as to whether a reward shall be offered, and the amount thereof, and must also determine to what jail the offender shall be delivered, etc., and his private secretary, authorized by Acts 1906, p. 260, c. 30, to assist him in the labors of his office, cannot, in the absence of the Governor, offer a reward.

[Ed. Note.—For other cases, see Rewards, Dec. Dig. § 4.*]

4. EVIDENCE (§ 431*)—ACTION ON WRITTEN CONTRACT—DEFENSES.

The rule that, in a suit on a written contract, the writing cannot be called in question, except on an allegation of fraud or mistake, does not preclude a party from pleading that he did not execute the writing, or that he signed a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

blank, which was subsequently filled by another, without authority.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1976; Dec. Dig. § 431.*]

5. MANDAMUS (§ 164*)—REWARDS—PAYMENT—ACTION TO COMPEL.

A plea in mandamus to compel the Auditor of State to issue a warrant to pay a reward offered by the Governor, which alleges that the Governor did not offer the reward, that he signed a blank, and that, while he was absent, his private secretary offered the reward by filling out the blank, charges that the record sued on is not a genuine record, because not in fact made by the Governor, and is available, though Ky. St. 1903, § 3760, provides that an official certificate shall not be called in question, except on allegation of fraud or mistake.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 164.*]

6. REWARDS (§ 4*)—EXECUTIVE POWER—CERTIFICATE OF GOVERNOR—EVIDENCE.

An official certificate of the Governor to a reward offered for the apprehension of an offender is only prima facie valid, and may be shown to be invalid by proof that would invalidate other official certificates purporting to be the acts of the officers whose names they bear.

[Ed. Note.—For other cases, see Rewards, Dec. Dig. § 4.*]

7. STATES (§ 181*)—DEMANDS—STATUTES.

Claims against the state treasury cannot arise by implication, and he who demands money from the treasury must show that his claim is warranted by law.

[Ed. Note.—For other cases, see States, Dec. Dig. § 181.*]

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Mandamus by J. P. Sidebottom against S. W. Hager, Auditor of State, to compel the issuance of a warrant for the payment of a claim. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

N. B. Hays and C. H. Morris, for appellant. John B. Lindsey and Cammack & Perry, for appellee.

HOBSON, J. J. P. Sidebottom brought this suit against S. W. Hager, as Auditor of Public Accounts of the state of Kentucky, alleging, in effect, that the Governor on November 30, 1906, by proclamation duly issued, offered a reward in the sum of \$500 for the apprehension and delivery of Burt Hudson to the jailer of Owen county, wherein Hudson stood charged with murder; that while the offer was in force, he arrested Hudson on December 3, 1906, in St. Louis, Mo., and delivered him to the jailer of Owen county; that at the February term, 1907, his claim for \$500 was allowed by the Owen circuit court; that he presented it to Hager as Auditor, and he refused to issue a warrant in his favor. A copy of the Governor's proclamation was filed with the petition, and a mandamus was prayed against the Auditor, requiring him to issue a warrant for the payment of the claim. The Auditor demurred to the petition. His de-

murrer was overruled. He then tendered an answer, but the court refused to allow it to be filed, and entered judgment in favor of the plaintiff as prayed. The Auditor appeals.

The suit was filed July 24, 1907. The process was served on that day. The next rule day was August 5th. No defense was made then or on the next rule day, September 2d. On September 10th, the second day of the term, the plaintiff entered a motion in court for a mandamus pursuant to notice given when the suit was filed. On September 19th the plaintiff entered a motion for judgment. The court took time; and on September 24th the defendant filed a demurrer to the petition. On October 4th the court overruled the demurrer. The defendant then tendered his answer, but the court refused to allow it to be filed. It is insisted that the court properly refused to allow the answer filed because it was not tendered in time under the practice act. We do not deem it material to consider whether or not the filing of the answer was governed by section 474, Civ. Code Prac. The court had allowed the demurrer to be filed, and when he passed on the demurrer, the answer was tendered. The suit is practically one against the state. The Auditor was defending for the state. A meritorious defense for the state should never be rejected because of the delay of its officers in tendering it. The state is, as a rule, not affected by the laches of its officers. In the multitude of matters they have to look after some will be delayed, and we know officially that the Attorney General's office at this time was much overworked. We assume from the court's allowing the demurrer to be filed that he refused to allow the answer filed because he did not consider that it presented a defense to the action; and this is the main question in the case.

In the answer it was, in substance, alleged that the Governor did not offer a reward for Burt Hudson; but that he signed a blank, and left it with his private secretary, Ed. O. Leigh; that while the Governor was absent, application was made to Leigh; that he heard the application, and made out and promulgated the proclamation of the reward sued on, by filling out the blank in the absence of the Governor, and without his considering the application; that the proclamation was not the act of the Governor, and was null and void. It is insisted for the plaintiff that Leigh's act was authorized by the statute, to the effect "that the Governor of this commonwealth be and he is hereby allowed to employ and have a private secretary to assist him in the labors of his office. * * * The Governor shall be responsible for all the official acts of his private secretary." See Acts 1906, p. 260, c. 30. The private secretary is to assist the Governor

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the labors of his office. He is not authorized to discharge the duties of the Governor in his absence. Certain officers are allowed by law to appoint deputies, but there is nothing in the act showing any intention to vest in the private secretary any of the powers vested in the Governor. The rule is elementary that a delegated authority cannot be delegated without authority of law, and that acts requiring the exercise of discretion and judgment must be performed by the officer himself. The Governor in cases of this sort must exercise a discretion as to whether a reward should be issued, and, if issued, in what amount. Ky. St. 1903, § 1932. He must determine to what jail the prisoner shall be delivered, and how, or in what paper or papers, the offer of reward shall be published. Ky. St. 1903, § 1933. If the Governor may delegate to his private secretary such matters of discretion as these, it is hard to understand what duties of the chief magistrate may not be performed by his secretary in his absence.

Section 3760, Ky. St. 1903, is also relied on. That section provides, in substance, that an official certificate shall not be called in question "except upon the allegation of fraud in the party to be benefited thereby or mistake on the part of the officer." In a suit on a written contract the writing cannot be called in question except upon an allegation of fraud or mistake; but this rule was never understood to mean that a party could not plead that he did not execute the writing, or that he signed a blank which was afterwards filled by another without authority. The pleading here does not call in question the Governor's certificate. It charges that it is not his act. It is a plea that the alleged record sued on is not a genuine record because not in fact made by the Governor. Nor is the record itself conclusive of its genuineness. There is no statute giving it any such effect. It is, like the certificate of any other officer, *prima facie* valid, but subject to be shown invalid by proof that would invalidate other official certificates, purporting to be the acts of the officers whose names they bear. If the statute had authorized the circuit judge of the district to issue offers of reward in cases like this, would it be maintained that a certificate signed in the judge's name was conclusive on the state? Or if it was shown that the judge had signed a blank before leaving home, and in his absence his stenographer had heard an application and issued an offer of reward by filling in the blank, could it be said that this was the act of the judge, and binding on the state? The validity of an official act does not depend on the grade of the officer. The highest officer is bound by the law no less than the lowest. If he does not conform to the law, his act no more binds the state than that of the hum-

blest officer in the land under like circumstances. Both are but agents of the state, and, to bind it, must act in conformity to law. One can no more delegate his discretionary duties to another than the other. Claims against the treasury cannot arise by implication, and he who demands money from the public treasury must fail unless his claim is warranted by law. The foundation of the plaintiff's claim is the proclamation of the Governor, and if that is invalid, the law does not authorize its payment. A similar question to that before us arose in *Re Tod*, 12 S. D. 386, 81 N. W. 637, 47 L. R. A. 566, 76 Am. St. Rep. 616, where the Governor signed blank warrants, and these, when application was made, were filled out and issued by his secretary without action by the Governor. The warrants were held void.

If the proceeding here was sustained, officers might be appointed, persons might be arrested, death warrants might issue in the absence of the Governor, and without any exercise by him of the discretion confided in him personally by law. We therefore conclude that the answer presents a good defense to the action. The *ex parte* order of the Owen circuit court is only *prima facie* evidence of the correctness of the claim. Ky. St. 1903, § 340a.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

WEST et al. v. McDONALD et al.

(Court of Appeals of Kentucky. Nov. 23, 1908.)

1. JUDICIAL SALES (§ 31*)—CONFIRMATION—OBJECTIONS—PERSONS ENTITLED TO RAISE.

The objection that the petition did not state a cause of action and was insufficient to support the decree cannot be relied on by the purchasers at the decretal sale to defeat a confirmation.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 63; Dec. Dig. § 31.*]

2. JUDICIAL SALES (§ 31*)—CONFIRMATION—OBJECTIONS—PERSONS ENTITLED TO RAISE.

The objection that the property was divisible and should have been sold in separate parcels cannot be relied on by the purchasers at a decretal sale to defeat a confirmation.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 63; Dec. Dig. § 31.*]

3. APPEAL AND ERROR (§ 934*)—REVIEW—PRESUMPTIONS—JUDGMENT.

Where, notwithstanding no proof seems to have been taken as to whether a lot sold under a mortgage foreclosure was divisible, the petition alleged that it was not, and such allegation was not denied, and the lot, though containing two houses, was small and the houses not valuable, the Court of Appeals will not presume that the court below acted unadvisedly in decreeing a sale of the lot as a whole, but will take it for granted that the petition and mortgage filed as an exhibit so described the lot as to enable the court to determine its indivisibility.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3777-3782; Dec. Dig. § 934.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. JUDICIAL SALES (§ 31*)—CONFIRMATION—OBJECTIONS.

Purchasers at a decretal sale not prejudiced by the sale of the lot as a whole cannot complain that it was so sold.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 63; Dec. Dig. § 31.*]

5. JUDICIAL SALES (§ 31*)—CONFIRMATION—OBJECTIONS.

An objection by purchasers at a decretal sale to the confirmation thereof, charging the existence of a street improvement lien and also a lien for taxes, will not be sustained, where such liens may be set up and paid out of the proceeds of the sale after satisfying the judgment for which made, before final distribution of the surplus.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 31.*]

6. WILLS (§ 620*)—CONSTRUCTION—ESTATES CREATED—MAINTENANCE.

Under a will devising testatrix's interest in a lot to a daughter, with full power and authority to dispose thereof by will or otherwise, and providing that another daughter should have a home in the real estate, the estate of the latter daughter continued for life, provided only that the lot was not disposed of by the other daughter.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1439; Dec. Dig. § 620.*]

7. JUDICIAL SALES (§ 31*)—CONFIRMATION—OBJECTIONS—EVIDENCE—SUFFICIENCY.

An objection to the confirmation of a decretal sale that defendant was of unsound mind when the action was brought and judgment rendered *held* not sustained by the evidence.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 31.*]

8. EVIDENCE (§ 67*)—PRESUMPTIONS—CONTINUANCE OF CONDITION—SANITY.

A person adjudged to be of sound mind will be presumed to so continue until the contrary is shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 87; Dec. Dig. § 67; * Insane Persons, Cent. Dig. § 6.]

9. INSANE PERSONS (§ 100*)—JUDGMENTS—VALIDITY.

A judgment against an insane person is not void, but voidable.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 179; Dec. Dig. § 100.*]

Appeal from Circuit Court, Garrard County.

"Not to be officially reported."

W. T. West and another became the purchasers of a lot sold under the decree in an action by Mary K. McDonald against Mary Cunningham. The commissioner's report of sale having been filed, they interposed exceptions thereto, which were overruled, and they appeal. Affirmed.

Lewis L. Walker, for appellants. Wm. Herndon, for appellee Mrs. McDonald.

SETTLE, J. The appellants, W. T. West and J. A. Jones, became the joint purchasers at decretal sale of a small parcel of ground lying in the city of Lancaster, and known on the city plat as lot 39. The lot contains two small houses, and was until purchased by appellants the property of Mrs. Mary Cunningham. It was appraised be-

fore its sale at \$1,700. Appellants were the highest and best bidders for the property, and it was knocked down to them at the price of \$1,253, for which they executed two bonds with approved personal security, in each of which a lien was retained upon the lot to further secure their payment. The decree under which the lot was sold was rendered in an action brought in the Garrard circuit court May 17, 1907, by the appellee Mary K. McDonald against Mary Cunningham to recover of the latter upon a note of \$650, bearing date May 16, 1898, payable one day thereafter with interest from date which had been paid down to May 1, 1903. The note was secured by a mortgage on the lot in question executed and acknowledged by the obligor simultaneously with the execution of the note, and duly recorded in the office of the clerk of the Garrard county court, and in the petition the lien given by the mortgage was sought to be enforced and a sale of the lot asked in payment of the note. Mary Cunningham, the defendant in that action, though duly summoned, made no defense, and judgment was rendered by default against her for the amount of the note and interest and also for the sale of the lot in satisfaction thereof. After appellants' purchase of the lot, the commissioner filed in the court below his report of sale, following which appellants filed exceptions raising numerous objections to its confirmation. The exceptions were, however, all overruled, the sale confirmed, and the commissioner directed to make appellants a deed of conveyance to the lot, which was done. Appellants excepted to the judgment manifesting these rulings of the court, and have appealed.

The exceptions filed to the report of sale were: (1) That the petition did not state a cause of action and was insufficient to support the judgment. (2) That the property was divisible, and should have been divided and sold in two separate parcels. (3) That there were other liens upon the property, and the holders thereof should have been made parties. (4) Because one Nancy Ann McMurtry, a sister of Mary Cunningham, owned an interest in the lot, and should have been made a party to the action. (5) That Mary Cunningham was of unsound mind when the action was brought and judgment rendered, that a committee was not appointed by the court to make a defense for her, and for this reason, and upon the other grounds mentioned in the exceptions, the judgment under which the lot was sold is void, and the sale should have been set aside.

Appellants cannot object to the judgment upon the grounds presented by exceptions 1 and 2. If true, none of them would render the judgment void; and besides they can-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not be relied on by a mere purchaser of the property at decretal sale. Whether they could be relied on by the defendant Cunningham we need not decide, for no such objections are being urged by her. Our examination of the petition convinces us that it does state a cause of action, and was sufficient to support the judgment. While no proof seems to have been taken on the question as to whether the lot was divisible, the petition alleges that it was not, and this was not denied. Moreover, the lot, though containing two houses, is a small one, the houses not valuable, and on the face of the record we will not presume that the circuit court acted unadvisedly in decreeing a sale of the property as a whole, but, on the other hand, will take it for granted that the petition and mortgage filed as an exhibit so described the lot as to enable the court to determine its indivisibility. *Sears v. Henry*, 13 Bush, 413. Obviously appellants were not prejudiced by the sale of the lot as a whole, and it does not lie in their mouths to complain that it was so sold. *Fowler v. Kellam*, 4 Ky. Law Rep. 988.

As to the third exception, we may say that while it charges the existence of a small street improvement lien against the lot sold in favor of the city of Lancaster, and also a small lien for taxes due the commonwealth, county of Garrard, and city of Lancaster, these liens will not together or in the aggregate exceed \$80 in amount, and they may be set up by the lienholders and paid out of the proceeds of the lot after satisfying appellees' judgment before a final distribution of the surplus.

The interest in the lot claimed for Nancy Ann McMurtry by the fourth exception is not apparent from the record before us. Nancy Ann McMurtry is a sister of Mrs. Cunningham, and both were the daughters of Martha McMurtry, deceased, who before her death jointly with her daughter, Mary Cunningham, purchased of W. H. Kinnaird and wife the lot in controversy, each paying a certain proportion of the purchase money. The deeds from the Kinnairds conveyed them the lot jointly, but provided that each of the grantees should take title in proportion to the amount of purchase money paid by her upon the lot. The will of Martha McMurtry devised her interest in the lot, which was something less than a moiety to the sole and separate use of Mary Cunningham free from the control of her husband then living or any future husband she might have, "with full power and authority to dispose" of such interest "by will or otherwise." The will provides that Nancy Ann McMurtry should during her life have a home in the real estate. We incline to the opinion that the meaning of the testatrix as gathered from the entire lan-

guage of the will was that the home thus intended to be provided Nancy Ann was to continue during her life, or until the property should be disposed of by her sister, Mrs. Cunningham. Unless such was her meaning, no effect can be given to the language of the will, which confers upon Mrs. Cunningham "full power to dispose of same by will or otherwise." The latter did dispose of the lot by giving appellee a mortgage upon it, and, when the mortgage debt matured and Mrs. Cunningham's inability to pay it compelled appellee to enforce the mortgage by suit and a sale of the lot, that fact ended the right of Nancy Ann to longer occupy it as a place of residence.

The exception as to the alleged unsoundness of mind of Mary Cunningham is not sufficiently sustained by the evidence. The witnesses who testified on that subject were not experts. Those introduced by appellants testified, it is true, to certain eccentricities of character possessed by Mrs. Cunningham, and among them that she was superstitious, but not one of them ventured to express the opinion that she was incapable of understanding a business transaction either at the time of the execution of the mortgage, at the time of the institution of the suit, or when appellants purchased the lot in controversy. On the other hand, appellees' witnesses were of opinion that she was of sound mind and mentioned business transactions which went far to support the opinions they expressed. Two of these witnesses were lawyers who had dealings with Mrs. Cunningham. Mrs. Cunningham seems to have been at one time adjudged of unsound mind after a verdict to that effect by a jury, but in a subsequent inquisition held before the execution of the mortgage to appellee she was found by verdict of the jury and adjudged to be of sound mind, and, this being true, the law presumes her to be still of sound mind, and this presumption will prevail unless overthrown by proof to the contrary. Furthermore, it may be said that a judgment rendered against an insane person is not necessarily void or to be so treated. It is merely voidable. *Logan, etc., v. Vanarsdall, &c.*, 86 S. W. 981, 27 Ky. Law Rep. 822.

Finding in the record no reason for disagreeing with the conclusions arrived at by the lower court in this case, the judgment is affirmed.

LOUISVILLE & N. R. CO. v. SCHROADER. (Court of Appeals of Kentucky. Nov. 24, 1908.)

1. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Whether a brakeman, who, while adjusting the crane of a water tank to fill the tank of his engine, was struck by another train backing on the next track, was guilty of contributory negli-

ence, is a question for the jury on conflicting evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 389.*]

1. MASTER AND SERVANT (§ 291*)—INJURIES TO EMPLOYE—ACTION—INSTRUCTIONS—CONFINING JURY TO EVIDENCE.

An instruction that "if the jury believe from the evidence" that the trainmen failed to observe the rules of defendant confines them to the rules given in evidence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 291.*]

1. MASTER AND SERVANT (§ 137*)—INJURIES TO EMPLOYE—BACKING TRAINS—LOOKOUT.

In backing a train in a town by where another train on the next track was taking water, and where the presence of persons on and about the track was to be anticipated, it was the company's duty to have some one on the rear of the backing train to keep a lookout and give signals of its movements.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 270; Dec. Dig. § 137.*]

1. MASTER AND SERVANT (§ 145*)—INJURIES TO EMPLOYE—TRAINS "PUSHED" BY ENGINE—RULES OF COMPANY.

The rule of a railroad company as to having a flagman at the front of the leading car to keep a lookout and give signals, when a train is being pushed by an engine, applies when the engine, being behind the cars, is either going backward or forward.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 145.*]

1. MASTER AND SERVANT (§ 285*)—INJURIES TO EMPLOYE—QUESTION FOR COURT—CONSTRUCTION OF WRITTEN RULES.

The construction of a written rule of a railroad, like that of other writing, is for the court.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.*]

1. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—INSTRUCTIONS.

A party is not prejudiced by an instruction where the court should have given one more unfavorable to it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. § 1033.*]

1. TRIAL (§ 295*)—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

The instruction to find for plaintiff, if certain facts be found, unless the jury believe he was guilty of such contributory negligence as caused or helped to cause the accident, and but for which he would not have been injured, if not conforming to the proper rule as to contributory negligence, could not have misled the jury, they having also been instructed that if plaintiff failed to exercise ordinary care to avoid injury to himself, and by such failure he contributed to his injury to such a degree that but for such failure he would not have been injured, he could not recover.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. § 295.*]

1. DAMAGES (§ 215*)—PUNITIVE DAMAGES—GROSS NEGLIGENCE.

There is evidence of gross neglect, making it proper to submit the question of punitive damages where, without warning or a lookout, a train was backed onto the brakeman of another train on the adjoining track while he was turning, with a lever, a crane to supply his engine with water, the conductor and brakeman of the backing train taking no steps for his protection,

though seeing his position, and that the train was backing without a flagman.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 543–547; Dec. Dig. § 215.*]

9. APPEAL AND ERROR (§ 994*)—DISCREDITING UNCONTRADICTED TESTIMONY.

The appellate court will not discredit the testimony of a physician for plaintiff, the facts testified to being physical symptoms, and he being uncontradicted, though any physician could have examined plaintiff and testified as to the correctness of the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3901; Dec. Dig. § 994.*]

10. DAMAGES (§ 132*)—PERSONAL INJURY.

A verdict of \$12,000 for injury to a healthy young man, a railroad brakeman, resulting in loss of a leg above the ankle, paralysis of other parts, and nervous injury, is not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372, 374, 380, 381; Dec. Dig. § 132.*]

Appeal from Circuit Court, Hart County.

"Not to be officially reported."

Action by Louis P. Schroader against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Benjamin D. Warfield and Sims, Du Bose & Rodes, for appellant. Bennett H. Young and McCandless & Larimore, for appellee.

HOBSON, J. Louis P. Schroader was a brakeman on a north-bound, through freight train known as "2d 74." His train overtook at Bonnierville the north-bound, local freight train 32, and, as it ran into the station, was flagged down by the flagman on 32. After it was thus flagged down, his train pulled up to the water tank for the purpose of taking water, and Schroader was directed by his engineer to turn the crane so that the water could be run into the tank of the engine. The crane was turned by a lever on the ground, between the main track and the side track, and in turning the lever it was necessary for the men to be at the end of it. The lever was so long that it reached over the end of the ties of the side track. Schroader took hold of the lever and pushed the crane around. When he had done this, it was found that the engine had pulled a little too far, and the engineer had to back up. After the engineer backed up, Schroader pushed the crane to get it over the opening of the tank, and, while he was doing this and just as he got the crane in position, train 32 backed in on the side track, striking him in the back and knocking him over on a barrel. He rebounded from the barrel, and fell to the ground. One of his legs, coming under the freight train, was cut off near the ankle. He brought this suit to recover for his injury, and, a verdict and judgment having been rendered in his favor for \$12,000, the railroad company appeals.

There is little conflict in the evidence. It is conceded that there was no one on the rear

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

end of the backing train to keep a lookout, and that the engineer from his position in front could see nothing on account of the freight cars he was pushing. The proof for the plaintiff is to the effect that no signal of the moving of this train was given. The proof for the defendant is to the effect that the whistle was blown when it started back. The conductor and two of the brakemen of the backing train were at the switch about 250 feet away. The conductor turned the switch, and signaled the train to come back. The flagman, who ought to have been on the rear of the train, keeping a lookout as it came back, was off getting a jar of honey, and not on the train. The conductor and the two brakemen at the switch knew there was no one on the train to keep a lookout. They saw Schroader at the tank turning the lever, but took no steps for his protection, on the ground that they thought he was in the clear, as they testify. He was not in the clear, however, and it was their manifest duty, seeing him there so close to the track, to take some steps for his protection. Rule 104, adopted by the company, is as follows: "When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger and immediately signal the engineman." Rule 44 is as follows: "Three short blasts of the whistle, when the train is standing (to be repeated until answered as provided in rule 61), is a signal that the train will back."

It is insisted that a peremptory instruction should have been given the jury, on the ground that the accident was due to the contributory negligence of Schroader. There is evidence in the record from which the jury might infer this; but there was other evidence in the record to the effect that Schroader was at the time engaged in doing what he had been commanded to do, that he was doing it in the usual way, and that he was struck and run over while actually engaged in the work, and before he had completed what he had been told to do, by the backing in of train 32 without any signal and without any lookout. What the facts were was a question for the jury; but, the evidence being conflicting, the court properly left the question to the jury.

The court, at the conclusion of the evidence, gave these two instructions:

"(1) The court instructs the jury that it was the duty of the agents, servants, and employes of the Louisville & Nashville Railroad Company, defendant herein, at the time and place of the accident set out in the pleadings, to exercise ordinary care in the movement and operation of the train, which was backed in on the siding and which ran over the plaintiff herein, for the safety of the plaintiff, and to observe in the operation of said train the rules and regulations which defendant had prescribed for the movement

of trains under similar circumstances, and, if the jury believe from the evidence that the agents and employes of the defendant in charge of the train which ran over the plaintiff failed to exercise ordinary care in the movement thereof, or failed to observe the rules and regulations prescribed by defendant for the operation of trains under such circumstances, then the law is for the plaintiff and the jury should so find, unless they shall further believe from the evidence that the plaintiff, at the time and place of the accident, was himself guilty of such contributory negligence as caused or helped to cause said accident, and but for which he would not have been injured, in which latter case the law is for the defendant, and the jury should so find."

"(4) If the jury shall find for the plaintiff, they will award him such sum in damages as they shall believe from the evidence will fairly and reasonably compensate him for any pain and suffering, mental and physical, which he has suffered, or which the jury may believe from the evidence it is reasonably certain he will hereafter suffer by reason of his injury occasioned by said accident, and for any permanent impairment of his power to earn money directly resulting therefrom, if they shall believe there was such impairment. And, if the jury shall believe from the evidence that the accident and injuries resulting therefrom were brought about by the gross negligence on the part of the employes of the defendant in charge of or operating the train which ran over plaintiff, then the jury may or may not in its discretion, in addition to the award for mental and physical suffering, and the permanent impairment of the plaintiff's power to earn money, if any, award such punitive damages against the defendant as they may see proper under all the evidence in this case, the whole amount not to exceed the sum of \$25,000, the amount claimed in the petition."

It is insisted that instruction 1 is erroneous, in that it does not confine the jury to the rules read in evidence, and allows a recovery without reference to whether the infraction of the rules was the proximate cause of the accident or was negligence as to Schroader. The instruction is based upon these words: "If the jury believe from the evidence." Under the instruction, the jury could consider no rule not read in evidence. There is much force in the other two grounds of objection to the instruction; but, under all the facts, we do not see that the defendant was substantially prejudiced by the instruction. In backing the train in the town of Bonnaville right by where the other train was taking water, and where the presence of persons on and about the track was to be anticipated, it was incumbent upon the railroad company to have some one on the rear of the backing train to keep a lookout and give proper signals of its movements. See *Chesapeake & Ohio Ry. Co. v.*

McCoy (Ky. App.) 112 S. W. 1105, and cases cited. It is insisted for the railroad company that rule 104 only applies when the engine is behind the cars and going forward pushing the cars in front of it, and that it has no application to the backing of a train. The train is pushed when the engine is behind the cars, and not in front of them. It is immaterial whether the engine is going backward or forward. The purpose of the rule is that some one must be on the leading car when the engineman, from his position on the engine, cannot see the track in front by reason of the cars which he is pushing. The direction in which the engine is moving is immaterial. The rule applies when the cars are in front of the engine in the direction in which it is going. The proper construction of a writing is for the court. The rules of a railroad company being in writing, their proper construction is for the court and not the jury. In this case, instead of No. 1, the court should have instructed the jury that it was the duty of the servants of the railroad company to have a flagman stationed in a conspicuous position on the front of the leading car, as the train was backed in on the side track, to keep a lookout; that it was their duty to give three short blasts of the whistle before the train was started back as a signal that it would back in on the side track, and to exercise ordinary care in the movement and operation of the train; that if they failed to do this, and by reason of it the plaintiff was injured, they should find for the plaintiff, unless he himself failed to exercise ordinary care for his own safety, and but for this would not have been injured. If the court had given the instruction we have indicated, it would have been more unfavorable to the defendant than the instruction which the court gave, for it is admitted in the evidence that no lookout was kept on the leading car of this train, and it is manifest that, if a lookout had been kept, Schroader would not have been hurt. It is insisted that the latter part of the instruction, as to contributory negligence, does not conform to the rule heretofore laid down by this court, but we cannot see that this could have misled the jury, as the court also gave the jury the following instruction: "6. The plaintiff, Schroader, in entering the service of the defendant, assumed all of the ordinary risks of accidents incident to the branch of service he was engaged in, and it was the duty of the plaintiff, Schroader, to use ordinary care to avoid injury to himself, and, if you believe from the evidence that on the occasion in controversy he failed to exercise such care, and that by such failure he contributed to his injury to such a degree that but for such failure he would not have been injured, the law is for the defendant and you should find for the defendant."

It is insisted that instruction 4 is erroneous in allowing the jury to find punitive damages. But we think there was some evi-

dence of gross neglect; and, where gross neglect is shown, the question of punitive damages should be submitted to the jury. The conductor and the two brakemen at the switch actually saw Schroader at the lever. They actually knew there was no one on the leading car of the train keeping a lookout; and, when they saw that the flagman was not at his place of duty, and also saw Schroader in a position of peril, it was incumbent upon them to take some steps for his protection, and their failure so to do was evidence of the want of slight care. Either one of them could have gotten on the front of the car as it passed them. The conductor could have had one of the brakemen get on it before he signaled the train to back. And the backing of a train, without warning and without any lookout, where persons are known to be in danger, or danger to them should be reasonably anticipated, has been held evidence of gross neglect.

Lastly, it is insisted that the verdict is palpably excessive, that the only injury which Schroader received was the loss of a foot, and that a verdict for \$12,000 is so large as to strike the mind at first blush as excessive. But this is not the only injury that Schroader received. Dr. Reynolds testified that he examined Schroader on November 8, 1906, the accident having happened in July, that at that time his left wrist was paralyzed, and the muscles of the whole left arm wasting. He gave the measurements of the arm to confirm this. He found a circular scar to the right of the union between the spine and the top of the hip bone; half an inch further, to the right, a long depression, which showed that the muscles attached to the hip bone at that point had been torn away. He also found a loss of sensibility in the skin, and an absence of what is called "muscular reflex" over the left shoulder. On the left side, by picking the skin, it was shown that the nerves had been injured; there being a loss of sensibility. The leg had been amputated 6½ inches above the ankle. The stump of the wound was then discharging pus. On April 23, 1907, and on September 18th following, he again examined him. His pulse, when he was sitting, was 106 to the minute, when it should have been 68. When standing it was 112, when it should have been 76. He was breathing 26 times to the minute, when normally he should not have been breathing more than 16 times to the minute. His temperature was 100, when it should have been only 98½. The high temperature, the rapid pulse, and quick breathing showed that he had had a severe nervous shock affecting the base of the brain, and manifestly affecting both his vitality and his strength. It is urged by counsel for appellant that we should not credit the doctor's statements; but he is uncontradicted. The facts to which he testified were physical symptoms. Any physician could have examined Schroader and informed the court in

a few minutes whether Dr. Reynolds was right or not. The defendant introduced no physician or other testimony to contradict Dr. Reynolds, and it cannot now ask this court to reject testimony which it failed to contradict or impeach in any way. Dr. Reynolds is sustained by a witness who testified to Schroeder's loss of flesh since his injury. And, if he is affected as above indicated, it cannot be said that \$12,000 is more than a healthy, young man should receive for such injuries.

By section 134 of the Civil Code of Practice it is provided that the court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party, and that no judgment shall be reversed for any such error or defect. Upon the whole record we are satisfied that none of the matters complained of affected the substantial rights of the defendant, and that upon the whole case the judgment should not be disturbed.

Judgment affirmed.

LATHAM v. LINDSAY.

(Court of Appeals of Kentucky. Nov. 25, 1908)

1. APPEAL AND ERROR (§ 699*)—RECORD—QUESTIONS PRESENTED—INSTRUCTIONS.

Where the court struck from the record the part of it which purported to contain the instructions, errors in the instructions could not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2930; Dec. Dig. § 699.*]

2. EJECTMENT (§ 64*)—ACTIONS—PETITION—DESCRIPTION OF PROPERTY.

A petition in ejectment describing the land as "beginning at a stake near a branch, B.'s corner and running thence N. 19½° E. along the old W. line about 140 poles to a small hickory on the hill side, W.'s old corner, thence S. 24° E. 14 poles; thence S. 19½° W. 140 poles; thence N. 81° W. 14 poles to the beginning," sufficiently describes the land to enable the parties to form an issue as to its ownership, and to permit the jury to understand the controversy, and to authorize the court to pronounce judgment on the verdict.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 158-164; Dec. Dig. § 64.*]

3. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

4. JUDGMENT (§ 226*)—FORM—SUFFICIENCY.

The judgment in actions involving or for the recovery of real estate should so describe the land that it may be identified by the parties or officer executing the judgment, or by persons interested, without reference to any other paper or record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 406; Dec. Dig. § 226.*]

5. JUDGMENT (§ 303*)—FORM—SUFFICIENCY.

Where an insufficient description in a judgment in an action involving or for the recovery

of real estate may be perfected by a reference to the pleadings and no injustice results, the judgment though erroneous, is not void, but may be corrected by the court rendering it, on motion of either party or any person interested.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 303.*]

6. EJECTMENT (§ 114*)—JUDGMENT—SUFFICIENCY.

Where, in an action for the recovery of land, the petition sufficiently described the land and the jury found for plaintiff for the land in controversy, the error in the judgment merely reciting that plaintiff was the owner and entitled to the land in controversy was in the nature of a clerical mispision, which could be corrected by the record.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 355; Dec. Dig. § 114.*]

7. APPEAL AND ERROR (§ 1154*)—DISPOSITION OF THE CASE ON APPEAL—REMAND FOR CORRECTION OF JUDGMENT.

Where a judgment in an action for the recovery of land erroneous for failing to describe the land may be corrected by the record, the court on appeal will affirm it with direction to the trial court to properly describe the land in the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1154.*]

Appeal from Circuit Court, Todd County.
"To be officially reported."

Action by Nellie E. Lindsay against G. N. T. Latham. From a judgment for plaintiff, defendant appeals. Affirmed, with directions.

Petrie & Standard, for appellant. Selden Y. Trimble, O. A. Denny, and Trimble & Mallery, for appellee.

CARROLL, J. The appellee, Mrs. Nellie E. Lindsay, who was the plaintiff below, brought this action to recover from G. N. T. Latham, defendant below, a tract of land described in her amended petition as follows: "Beginning at a stake near a branch, Bowman's corner, and running thence N. 19½° E. along the old Willoughby line; about 140 poles to a small hickory on the hill side, Willoughby's old corner; thence S. 24° E. 14 poles; thence S. 19½° W. 140 poles; thence N. 81° W. 14 poles to the beginning." She alleged that she was the owner and entitled to the possession of this tract of land, and asked judgment for its possession and damages for its wrongful detention. Upon a trial before a jury the following verdict was returned: "We, the jury, find for the plaintiff for the land in controversy. W. S. Willock, Foreman." Upon the verdict this judgment was rendered: "Wherefore it is adjudged by the court that the plaintiff, Nellie E. Lindsay, is the owner and entitled to the possession of the land in controversy in this action, and that the said plaintiff, Nellie E. Lindsay, recover of the defendant, G. N. T. Latham, her costs herein expended, to which judgment of the court the defendant objects and excepts." A reversal of the judgment is asked, first, because the court erred in refusing to enter a judgment for the appel-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

lant notwithstanding the verdict; second, because the verdict is not sustained by the evidence; third, because the judgment is not sufficiently specific and certain; and, fourth, for error in instruction number one. Upon a former day the court struck from the record that part of it which purported to contain the instructions, so that we cannot consider the alleged error in this respect.

In support of the proposition that the court erred in failing to enter a judgment for appellant notwithstanding the verdict, the argument is made that this motion should have been sustained because the pleadings of appellee did not present such a description of the land as would enable a correct issue to be made concerning same. We do not consider this point well taken. The description contained in the petition and heretofore set out was sufficient to enable the parties to form an issue as to the ownership of the land, and to permit the jury trying the case to understand the matter in controversy and to authorize the court to pronounce judgment upon the verdict. Nor are we prepared to say that the verdict is not sustained by the evidence. The evidence was conflicting, but that introduced by the plaintiff was sufficient to sustain the verdict.

The point made that the judgment is not sufficiently specific and certain presents a question of more difficulty. The rule is that in actions involving or for the recovery of real estate the judgment should so describe the land that it may be identified by the parties or the officer whose duty it may be to execute the judgment or by persons interested without reference to any other paper or record. This is especially true of judgments for the recovery or sale of land; but it does not follow from this that a judgment, although it may be erroneous, is void because it does not describe the land, so that it may be identified by an inspection of the judgment alone. If the description contained in the judgment in actions for the sale of land can be perfected by reference to the pleadings, and it is made to appear that no injustice or injury resulted to any of the parties, we should say that the judgment, although erroneous because uncertain or indefinite, is not void, but may be corrected after notice upon motion of either party or any person interested by the court rendering it. *Brumley v. Nichols-Shepherd Co.*, 92 S. W. 548, 29 Ky. Law Rep. 139; *Four Mile Land & Coal Co. v. Slusher*, 107 Ky. 664, 55 S. W. 555. And we see no good reason why this rule may not be applied to judgments for the recovery of land in actions in ejectment. To illustrate, the judgment in this case is manifestly insufficient. It contains no description whatever of the land in controversy. Looking at the judgment alone, it cannot be ascertained what land was in controversy, or what land was recovered, or what land the plaintiff was adjudged entitled to the possession of. But,

when we look to the pleadings and the verdict, there is no difficulty in ascertaining an accurate description of the land in controversy, or in determining that the jury by their verdict found that the plaintiff was the owner and entitled to the possession of the land described in the pleadings, and the lower court can readily enter a judgment that will accurately describe the land in controversy. So that, under these circumstances, it is not necessary that the judgment below should be reversed for the purpose of enabling the court to conform the judgment to the verdict and pleadings. The error of the court in this respect was in the nature of a clerical misprision—one that can be corrected by the record.

In behalf of appellant our attention is called to the cases of *Meyer v. City of Covington*, 103 Ky. 546, 45 S. W. 769, and *Neff v. Covington Sand & Stone Co.*, 108 Ky. 457, 55 S. W. 697, 56 S. W. 723. In the former case, in an action to enforce a lien upon real property, the lower court "adjudged that the plaintiff has a lien therefor upon the real estate of the defendant, beginning at Pike street on the east side of York street, in this city, running thence North 296½ feet, more or less, the said property or enough thereof to satisfy said lien be sold, after advertising the sale in both modes mentioned in rule number 40 of this court. For services, the master is allowed \$15.00 to be paid by plaintiff and taxed as costs." In holding this judgment insufficient, the court said: "It will be seen from the foregoing that the description of the property ordered to be sold is totally insufficient. The terms and place of sale are not in accordance with the provisions of the Code. There should be a sufficient description of real property ordered to be sold to enable the purchaser or bidders to know with reasonable certainty what property was being offered for sale, and the report of the commissioner should in like manner be sufficient, to the end that there should be no controversy after the sale as to what property was sold or purchased. Explicit directions should be given to the commissioner as to the time, terms, and place of sale, in order that all such sales should be made as required by law. The judgment should be explicit in regard to the property ordered to be sold, as well as the time, terms, and place of sale, so that the commissioner should not be required to look to any other paper for order or direction. If the commissioner should be allowed to look to anything other than the judgment, as his guide, he might innocently sell property not adjudged to be sold, or sell it upon terms not authorized by law. In other words, the judgment should specifically direct the commissioner what to do, and not leave him to draw his conclusion from any other paper or from any other source of information." In the *Neff Case* the judgment followed that in the *Meyer Case*,

and was also reversed. But it will be observed that there were several defects in this judgment. It did not fix the time, terms, or place of sale, but left these essential matters to the discretion of the commissioner; and we apprehend that the reversal was due more to these errors than to the insufficiency in the description. In the case before us the only error complained of is the failure of the judgment to sufficiently describe the land. In *Foreman v. Redman*, 5 S. W. 556, 9 Ky. Law Rep. 531, which was an action involving the title to land, the judgment was held sufficient because the land recovered was not described, and for this reason it was reversed and remanded, with directions to the lower court to make the judgment more specific. But in that case a description of the land in controversy could not be ascertained by this court from the pleadings or record, and hence a reversal was necessary to enable the lower court to correct the judgment if it could do so. In the case at bar there is no difficulty in describing the land after an inspection of the pleadings and verdict, and no injustice will be done by correcting it by the record.

Wherefore the judgment of the lower court is affirmed, with directions to enter a judgment in favor of the plaintiff below awarding her the ownership and possession of the land in controversy, describing it in the judgment as it is described in the amended petition.

DUPOYSTER et al. v. DUNN et al.

(Court of Appeals of Kentucky. Nov. 25, 1908.)
QUIETING TITLE (§ 12*)—ACTUAL POSSESSION BY PLAINTIFF.

Under St. 1903, § 11, authorizing one having "the legal title and possession" of land to prosecute suit to quiet title to it, and providing that, if he establish his title to it, he shall have a decree, he must prove not only ownership, but actual possession when he sued.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 8-12, 44, 45; Dec. Dig. § 12.*]

Appeal from Circuit Court, Ballard County.
"Not to be officially reported."

Action by J. C. Dupoyster and others against J. I. Dunn and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

F. L. Turner, for appellants. J. M. Nichols & Son, for appellees.

CLAY, C. This is an action by appellants against appellees, under section 11 of the Kentucky Statutes of 1903, to quiet their alleged title to a tract of land located in Ballard county, Ky. Appellants alleged that they were the owners of, and in actual possession of, the land described in the petition, to wit, section 7, township 5, range 3 west, and the south half of section 6, same

township and range. After denying their ownership and possession, appellees set out a boundary of land containing 222 acres, and alleged that the land belonged to them, and that they, and not the appellants, were in the actual possession of it at the date of the institution of this action. Judgment below was in favor of appellees, and, from that judgment, this appeal is prosecuted.

Neither appellants nor appellees exhibited a title from the commonwealth. Appellants claimed under a deed from Thomas Dupoyster to B. S. Dupoyster and others, executed March 18, 1859, and covering some 5,000 acres of land. It is the contention of appellants that, after procuring this deed, they moved upon that land and claimed the same to a well-defined boundary. The testimony for appellees is to the effect that Williams Hughes lived upon the 222 acres of land prior to, and at, the time the deed was made from Thomas Dupoyster to B. S. Dupoyster and others in 1859. For a while he occupied a residence upon the very tract in question. After being there for some time, the house burned down, and he then moved to a tract adjoining. During all the time, however, he exercised acts of ownership over the 222 acres of land, and claimed the same to a well-defined boundary. Upon the death of Hughes the land was purchased at a commissioner's sale by J. C. Harkless. Upon Harkless' death, the land was devised to appellee Jessie I. Dunn. Prior to his death Harkless leased the land for a period of five years to James Carpenter. Carpenter placed a man on the land, who occupied the same at the time of the institution of this action. After Harkless' death, Carpenter paid the rent to appellee Jessie I. Dunn. We think the evidence shows there was a well-defined boundary line between the Dupoyster land and the land involved in this action. It does not appear that any of the Dupoysters ever claimed the land in question. When Harkless took possession under this deed from the commissioner, he claimed to this well-defined boundary line. A large number of acres were cultivated, and he and his tenants for him exercised acts of ownership up to the boundary line lying between the 222 acres and the Dupoyster tract. As this action was instituted under section 11 of the Kentucky Statutes of 1903, it was necessary for plaintiffs below to prove both ownership and actual possession of the land at the time of the institution of the action. These two facts were essential to the maintenance of the cause. Appellants not only failed to prove possession in themselves, but we are of opinion that appellees were in the actual possession of the 222 acres of land. That being the case, the trial court properly gave judgment in favor of the appellees. *Dupoyster v. Turk*, 110 S. W. 260, 33 Ky.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Law Rep. 320; *Cornellson v. Foushee*, etc., 101 Ky. 257, 40 S. W. 680; *Packard v. Beaver Valley Land & Mining Co.*, 96 Ky. 249, 28 S. W. 779.

Judgment affirmed.

HOWELL v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 1, 1908.)

1. PERJURY (§ 33*)—SUFFICIENCY OF EVIDENCE.

Evidence on a prosecution for perjury held sufficient to support a conviction.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 33.*]

2. PERJURY (§ 36*)—PROSECUTION—QUESTIONS OF LAW.

Whether the police judge, before whom was held a court of inquiry on the question of gambling having been committed, was satisfied that such offense had been committed, and whether he had authority to swear defendant, are questions of law for the court on a prosecution for perjury based on what defendant testified to before such judge.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 36.*]

Appeal from Circuit Court, Hardin County.

"Not to be officially reported."

Taylor Howell was convicted of perjury, and appeals. Affirmed.

W. A. Barry and H. L. James, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CLAY, C. This is the second appeal of this case. The opinion on the former appeal may be found in 104 S. W. 685, 31 Ky. Law Rep. 983. By that opinion the case was remanded for a new trial. Appellant was again tried and convicted of the crime of false swearing, and his punishment fixed at one year in the penitentiary. From the judgment based upon the verdict of the jury, he prosecutes this appeal.

It is first insisted that the court erred in refusing a peremptory instruction to the jury to find appellant not guilty. It appears that appellant, together with three or four other negroes, were apprehended by some parties in a crap game back of Scott's barber shop in the town of Elizabethtown, Ky. Upon the facts being made known to Fletcher Irwin, the police judge of that town, he proceeded to hold a court of inquiry. Among the witnesses who appeared before the police judge was the appellant. After being duly sworn, he testified that he was not engaged in any game of dice at the place or time that he was asked about, and that no one else was engaged in said game as far as he knew, and that no game was played there. He further stated that John Blevin, George Blevin, Ed English, and Albert Pawley were not engaged in shooting dice or gambling at the time and place inquired about. The proof of the commonwealth upon appellant's

trial was to the effect that appellant and John Blevin, George Blevin, Albert Pawley, and Ed English were engaged in a crap game in the rear of Scott's barber shop, that they were seen to be shooting dice and passing the dice on the ground, and money was to be seen on the ground near the place where the game was played. Several witnesses testified to the statements made by appellant on oath before the police judge, and to facts showing the falsity of these statements. No evidence was offered by appellant. Without stating the evidence in detail, we may say it was sufficient to authorize the submission of the case to the jury, and abundantly supports the verdict of guilty.

It is next contended that the court erred in the instructions which it gave to the jury. When this case was before us on the former appeal, we held that the lower court erred in failing to require the jury to believe from the evidence beyond a reasonable doubt that the accused was present at the place back of E. B. Scott's barber shop at the time stated, and engaged in a game of dice with Ed English, or either of the parties named in the indictment, in which game money or property of value was bet, won, or lost, or that he was present at the place stated and saw the other parties engaged in a game of dice in which money or property of value was bet, won, or lost. Upon the second trial the court embodied in its instructions the suggestion contained in our former opinion as to the presence of the accused at the place and time referred to in the evidence, and to his engaging in a game of dice, or seeing others engaged in such game; and the instruction, as so amended on the second trial, properly presented the law of the case. In our former opinion criticism was made of the reasonable doubt instruction, and the lower court directed to give an instruction upon this point in accordance with section 238 of the Criminal Code of Practice. Upon the second trial, the lower court complied with the direction contained in the opinion, and presented the reasonable doubt instruction in the exact language of the Code. In our former opinion the trial court was also directed to instruct the jury that they should acquit the accused, unless it was proved that he swore falsely by two witnesses, or by one witness and strong corroborating circumstances. This direction was also complied with by the trial court. We are therefore of opinion that the trial court properly instructed the jury.

It is next insisted that the trial court erred because it failed to give an instruction offered by appellant, submitting to the jury the question whether or not the police judge before whom the court of inquiry was held was satisfied that the public offense of gambling had been committed, and the further

question of the authority of the police judge to swear the appellant. The questions embodied in the instruction offered are not questions of fact to be determined by the jury. They are questions of law properly determinable by the court; and the trial court, therefore, properly refused to submit them to the jury.

Being of the opinion that the record contains no error prejudicial to the substantial rights of the appellant, the judgment is affirmed.

GEORGIA HOME INS. CO. v. KELLEY.

(Court of Appeals of Kentucky. Dec. 2, 1908.)

1. INSURANCE (§ 145*)—CONTRACT TO REINSURE—ACTION—PETITION.

In an action for breach of an insurance company's contract to reinsure at the expiration of an existing policy, the petition *held* to state a cause of action.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 145.*]

2. INSURANCE (§ 145*)—CONTRACT TO REINSURE—CONSTRUCTION—CERTAINTY.

Where plaintiff had purchased \$600 insurance on certain tobacco for three months, the agent agreeing to keep it in force when it expired by renewing it, according to the course of business between the parties, the contract was to issue a new policy insuring the property for the same amount, and for the same time from the date of the expiration of the old one, and was therefore not defective for uncertainty.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 145.*]

3. INSURANCE (§ 145*)—CONTRACT TO REINSURE—BREACH—NOTICE.

Where an insurance agent had been in the habit of renewing plaintiff's insurance, and extending credit to plaintiff for the premiums, and he agreed to keep certain insurance in force, it was his duty to renew a policy on its expiration, unless he gave plaintiff notice that further credit would be refused.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 145.*]

4. TRIAL (§ 207*)—RECEPTION OF EVIDENCE—PARTIES—LIMITATION.

Plaintiff's tobacco was destroyed on the night of the day on which his insurance expired, and he sued for breach of the insurance company's agent's contract to keep the property insured. The agent, a man of high character, testified that plaintiff was in debt to him for premiums, and that he had notified him prior to the expiration of the policy that he would not carry him further. In rebuttal plaintiff and his attorney testified that, in a conversation with the agent after the fire, the agent admitted that he had never notified plaintiff that he would not keep up the insurance. The court did not limit this evidence to the purpose of impeaching the agent, who then testified that such conversation never occurred. *Held*, that the court erred in not so limiting the testimony, and that such error was accentuated by an instruction limiting the effect of the agent's answer that the conversation never occurred to impeachment purposes.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 207.*]

Appeal from Circuit Court, Henry County.
"Not to be officially reported."

Action by Leonard Kelley against the Georgia Home Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Wm. P. Thorne and William Carroll, for appellant. Moody & Barbour, for appellee.

HOBSON, J. On February 6, 1907, the Georgia Home Insurance Company issued a policy to Leonard Kelley, insuring a lot of tobacco that he owned in the sum of \$600 for three months, or until noon May 6, 1907. The tobacco was burned on the night of the 6th of May, and this suit was brought by Kelley to recover on the policy. He charged that at the time the policy was written, and afterwards, the insurance company, through its agent, agreed with him that, upon the expiration of the policy, it would issue to him another policy for the term of three months, beginning at noon May 6, 1907, in consideration of the usual premium; that its agents in Henry county, having authority to make contracts of insurance and to renew them, had been for some time doing business with him, and had, under a similar agreement, issued to him new policies upon the expiration of the old ones; that the premiums were not paid at the time the policy was issued, but were charged to him, and paid by him afterwards; that this was the usual course of dealing between the parties, and that because of this, he had not, on May 6th, paid the renewal premium, which he would have done but for the agreement with the agent to keep the policy in force, and to collect from him the premium later; and that he did not know that the agent had failed to renew the policy until after the fire. The defendant put in issue the allegations of the petition. The case was tried before a jury, who found for the plaintiff, and, the court having entered judgment on the verdict, the defendant appeals.

The petition is sufficient to maintain the action under the rule laid down by this court in *Baldwin v. Phoenix Ins. Co.*, 17 Ky. 356, 54 S. W. 13, 92 Am. St. Rep. 362. The proof on the trial, both for the plaintiff and the defendant, substantially showed that at the time the policy was issued it was agreed between the plaintiff and the agent that the agent would keep it in force when it expired by renewing it, and that this course of business had been pursued by the parties for some time. After the policy was issued, the plaintiff called the agent up over the phone. He and the agent do not differ substantially as to what occurred. He said to the agent to keep the policy in force for him, and not let it run out when it expired, and the agent, in effect, said he would. The agent, however, testified that in March the plaintiff had fallen in debt to him in the

sum of \$92, and that he failed to pay it; that in April he saw him, and told him that he must pay up or he would not carry the policy any longer, and that when he failed to pay, he wrote him a letter, telling him that he would not renew this policy on May 6th. The plaintiff denied receiving the letter, and also denied that the agent told him that he would not carry the insurance longer. After the fire Kelley called up the agent over the telephone, and asked him if he had renewed the policy. The agent answered: "No; you know the reason why I did not." Kelley said, "Yes," and hung up the receiver. The case is clearly distinguishable from *Hartford Fire Insurance Company v. Trimble*, 117 Ky. 583, 78 S. W. 462. In that case the alleged agreement was held not enforceable because neither the amount of the insurance, the rate of premium, nor the duration of the risk was agreed upon. But here there was simply an agreement to renew an existing policy. The agreement would naturally mean that a similar policy was to be issued on May 6th on the same tobacco, insuring it for \$600 for three months from that time. This is evidently what both parties to the oral contract understood, and undoubtedly the contract would have been carried out but for the fact that Kelley failed to pay the agent what he owed him. But although he failed to pay, still he, if his statement is true, agreed to pay soon; and the agent gave him further time. If this be true, it was the duty of the agent under the agreement to renew the policy, unless he gave Kelley notice that further credit would not be extended; for if such notice was given, Kelley could protect himself by getting other insurance; and if it was not given, he had a right to rely on the promise of the agent to keep his insurance up for him.

The plaintiff in rebuttal proved by himself and his attorney, Hillis List, that on the 4th day of July after the fire, there was a conversation between them and Patterson, the agent, in Patterson's office, in which List said to Kelley, "Leonard, Judge Patterson says that you would not say in his presence that he had not revoked his agreement to issue said policies," that Kelley answered, "Why, Judge, you did not tell me any such thing, you never told me that you revoked your agreement to keep my insurance up," and that Patterson said in reply, "No; I did not." This evidence was admitted over the defendant's objection and exception, and the court did not charge the jury that the evidence was not to be considered as substantive testimony, and was only to be considered by the jury for the purpose of impeaching the credibility of the witness Patterson, if it did so impeach him. The failure to so charge the jury when this evidence was admitted was a substantial error.

The statements of the agent after the transaction was closed were not substantive evidence against the defendant, but the jury would naturally consider them so, unless told otherwise. This error was accentuated by the fact that when Patterson was on the stand, he was asked if the conversation referred to did not occur, and said that it did not. The court thereupon said to the jury that they should consider the question and answer as contradicting the witness, if it did contradict him, and not as to the merits of the case, one way or the other. The jury would naturally infer from this that they were not to consider the conversation suggested in the answer as evidence, as Judge Patterson had denied its having taken place; and, when they were not similarly cautioned when the testimony of List and Kelley was given, they would naturally understand that now, as the conversation had been proven, they were to consider it. The case turns simply on the testimony of Patterson on the one hand, and that of Kelley on the other. There were circumstances sustaining Patterson, and but for this evidence as to the conversation which occurred on July 4th, it would seem that the weight of the testimony was with the defendant. The admission of this evidence, therefore, without any caution as to the purpose for which it could be considered, was prejudicial to the defendant. It would appear from the record that Judge Patterson is a man of high character, and the jury might have paid very little attention to the conversation which was had on July 4th, if they had been told they could only consider it on the question of the credibility of the witness.

Judgment reversed, and cause remanded for a new trial.

LOUISVILLE SCHOOL BOARD v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. Dec. 1, 1908.)

MUNICIPAL CORPORATIONS (§ 986*)—DISPOSITION OF TAXES COLLECTED—LIABILITY FOR TAXES NOT COLLECTED.

St. 1903, § 2969, provides that cities of the first class shall levy, assess, and collect a certain tax annually for city purposes, which tax shall be passed to the credit of the school fund as the same is collected, and shall be paid over to the school board in regular weekly installments, the first payment to be made within one week after the collection of the taxes shall have been commenced. A city refrained from assessing taxes on a water company in consideration of its furnishing water to the city without charge. After this arrangement had continued for a number of years, the city sued the water company for the taxes unpaid, and the court decreed that the water company was entitled to a credit for the value of water furnished, which exceeded the claim for taxes, and the court decreed a cancellation of tax bills. *Held*, that the city was not liable to the school board for the amount of taxes found due by the decree, as the outcome of the suit did not amount to a collection of taxes, and the statute does not contemplate that the city shall be liable to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the school board for the amount of taxes levied, and not actually collected.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 986.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"Not to be officially reported."

Action by the Louisville School Board against the City of Louisville. From a judgment dismissing the action, plaintiff appeals. Affirmed.

See, also, 119 Ky. 574, 84 S. W. 729.

Wallace A. McKay, D. W. Sanders, and C. H. Harrison, for appellant. A. E. Richards and Elmer C. Underwood, for appellee.

CARROLL, J. This appeal seeks the reversal of a judgment dismissing the action brought by the appellant against the city of Louisville to recover \$45,192 of taxes which it claimed the city owed it. The controversy arose in this way: For many years the Louisville Water Company furnished water to the city for fire protection free of charge, under an act that provides "it shall be the duty of the Louisville Water Company to furnish water to the public fire plugs or hydrants of the city of Louisville for fire protection free of charge." Partly in consideration of this, the city did not assess any taxes against the water company, and for the further reason that the Louisville Water Company, although a separate corporation, was really the property of the city of Louisville. For many years this condition of affairs existed. Finally a suit was brought by the city to compel the water company to pay city taxes, and it was held by this court in *City of Louisville v. McAteer*, 81 S. W. 698, 26 Ky. Law Rep. 425, 1 L. R. A. (N. S.) 766, that the water company was liable. In the opinion it was said that: "In this suit the city should credit upon appellee's tax bills the reasonable price of the water it has used for the years for which the tax is being asserted, and for which it may not have paid. The basis of this credit should be upon such terms as the court may find from evidence if the parties cannot agree upon it. Credit should be given on the city's tax bills for each year's water rents so as to avoid penalties and interests so far as the water rents may go to extinguish the annual bill." Pursuant to the opinion of this court, the case was remanded for further proceedings, and, in a judgment rendered in conformity with the opinion, the lower court found that the taxes due the city from the water company for the years in question amounted to \$223,224, and that the amount due the water company from the city for water was \$389,091, thereby bringing the city out in debt to the water company in an amount more than \$150,000. The judgment further recited: "And, it further appearing to the court that said water bills exceed in

amount all of its unpaid tax bills for the years prior to and including the year 1903, it is now adjudged pursuant to the opinion and mandate of the Court of Appeals herein that said water bills be credited upon and applied to the payment of said tax bills, and that the said tax bills for the years prior to and including the year 1903 be canceled by said credits." In this action the school board insists that under the facts stated, it is entitled to receive from the city the same proportion of the taxes assessed against the water company as it received from taxes assessed against other property. The amount of taxes the school board is entitled to demand and receive from the city is fixed and regulated by statute (section 2969 of the Kentucky Statutes of 1903, which is a part of the charter of cities of the first class), reading as follows: "To raise money for the maintenance of the schools, the general council shall, in the year one thousand eight hundred and ninety-three, and annually thereafter, cause to be levied and collected a tax of not less than thirty-three cents on each one hundred dollars' worth of property assessed for taxation for city purposes. Upon the completion of the assessment of property for taxation, the amount levied as above shall, annually, be passed to the credit of the school fund upon the books of the city, and the said amount, as collected, shall be paid over to the board by the treasurer in regularly weekly installments, the first payment to be made within one week after the collection of said amount shall have been commenced, and the other payments to be made weekly thereafter, in current money, by the said treasurer, as collected."

Under this statute it is the duty of the general council of the city to levy for the benefit of the schools the tax specified, but the city does not become liable to the school board for any part of the tax so levied unless and until it has been collected. If the city should levy a tax upon any species of property, it could not be required to pay the school board's portion thereof until after the tax was collected. In other words, the liability of the city attaches, not by reason of the levy, but by reason of the collection of the tax. We think this is the manifest meaning of the statute, and that it is not susceptible of any other construction. The statute provides that the amount of tax collected shall be paid over to the board, in weekly installments, the first payment to be made within one week after the collection and the other payments weekly thereafter as collected. Nowhere do we find any statutory authority to support the contention that the city is liable for taxes not collected. If it was made to appear that the city levied a tax and obstinately or negligently failed to collect the same as it might have done, there would be some reason for holding the city liable for taxes that it could and should

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have collected. But this is not the state of case we are dealing with. The opinion of this court holding that the city had the right to levy and collect taxes from the water company also declared that the water company might set off against the city's claim for taxes any indebtedness to it by the city on account of water furnished. In short, the effect of the ruling was that the city and the water company had mutual existing accounts against each other, and that neither could collect its account until it had first settled the account of the other. Under this ruling, and the facts developed by it as expressed in the judgment of the court below, the levy by the city of taxes upon the property of the water company did not bring into the city treasury any revenue. It did not and it could not collect any sum in the way of taxes from the water company. Therefore the school board has no claim against the city on account of this matter.

Wherefore the judgment of the lower court is affirmed.

GAMBRELL v. GAMBRELL.

(Court of Appeals of Kentucky. Dec. 2, 1908.)

1. APPEAL AND ERROR (§ 907*)—REVIEW—WANT OF BILL OF EXCEPTIONS.

In the absence of a bill of exceptions and evidence, it will be presumed that the evidence and instructions authorized the verdict rendered, and the court will review the sufficiency of the pleadings only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3673-3678; Dec. Dig. § 907.*]

2. REPLEVIN (§ 93*)—VERDICT—CONFORMITY TO PLEADINGS.

Under Civ. Code Prac. § 388, providing that, in an action for possession of specific personal property, plaintiff may have judgment for its delivery, if it can be had, and, if not, for its value and for damages for the detention, a petition praying for judgment for the recovery of certain articles and also for \$249 for property disposed of and for damages in the amount of \$50 for the detention of said property was sufficient to support a verdict for \$300.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 93.*]

3. APPEAL AND ERROR (§ 1171*)—REVERSAL—AMOUNT OF RECOVERY—TRIVIAL EXCESS.

Where a verdict is for \$300, instead of \$299, the error of \$1 is too small to authorize reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171.*]

4. APPEAL AND ERROR (§ 699*)—RECORD—BILL OF EXCEPTIONS.

Instructions of the lower court cannot be reviewed where not made part of the record by a bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2923-2930; Dec. Dig. § 699.*]

5. REPLEVIN (§ 93*)—VERDICT.

In an action of claim and delivery, if the chattels described as in the possession of defendant are surrendered to plaintiff before or at the time of trial, or if the proof shows that

they were the property of defendant and not the property of plaintiff, it is not necessary for the jury to find concerning such articles, though it is the better practice to so find if the property belongs to defendant.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 93.*]

6. REPLEVIN (§ 93*)—VERDICT.

In an action of claim and delivery, the verdict need not award to plaintiff such articles as have been disposed of by defendant.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 93.*]

7. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT—VERDICT.

Defendant in an action of claim and delivery cannot complain that the jury failed to award plaintiff certain of the articles claimed, where it does not appear that they were taken out of defendant's custody by the writ.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

8. TRIAL (§ 345*)—VERDICT—OBJECTIONS.

Where the verdict in an action of claim and delivery fails to award the property alleged to be in defendant's possession, he should move to have the jury make a more complete verdict, and he cannot wait until the jury is dismissed, and then avail himself of the error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 819; Dec. Dig. § 345.*]

Appeal from Circuit Court, Knox County.
"To be officially reported."

Action by Mary Gambrell, as administratrix of the estate of Frank Gambrell, against Frank Gambrell. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Wilson, for appellant. S. A. Smith and W. R. Lay, for appellee.

O'REAR, C. J. Appellee brought this action of claim and delivery (detinue) against appellant for the recovery of certain mules, cows, wagons, hogs, and other chattels which she alleged belonged to her intestate's estate. Each article was described and valued as required by the Code of Practice. The petition also alleged that certain of the articles named, and valued at \$249, had been disposed of by appellant, so that they could not be found. She prayed judgment for a recovery of the articles on hand, and for \$50 in damages for the detention of the property. Appellant denied appellee's ownership of the property, and put in issue its value and the damages sustained by her for its detention. The answer further pleaded that the intestate had in his lifetime sold the property to appellant, who claimed it by virtue of that sale. The result of the trial before a jury was a verdict for appellee for the sum of \$300 in money.

Appellant within three days moved the trial court to grant him a new trial. The only ground then asserted that can be reviewed upon this appeal was the failure of the jury to designate the specific property to be returned to the plaintiff and its value, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the damages awarded, if any, for its detention. The motion for a new trial was overruled. Time was taken to prepare and file a bill of exceptions, but the bill was not filed. The appeal prosecuted from the judgment therefore presents but the single question whether the judgment is authorized, or might be authorized, by the pleadings. For, in the absence of a bill of exceptions and evidence, it will be presumed that the evidence and instructions authorized the verdict rendered, provided the state of pleadings do. Section 388, Civ. Code Prac., upon the manner of giving judgment, reads: "In an action for the possession of specific personal property, the plaintiff may have judgment for its delivery, if it can be had; and, if not, for its value and for damages for its detention. * * * " The petition in this case contained this prayer for relief: "Wherefore the plaintiff, Mary Gambrell, prays judgment against the defendant for the recovery of said mule, wagon, and harness. She prays for judgment against him for \$249 for the property he has heretofore disposed of—one mule, steer, and four hogs—for damages in the amount of \$50 for the detention of said property, for her cost herein expended, and for all proper relief." We cannot know from this record what facts were developed at the trial. It may have been that the mule, wagon, and harness which were alleged to have been in the possession of the defendant when the petition was filed had been surrendered by him to the plaintiff at the time of the trial, in which event there would have been nothing left on that score for the jury but to assess the damages for the detention of the property; or it may have been that the evidence showed that plaintiff was not the owner or entitled to the possession of these articles. At the same time, it may have shown that the articles missing were the property of the plaintiff to which she was entitled to the immediate possession, and that the reasonable damages for their detention was \$50, and their value as claimed. In the latter event, the jury's verdict should have been for \$299. The error of \$1 in assessing the amount in the verdict is too small to be noticed as a ground for reversal.

Copied into the record are what purports to be instructions presumably given on the trial. But these we cannot notice. They were not made part of the record by bill of exceptions or otherwise. *Meaux v. Meaux*, 81 Ky. 475, 5 Ky. Law Rep. 548; *Forest v. Crenshaw*, 81 Ky. 51, 4 Ky. Law Rep. 596; *Meador v. Turplin*, 4 Metc. 94; *Higgins' Adm'r v. L. & N. R. Co.*, 38 S. W. 876, 18 Ky. Law Rep. 899; *Tinsley v. White*, 54 S. W. 169, 21 Ky. Law Rep. 1151. Nor, in the absence of a bill of exceptions, can the appellate court inquire into the propriety or correctness of the instructions that may have been given. *Beaven v. Phillips*, 83 Ky. 88.

If the fact was that the chattels described as on hand when the petition was filed were surrendered to the plaintiff before or at the time of the trial, or if the proof showed they were the property of the defendant, or not the property of the plaintiff, it was not necessary for the jury to find in their verdict concerning such articles, except that, in the instance next to the last supposed, it would have been better practice to have had the jury do so. But, as to the articles alleged in the petition to have been disposed of, it was needless for the jury to award them specifically to the plaintiff. They were gone. Code Civ. Prac. § 388, expressly allows the verdict and judgment to be for the value of the articles not to be had; and, as to the damages, they might without impropriety have been included in the general award of money. In such aspect there is no error in the form of the verdict. But, if the fact be that the evidence was such as to have warranted a deliverance by the jury as to the mule, wagon, and gears alleged to have been on hand, the failure of the jury to do so is a matter of complaint on the part of the plaintiff, as it does not appear that they were taken out of the defendant's custody by the writ. But, even if they had been taken from the defendant by the sheriff under the order of delivery, the defendant should have moved the court when the verdict was returned to have the jury make a more complete verdict. By waiting till the jury was dismissed, he could not avail himself of an error which was as much to the plaintiff's hurt as his in order to wrest from her a verdict otherwise unassailable. This record fails to show that appellant has been prejudiced in the slightest by the alleged error of which he complains.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. MAHAN. (Court of Appeals of Kentucky. Dec. 1, 1908.)

1. TRIAL (§ 143*)—EVIDENCE—ISSUES—QUESTIONS FOR JURY.

Where the evidence is conflicting, the court cannot direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

2. MASTER AND SERVANT (§ 149*)—INJURY TO SERVANT—NEGLIGENCE.

An employé ordered by the foreman in charge of the work to carry a machine which was too heavy for him was injured. The employé expressed doubt as to his ability to carry the machine, but the foreman insisted on his doing so. It was dangerous for one man to carry the machine, and to do so was in violation of the order of the superintendent. *Held*, that the employer was liable for the injuries sustained.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 291; Dec. Dig. § 149.*]

3. MASTER AND SERVANT (§ 287*)—FELLOW SERVANTS—FOREMAN—QUESTION FOR JURY.

Whether one was a foreman when he ordered an employé to do a particular work re-

sulting in his injury held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1062-1064; Dec. Dig. § 287.*]

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Action by Jesse Mahan, a minor, against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Browder & Browder and Benjamin D. Warfield, for appellant. Willis & Meredith, for appellee.

BARKER, J. The appellee, Jesse Mahan, aged 19 or 20 years, was a part of a bridge force in the employ of the appellant, Louisville & Nashville Railroad Company, and at the time he was hurt was engaged at work on the bridge spanning Clifty creek, in Muhlenberg county, Ky. J. W. Ellette was the foreman of the crew, and had general supervision of the work. One Parks was the assistant foreman, and, in the absence of Ellette, had charge and superintendence of the crew and work. The accident to appellant, Mahan, which constitutes the basis of this litigation, occurred (as claimed by appellee) as follows: There was in use in the work being done a "hydraulic jack," which, just before the accident, was on a flat car near the bridge. Wallace Butt, who generally was an ordinary workman in the crew, but who, appellee claims, was at the time temporarily in charge as foreman, told Mahan to shoulder the jack and carry it from the car to a point a short distance therefrom. The instrument weighed from 150 to 200 pounds, and had handles on each side, and the ordinary way to move it was to have it carried by two men, each holding a handle. Appellee states that, when he was told to shoulder the jack, he demurred on the ground that he thought it was too heavy, but he was told by his superior, Butt, that he (Butt) had himself carried it the day before, that other men had carried it, and that he (Mahan) could also carry it. Whereupon Mahan, in obedience to the orders of his superior, undertook to carry the instrument; it being placed upon his shoulder by Butt, who was on the car for that purpose. As soon as the jack was on his shoulder, Mahan found that he could not stand up under its weight, and undertook to throw it from him so as to escape injury, but, falling in this, was crushed to the earth, the jack falling on him, breaking his collar bone, and inflicting other serious bodily injuries. To recover damages for this accident he instituted this action against appellant, alleging that his injuries were caused by the gross negligence of his superior, Wallace Butt. Appellant answered, denying all the allegations of negligence charged in the petition,

pleading that Wallace Butt was a fellow servant of plaintiff, and was not superior to him in authority, and also that the injuries occurring to plaintiff on the occasion in question resulted from his own negligence. A trial resulted in a verdict for the plaintiff in the sum of \$800, and of the judgment based upon this verdict the railroad company is now complaining.

The chief complaint of the appellant is that the trial court erred in overruling its motion for a peremptory instruction at the close of all the evidence; but it seems to us that this position is untenable, and that the trial court correctly ruled on the motion for a peremptory instruction. The plaintiff testified that he was ordered by Wallace Butt to carry the jack; that he was afraid of its weight, but yielded to the orders of his superior upon the latter's assurance that the weight was not beyond plaintiff's strength. Several witnesses who testified for him agree that Parks had left the place from which the jack was to be carried, and had placed Butt in charge, and that the latter was temporary foreman at the time of the order to plaintiff to carry the jack. The evidence for the plaintiff also tended to show that the weight was much too great for the young man, and that it crushed him to the earth as soon as it was placed upon his shoulder. The evidence of the foreman, Ellette, who testified for the defendant, really strengthened the cause of appellee in several particulars. In the first place, it shows that he knew that the hydraulic jack was too heavy to be carried by one man, and that he had issued orders before the accident that it was not to be carried by one man again. This was because he had seen Parks carrying the jack on his shoulder, and it was to him, as well as the rest of the crew, that he issued orders that it was not to be so carried thereafter. On redirect examination, he was asked: "Q. Mr. Ellette, did you ever instruct this gang of workmen, of which Mr. Mahan was a member, how to carry these jacks? A. Yes, sir. Q. Tell what you told them. A. These jacks—we had two of them—they weighed about 150 pounds each, and I had seen Mr. Parks put this jack on his shoulder and tote it around the end of the car— Q. Go ahead, and tell how you came to give instructions after you saw Parks carrying it, what did you do, if anything. A. Told them the jacks was made for two men to tote, and didn't want to see any one man trying to tote it any more—" The witness said, on examination by the court, that he did not know whether Mahan heard or knew of his instructions or not. In answer to the question, "How ought they [the jacks] to have been carried?" he replied: "By the handle. Handles are put on with a band around the jack, handle on each side big enough for a man to get his hand in, and, of course, they can tote the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jack like you do a bucket of water, swinging down in your hand. Q. Took only two men to carry it? A. Yes, sir; it required two men." On the subject of Parks' authority to appoint a man to take charge of a crew in his absence, Ellette was asked: "Q. Mr. Parks had the right when he went away to leave another man in charge, didn't he? A. Yes, sir." It thus appears from the defendant's own testimony that it was dangerous for one man to carry the hydraulic jack on his shoulder, and to do so was in violation of the superintendent's order. It does not appear, however, that the plaintiff knew anything of the order which had been given by Superintendent Ellette. It also appears that Parks had the authority to appoint Butt foreman when he left. Now, while it is true that the defendant's evidence contradicts Mahan and his witnesses in their testimony that Butt was appointed foreman by Parks, or that Parks had gone away from the work, and it also wholly contradicts them on the subject of Butt telling Mahan to carry the jack at all, and, on the contrary, tends to show that Mahan voluntarily undertook to carry the instrument by which he was hurt, yet this contrariety of testimony raised questions of fact which were properly submitted to the jury, and the court would not have been warranted in instructing them peremptorily to find for the defendant. The appellant in its brief insists that the appellee best knew whether he was able to carry the jack with safety, and that, having voluntarily assumed to carry it, he cannot recover for the injuries sustained thereby. We do not think the question involved here is thus to be disposed of; and the cases cited by appellant on this point are not apposite to the principle we have for adjudication. There is no evidence in the record that appellee knew he could not carry the jack. On the contrary, he merely expressed a doubt as to whether he could carry it safely, but was assured by his superior, who presumably knew more about the weight of the instrument than did the appellee, that he could carry it, and insisted upon his so doing.

The case we have before us cannot be distinguished in principle from that involved in *Illinois Central R. R. Co. v. Langan*, 116 Ky. 318, 76 S. W. 32. There the employé was engaged with three others in moving steel-shafts weighing from 200 to 460 pounds each. The gang had moved several shafts weighing about 200 pounds, and had requested the freight clerk, who had charge of them, to obtain assistance for the removal of the larger shafts which weighed 460 pounds each. They stated to him that they could not in safety, or that it would be dangerous for them to attempt to, move these large shafts, which were about 20 feet long and from 4 to 6 inches in diameter, and which, because they were round and had been oiled or greased, were

hard to handle. The freight clerk having failed to get the additional men after an effort so to do, told appellee and others of his gang, "Oh, go ahead," or something to that effect. In attempting to handle one of these larger shafts afterwards, it slipped or dropped from the hands of the carriers, and fell on Langan's foot, severely injuring it. A judgment for the employé in this case was affirmed; it being held that it was the duty of the master to furnish the servant a sufficient number of collaborators to do the work at which he had been set. The reasoning of the opinion in that case is conclusive of the one before us. To the same effect are *Dryden v. Pogue*, 82 S. W. 262, 26 Ky. Law Rep. 523; *Pullman Co. v. Geller*, 107 S. W. 271, 32 Ky. Law Rep. 884.

The question whether or not Wallace Butt was the superior of appellee at the time the latter was hurt was properly submitted to the jury; the evidence upon this question being in dispute. *Crabtree Coal Mining Co. v. Sample's Adm'r*, 72 S. W. 24, 24 Ky. Law Rep. 1703.

We think the verdict was not excessive, and that the court in the instructions given fairly submitted the law of the case to the jury, and their verdict is fully supported by the evidence.

Judgment affirmed.

DELANO et al. v. SAYLOR et al.

(Court of Appeals of Kentucky. Dec. 1, 1908.)

1. APPEAL AND ERROR (§ 38*)—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY.

The Court of Appeals has jurisdiction where the amount in controversy is a lien upon land, though less than \$200.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 121, 178; Dec. Dig. § 38.*]

2. VENDOR AND PURCHASER (§ 337*)—RESCISION OF CONTRACT—LIEN OF PURCHASER.

Under a contract of sale of land whereby a part of the price was advanced on condition that, if a good title could not be made, it should be refunded, such sum is a lien upon the land to secure its repayment.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 985; Dec. Dig. § 337.*]

3. VENDOR AND PURCHASER (§ 341*)—ACTIONS—EVIDENCE—SUFFICIENCY.

Evidence in an action to recover the part paid of the price of land, because good title could not be made, held not to warrant a finding that there was either fraud or mistake in the execution of the contract, whereby a clause was omitted entitling vendors to have their attorney, in conjunction with the attorney for the purchasers, pass upon the title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 1014; Dec. Dig. § 341.*]

4. VENDOR AND PURCHASER (§ 18*)—CONTRACTS—VALIDITY—REASONABLENESS.

An option contract for the sale of land within a specified time, binding vendors to furnish a good title, and the purchasers, at their election, to take the land if the title was accepted and approved by their attorney, and providing that, if they should decline to take the land for any cause except insufficiency of the title,

the sum advanced by them should be forfeited to the vendors, but that, if the title was defective and for that reason alone the purchasers refused to take, such sum was to be refunded to them, was not unreasonable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 18.*]

Appeal from Circuit Court, Harlan County.
"Not to be officially reported."

Action by Warren Delano, Jr., and another against John M. Saylor and others. Judgment for defendants, and plaintiffs appeal. Reversed, with directions.

B. H. Sewell and Sampson & Sampson, for appellants. W. F. Hall and Greene & Van Winkle, for appellees.

CARROLL, J. On December 12, 1904, the following contract was entered into: "This agreement, made this 12th day of December, one thousand nine hundred and four, between John M. Saylor, and his wife, Louisa, F. R. Blanton, and Lavina C., his wife, and Jesse M. Blanton, and Serena C., his wife, all of Harlan Co., Ky., of the first part, and Richard B. Roane, of Pulaski, Va., and W. R. Ballou, of Pittsburg, Ky., parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of one hundred and seventy five dollars (\$175.00), the receipt whereof is hereby acknowledged, do covenant and agree that the said parties of the first part will, within thirty days after the exercise of this option by and upon request of the parties of the second part, or their assigns, grant and convey to the said parties of the second part, or their assigns, by deed in fee simple, clear of all liens, incumbrances and assessments, with general warranty of title, all that certain body of land more fully described as follows: On the waters of Jesse's creek, in Harlan Co., Ky., and bounded, on the north by land of Jackson Saylor and Wm. Osborn, on the south by land of said Roane and Ballou and others, on the east by land of F. G. Lewis and others (syndicate), on the west by land of James Brock and others, and containing 700 or more acres, subject to survey, and composed of three tracts—the Leander Russell tract, say 450 acres; the Sol A. Saylor tract, say 150 acres; and the John Brock tract, say 100 acres—in all, seven hundred acres, more or less. Upon the following terms and conditions: First: The said parties of the second part, their agent, attorney, or any person designated by them or their assigns shall have the right during the continuance of this agreement, to enter upon and take possession of the said land and make openings and excavations for the purpose of prospecting for coal or minerals. Second: The said parties of the second part shall have sufficient time to make surveys and examinations of title to said land, not to ex-

ceed six months or a reasonable time after the expiration of said six months, from the date of this agreement in which to exercise the option hereby granted, which reasonable time shall be named at the discretion or decision of said first parties. Third: If the title and surveys are satisfactory and accepted and approved by the attorney for the parties of the second part, or for their assigns, then the said parties of the second part, or their assigns, hereby agree to pay to the parties of the first part the sum of ten dollars (\$10.00), per acre, for the said tracts of land as ascertained by said surveys upon the conditions above named. The said sum of one hundred and seventy five dollars (\$175.00), paid as above stated, shall be credited upon the purchase price. Fourth: If the said title and surveys should not be satisfactory to the said parties of the second part, or their assigns, and not be approved by them or their said attorney, then the said parties of the first part bind themselves and agree to refund to the said party of the second part, the sum of one hundred and seventy five dollars (\$175.00) paid as above set forth; and until such repayment shall have been made this agreement shall continue in full force and effect and binding upon the said first parties, and their heirs and assigns. Fifth: If the said parties of the second part should refuse to purchase the said property for any reason except non-approval of title, the sum of one hundred and seventy five dollars (\$175.00), paid as above set forth, shall be forfeited to the said parties of the first part. It is understood and agreed that all costs and fees incurred in abstracting the titles of and in surveying these said tracts of land, shall be paid by said Roane and Ballou, or their assigns. Said parties of the first part are to have the free use of these said tracts of land for farming purposes only for 1905, by their paying the taxes for that year and keeping off depredations, and caring for these lands generally for 1905. This land shall be surveyed at the time the Sim W. Saylor tract adjoining it is surveyed and as soon as possible." This contract was signed and acknowledged by the grantors, was recorded in the proper office, and a few days afterwards was assigned by the grantees to Delano and Burr, the appellants herein.

In January, 1906, Delano and Burr brought this action against the grantors in the contract to recover the \$175 mentioned as paid in the contract, and to enforce a lien to secure the same upon the land described. They alleged that, soon after the execution of the contract, they caused the land to be surveyed and the titles to be examined by their attorney, who found that the titles were defective, and for this reason they refused to take the land, and within the six

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

months specified in the contract notified the grantors that the titles were disapproved and demanded the \$175, payment of which was refused. The answer in one paragraph traversed the petition, and in another set up that the fourth clause in the contract was not a part of the contract which they entered into, and averred that, in place of the fourth clause, it was agreed between the parties that, as soon as the survey was made and the titles abstracted, the grantors and grantees were each to select an attorney, and the two attorneys were to pass upon the title and say whether or not it was marketable, and, if they decided it was, the grantees were to accept the title and pay the contract price, or forfeit the sum of \$175; but that, by fraud or mistake, this condition in the contract was omitted, and the fourth clause, as it now appears and which was in the contract when first presented to them, was left undisturbed. They further averred that they were not given an opportunity to select an attorney to examine the title, but that the attorney for the grantees passed upon and refused to accept it. And, further, that their titles were not "defective or imperfect to any perceptible extent so as to render them unmarketable." In another paragraph they set up that, several days after the expiration of six months from the date of the contract, the grantees by their counsel prepared a list of exceptions to the title, and delivered the same to the grantors with the request that the defects be cured, and the assurance that, when cured, the title would be approved, and the trade closed, and that they were about to cure said defects, but, before they had time to commence to do so, they were notified that the titles had been rejected, and that the grantees would not take the land. A reply, that completed the pleadings, averred that the grantees had entered into the contract in good faith, without any notice either actual or constructive that there was any mistake in its execution, that they expended large sums of money in surveying the land and in causing the titles to be examined, and would have accepted the land except for the defects in the title.

The point is made on behalf of appellees that this court has no jurisdiction because the amount in controversy is less than \$200. But, if it is a lien upon the land, then, as has been often decided, this fact is sufficient to give this court jurisdiction without regard to the amount of money in controversy. As we understand the contract, the \$175 was advanced as a part of the purchase price, with the condition that, if the land was not purchased because a good title could not be made, it should be refunded to the grantees. Under this state of case, if the grantees in good faith refused to accept the title because it was defective, then it is a lien upon the land to secure the payment of the amount advanced as a part of the pur-

chase price. This question is fully settled in *Bullitt v. Eastern Kentucky Coal Land Co.*, 99 Ky. 324, 36 S. W. 16. We do not think the evidence is sufficient to show fraud or mistake in the execution of the contract. The appellees testified that they could read and write, that they signed and acknowledged the contract as it now appears, but that it was agreed between them and C. T. Smith, who represented Roane and Ballou in procuring the contract, that there should be inserted in it a stipulation that each party was to select an attorney to pass upon the sufficiency of the title. These statements, denied by Smith, are not supported by, but, on the contrary, are at war with, the circumstances developed by the testimony. Although the grantees had at least two separate meetings with the attorney representing the appellants, at each of which their attention was called to defects in the titles discovered by him, they did not make any mention of mistake in the contract, or assert that they had the right to have their attorney, in conjunction with the attorney for appellants, pass upon the title. Nor does it appear that this alleged mistake was brought to the notice of appellants or their attorney until the answer was filed in this case. The writing was put on record. It was assigned by the original grantees to appellants, and it is incomprehensible why the appellees or some one of them did not, when the question of title was being discussed and the errors in it pointed out and the title declined because of these errors, insist or at least make some suggestion that they had the right to have the sufficiency of the title passed on by an attorney of their selection. It requires the most convincing evidence to annul or modify a written contract that has been signed and acknowledged before an officer and put to record; and, although a preponderance of the evidence from a numerical standpoint supports the contention of appellees that there was a mistake in the contract, other facts and circumstances in the case rebut this evidence to such an extent that we do not feel warranted in saying that there was either fraud or mistake in the execution of the paper.

Nor is there any evidence indicating that appellants refused to fulfill the contract for any other reason than because the title was defective. They expended considerable money in having the land surveyed and in examining the titles, and in other ways manifested their desire in good faith to take the land if the title was good. About the time the six months expired, either a few days before or a few days afterwards, the appellees by agreement met the attorney for the appellants, and he then pointed out to them the defects in the title. A few days afterwards another meeting was held, and a written memoranda of the defects was made out and handed to appellees, with the suggestion that, if these defects could be cured

within a reasonable time, appellants would take the land. It does not appear, however, that any particular effort or indeed any effort was made on the part of appellees to cure the defects. This failure is attempted to be explained upon the theory that they were under the impression the title would not be accepted, although the defects were cured, and it is not disputed by them that there were defects in the title. Although other interviews between the parties were held after the second meeting, the defects were never cured.

It is further insisted that the contract was without consideration. We have carefully considered the contract, and we do not find it an unreasonable or objectionable one. It is simply an optional contract for the sale and purchase of land within a specified time, providing the title is satisfactory and the grantees desire to perfect the trade. The grantors bound themselves to furnish a good title, and the grantees were obligated to purchase and pay for the land at their election if the title was accepted and approved by their attorney. If the grantees for any cause except insufficiency in the title declined to take the property, the \$175 paid by them was forfeited to the grantors. But, if the title was found to be defective, and for this reason alone the grantees did not take the land, the \$175 was to be refunded to them. So that there are two essential features in this contract. The grantees by surrendering the \$175 paid had the absolute right to decline to take the land; on the other hand, if they desired to exercise the option and take the land, and the grantors failed to tender a good title, the \$175 was to be repaid. As heretofore stated, there is no serious dispute that the appellants desired to purchase and pay for the land, and only declined to do so because the title was defective. Nor is there any controversy that the title was defective, or concerning the proposition that in this particular the appellants acted in good faith and rejected the title because of serious defects in it.

Under these circumstances, the appellants are entitled to the relief sought in their petition, and the judgment is reversed, with directions to enter a judgment in favor of appellants for the amount claimed, giving them a lien upon the land to secure its payment.

DAVIDSON'S EX'R v. HIEATT et al.

(Court of Appeals of Kentucky. Dec. 1, 1908.)

INSURANCE (§ 222*)—LIEN ON POLICY—ACTIONS TO DECLARE—JUDGMENT.

The judgment in an action to establish a lien on the proceeds of a life policy assigned to secure a debt the options under which had not then become available cannot be complained of because simply adjudging a lien on the proceeds and not further adjudging the right to surrender

the policy when the options should become available and receive the amount due upon the option that would realize the most money and apply the proceeds to the debt.

[Ed. Note.—For other cases see Insurance, Dec. Dig. § 222.*]

Appeal from Circuit Court, Garrard County.

"Not to be officially reported."

Action by Leander Davidson's executor against William A. Hieatt and others. From a judgment in his favor, the executor appeals. Affirmed.

R. L. Davidson and W. I. Williams, for appellant. Greene & Van Winkle and R. H. Tomlinson, for appellees.

CARROLL, J. In November, 1898, the appellee Hieatt borrowed from Leander Davidson \$300, for which amount he executed his note payable 12 months thereafter, with interest from date. As collateral security for the loan, Hieatt transferred and assigned to Davidson a policy of insurance on his life issued by the Equitable Life Assurance Society for the sum of \$2,000. The policy was issued in September, 1898, and draws no dividends until after the completion of the tontine dividend period in September, 1909. At this time, if the policy has not been previously terminated by lapse or death, Hieatt has a right to exercise one of the following options: "(1) To withdraw in cash this policy's entire share of the assets; that is, the accumulated reserve which shall be \$634, and, in addition thereto, the surplus apportioned by this society to this policy. (2) To convert the same into a paid-up policy for an equivalent amount, provided always that, if the amount of said paid-up policy shall exceed the original amount of insurance, a separate certificate of good health from one of the society's medical examiners shall be required. (3) To withdraw in cash the share of the accumulated surplus apportioned by said society to this policy, and continue the policy in force on the ordinary plan. (4) To continue the insurance for the original amount and apply the entire tontine dividend to the purchase of an annuity to reduce the subsequent premiums falling due upon this policy, provided that in any year in which the amount derived from such annuity, together with the annual dividend on this policy, shall exceed the amount of premium due thereon, the excess shall be paid in cash to said William A. Hieatt or assigns." Appellee Hieatt paid the premiums due in 1898 and 1899. The premiums due in 1900 and 1904, inclusive, Davidson paid, and Davidson having died in March, 1905, his executors paid the premiums due in 1905, 1906, and 1907. In this action, brought by Davidson and prosecuted after his death by his executors, it is sought to have a lien adjudged on the proceeds of the policy to secure the payment of the debt, and to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

give the executors the right to exercise at the time and in the manner provided in the policy the options therein reserved, in order that a sufficient sum may be realized to satisfy the note, as well as the premiums paid by Davidson and his executors. The assurance society having been made a party to the action, it was submitted for judgment, and the court rendered a personal judgment against Hieatt for the amount of his note, with interest, and for the amount of the premiums paid by Davidson and his executors, with interest, and further adjudged that the appellant's executors "have a lien on the said policy of assurance and the proceeds thereof for the payment of this judgment and the costs of this suit, and all premiums hereafter falling due on said policy that are paid by the plaintiff, and that all dividends on said policy, all annuities arising therefrom, and all proceeds thereof shall be first applied to the satisfaction of this judgment until the same is fully satisfied. That said policy of assurance shall not be withdrawn from the files of this suit, except upon the order of this court entered of record, and shall not be surrendered to said assurance society except and until this judgment is satisfied in full."

The appellants except to the judgment of the court because it simply adjudges a lien on said policy and its proceeds to secure the payment of this judgment, and does not adjudge to them "the right to exercise on the completion of the tontine dividend period of said policy of insurance the options therein reserved to the defendant Hieatt to withdraw in cash from said assurance society said policy's entire share of said society's assets; that is, the accumulated reserve which will be under the terms of the policy §634, and, in addition thereto, the surplus apportioned by said society to this policy, and apply the proceeds so arising therefrom to the satisfaction of this judgment, and any surplus that might be left after the satisfaction of this judgment to be paid by them to Hieatt." In short, appellants do not complain of the judgment as far as it goes, but they insist that it does not give them all of the relief to which they are entitled; their contention being that the court should have adjudged them the right to surrender the policy to the assurance society in September, 1909, at which time the options under it become available, and the right to receive from the company the amount due upon the option that would realize the most money, and apply the proceeds so far as necessary to the satisfaction of the judgment in their favor. At the term of the court that convenes during or first after the maturity of the options in September, 1909, we assume the court will grant appellants the full relief they are entitled to, which is the relief they insist should have

been incorporated in the judgment appealed from. The rights of appellants are carefully protected by the judgment. Hieatt cannot exercise any option, or take any action concerning the policy, that would defeat them in the collection of their money or prolong its payment. Nor can the assurance society by any arrangement with Hieatt or others, or on its own initiative, do anything prejudicial to the rights of appellants. If the judgment is not satisfied in September, 1909, the court should, and we have no doubt will, direct that the policy be surrendered to the company and that it be required to pay into court, or to the parties in interest, if they agree about it, the amount due upon that option which in the judgment of the court will realize the largest amount of present money. And when this is done out of the sum so received the judgment obtained by appellants should be first satisfied. It being admitted that no money can be collected under the options until September, 1909, we are unable to perceive in what particular the rights of appellants were prejudiced by the judgment giving to them all the relief available at this time. The court might have anticipated its action in 1909, and have entered a judgment to become effective at that time, but its failure to do this is not at all prejudicial to appellants.

Wherefore the judgment is affirmed.

WARD, Sheriff, v. WENTZ et al. COMMONWEALTH v. SAME.

(Court of Appeals of Kentucky. Dec. 1, 1908.)

1. TAXATION (§ 611*)—ENJOINING COLLECTION—NOTICE OF RAISE—EVIDENCE.

Where the owner of land, in a suit to enjoin collection of taxes based on a raise of the assessment by the board of supervisors without proper notice, exhibits the notice actually served, which does not comply with Ky. St. 1903, § 4122, he overcomes the presumption that proper notice was given, and defendant must overcome the presumption that this was the only notice given by showing that one was given by posting on the land, as required by statute.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 611.*]

2. TAXATION (§ 482*)—ASSESSMENTS—RAISE BY SUPERVISORS—NOTICE.

Notice of a raise in an assessment by the board of supervisors given, as required by Ky. St. 1903, § 4122, in case of nonresidents having no agent or attorney in the state, by posting in a conspicuous place on the premises, is necessary to give the supervisors jurisdiction.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 854, 855; Dec. Dig. § 482.*]

3. TAXATION (§ 482*)—RAISE IN ASSESSMENT—FAILURE TO GIVE NOTICE—KNOWLEDGE BY OWNER.

The knowledge of the landowner's agent that an assessment had been raised by the board of supervisors did not dispense with the notice required by the statute to give them jurisdic-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion. Only his actual appearance before them to secure a reduction would have done this.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 854; Dec. Dig. § 482.*]

4. **TAXATION (§ 335*)—ASSESSMENT—LISTING PROPERTY.**

An assessment of land by the assessor is not invalid because the owner's agent did not comply with the statute in listing the land.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 562; Dec. Dig. § 335.*]

5. **TAXATION (§ 467*)—ASSESSMENT—OMITTED PROPERTY.**

One's land cannot be assessed as omitted property, there having been a valid assessment of all of it for the same year.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 467.*]

Appeal from Circuit Court, Harlan County.
"To be officially reported."

Two actions, one by John S. Wentz and others against M. S. Ward, sheriff of Harlan county, to enjoin collection of taxes, the other by the Commonwealth, by, etc., against John S. Wentz and others, to have lands assessed as omitted property. From judgments in favor of Wentz and others, the other parties appeal. Affirmed.

H. C. Clay and J. B. Carter, for appellants.
Sampson & Sampson and Bullitt & Kelley, for appellees.

CLAY, C. These two cases are so related that the decision of one involves the decision of the other, and they will therefore be considered together. John S. and Mary D. Wentz, who are residents of Philadelphia, Pa., are the owners of a large boundary of land consisting of 12,893 acres, located in Harlan county, Ky. This land was assessed by the assessor of Harlan county in the year 1906 for taxation purposes for the year 1907 at \$64,465. The assessment was evidently based upon a letter written to the county clerk by C. F. Blanton, agent of John S. and Mary D. Wentz, wherein he described the lands as "lands owned by John S. and Mary D. Wentz in Harlan county, Kentucky, lying on Loonies Ridge and Big Black Mountain, and the head waters of Lewis', Big Looney, and Clover Lick creeks, waters of the Poor fork or Cumberland river." This letter was mailed to the county clerk of Harlan county on October 20, 1906. In the assessment made by the county assessor of Harlan county the lands were described as 12,893 acres, situated on Loonies Ridge, in election precinct No. 4, valuation of each tract with the improvements \$64,465. Thereafter the board of supervisors for Harlan county raised the assessment from \$64,465 to \$167,609. Following is the supervisors' notice of the raise in the assessment of the property, together with the sheriff's return thereon:

"Supervisors' Notice.

"John S. and Mary D. Wentz, you are hereby notified that the board of supervisors of

Harlan county have raised your property from \$64,465.00 to \$167,609.00, and will reconvene at the courthouse in Mt. Pleasant, Harlan county, Kentucky, on January, the 21, 22 and 23 to hear any proof you may have to offer.

"[Signed] S. J. C. Howard, Supervisor.

"Sherman Blanton, Supervisor.

"Wilson Howard, Supervisor.

"H. C. Lewis, Supervisor.

"Asher Skidmore, Supervisor.

"The Return.

"Executed by sending J. F. Bullitt, agent for John S. and Mary D. Wentz a true copy of this summons, this Jan'y 18th, 1907.

"[Signed] M. G. Ward, S. H. C."

About January 22, 1907, C. F. Blanton, the agent of John S. and Mary D. Wentz, was in Mt. Pleasant, Harlan county, Ky. The board of supervisors was then in session. Blanton admits that at that time he knew the raise had been made, but he did not appear before the board to get a reduction. The Wentzes, through their agent, C. F. Blanton, tendered to the sheriff the amount of taxes based on the assessment made by the county assessor, but he declined to receive the same. The action of M. G. Ward, Sheriff of Harlan County, v. John S. Wentz, etc., is one wherein appellees seek to enjoin the collection of any taxes on the 12,893 acres of land based upon the valuation of the property in excess of the sum of \$64,465; it being the contention of appellees that the raise from that sum to the sum of \$167,609 was made by the board of supervisors without the notice to appellees, or their agent, required by the statute. In that section judgment was rendered in favor of appellees, and the sheriff of Harlan county appeals. After judgment in the above case the sheriff of Harlan county instituted an action against appellees for the purpose of having listed for taxation the 12,893 acres of land for the year 1907, on the ground that it was omitted property. Judgment was rendered against the Wentzes in the county court, and on appeal to the circuit court judgment was rendered in their favor, and the commonwealth, by M. G. Ward, sheriff, appeals.

The statute (section 4122, Ky. St. 1903) requires that the notice of a raise in the assessment by the board of supervisors in case of nonresidents who have no agent or attorney in the state shall be made by posting the same in some conspicuous place on the premises. While it is true that in an action to enjoin the collection of taxes based on a raise made by the board of supervisors without proper notice it is incumbent upon the party seeking the injunction to prove the absence of the notice required by the statute on the idea that the presumption is in favor of the validity of the board's action (*Bell's Trustee v. City of Lexington*, 120 Ky. 199,

85 S. W. 1081), yet we are of opinion that where the owner exhibits the notice that was actually served, and this notice did not comply with the statute, this fact was sufficient to overcome the presumption that proper notice was given, and it was then incumbent upon the sheriff to rebut the presumption that this was the only notice given by showing that a notice was actually posted on the premises. This the sheriff failed to do. We therefore conclude that appellees' proof of want of notice was sufficient. But it is contended by counsel for appellant that Blanton, the agent of the Wentzes, admitted that he knew the raise had been made by the board of supervisors, and that this actual notice took the place of that required by the statute. In 2 Cooley on Taxation, p. 484, the rule in regard to notice of an assessment where notice is required, or in regard to increase of assessment, is thus stated: "So all provisions designed to give him the opportunity of a review of the assessment, whether by the assessors themselves or on appeal from their conclusions, are exclusively in his interest. Every notice which the statute provides for that end, whether by publication or otherwise, must be given with scrupulous observance of all its requisites. The notice cannot be shortened a single day without rendering it ineffectual; the presumption being that the law has made it as short as was deemed consistent with due protection. A published notice cannot be received as the substitute for a notice to be personally delivered to the party concerned; and, where the notice is to be given personally and also by publication, a failure in either is fatal." The same authority, on page 626 of volume 1, further says: "Upon this subject there is a general concurrence of authorities in the affirmative. It is a fundamental rule that in judicial or quasi judicial proceedings affecting the rights of the citizen he shall have notice, and be given an opportunity to be heard before any judgment, decree, order, or demand shall be given and established against him. Tax proceedings are not in the strict sense judicial, but they are quasi judicial, and, as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when the conclusive steps are to be taken. Provision for notice is therefore part of the 'due process of law' which it has been customary to provide for these summary proceedings; and it is not to be lightly assumed that constitutional provisions, carefully framed for the protection of property rights, were intended or could be construed to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion without giving him an opportunity to contest the justice of the assessment." Following the rule above announced, it has been held that, where personal service is required, proof of giving it is a jurisdictional fact. *Scott v. Brackett*, 89 Ind. 418.

In the case of *Negley v. Henderson Bridge Co.*, 107 Ky. 414, 54 S. W. 171, this court said: "Under these provisions of the statute neither the assessor nor board of supervisors can increase the valuation placed by the taxpayer upon property listed by him without notice to such taxpayer of such increase. The purpose of these provisions is to give the taxpayer an opportunity to appear before the board, and be heard upon the proposed increase. * * * The increase in the valuation by the assessor of the property listed by the plaintiff, without the notice so required by the statute, and the failure on his part to report the change made by him in plaintiff's list to the board of supervisors, are fatal to the validity of such assessment; and the chancellor properly enjoined the collection of the taxes on the difference between the valuation fixed by the taxpayer and the illegal assessment made by the assessor." In the case of *Mt. Sterling Oil & Gas Co. v. Ratliff, Sheriff*, 104 S. W. 993, 81 Ky. Law Rep. 1229, this court in approving the rule above announced used the following language: "The requirement of the statute as to the giving the notice to the taxpayer is mandatory, and, in the absence of the notice, the act of the board in assessing appellant's property was and is void. Hence appellant was not required to appeal to the county judge for relief, but had the right to enjoin the collection of the tax illegally imposed." Under our statute the board of supervisors is given large powers and a wide discretion. Where its procedure is in conformity to the statute, its action is conclusive. In view of the large powers given it, it should therefore proceed in strict conformity to the statute. The notice therein required is a jurisdictional fact, and, unless it be given, the board of supervisors has no power to act. Although appellees' agent knew the assessment had been raised, he did not appear before the board for the purpose of having it reduced. Such knowledge on his part did not dispense with the necessary notice required by the statute. If, however, he had actually appeared before the board of supervisors for the purpose of securing a reduction, this would have dispensed with the necessity for notice, as the entry of an appearance by a party to an action dispenses with the necessity for the service of process.

The next question to be considered is whether or not the assessment made by the assessor in the first instance, wherein the assessment was fixed at \$64,465, was valid; and whether or not the land in question could be again assessed as omitted property. While it is true that the letter of the agent Blanton did not comply strictly with the provisions of the statute, we do not think this had the effect of rendering the assessment invalid. Under our statute the assessor has the power to obtain information from

other sources, and to make an assessment without reference to the list given in by the taxpayer. When the assessment is made by the assessor, the owner cannot attack the assessment, not can the taxing power repudiate it. If, as contended by counsel for appellant, the assessment is invalid because appellees' agent did not comply with the statute in listing the land, this would open the door for the escape of taxation by all those who failed to comply with the statute. If there was a valid assessment made by the assessor of the lands in question, it necessarily follows that no power lies in the commonwealth to assess it as omitted property. It is not contended that the property sought to be assessed as omitted property in the action of Commonwealth, by, etc., v. John S. Wentz, etc., is different from that which was actually assessed by the assessor of Harlan county. The facts of this case are different from those developed in the case of Bell's Trustee v. City of Lexington, 120 Ky. 199, 85 S. W. 1081. In that case the bonds, notes, mortgages, etc., were simply listed in a lump sum. They were not exhibited to the assessor and he could not have made any valuation of them himself. It could not be determined from that assessment whether all of the notes, mortgages, etc., were assessed or not, or whether they were assessed at their fair cash value. In that case the court held that the rule was that, when one comes into equity asking relief from taxation, it is incumbent on him to show clearly that he has paid, or is willing to pay, all that he justly owes toward the public burden; that he must make a full, fair, and complete disclosure of the property he has, subject to taxation, so that the court may determine whether or not he is unjustly taxed. The records in these cases show that the land sought to be taxed as omitted property is the same land which the assessor of Harlan county had previously assessed. It is not contended that the Wentzes owned other or additional land. That being the case, the land in question could not be assessed again unless the assessment made by the assessor of Harlan county was void. As the assessment made by the assessor in the first instance was valid, the circuit court properly held that the same land could not be again assessed as omitted property.

For the reasons given, the judgments of the trial court in both actions are affirmed.

COLUMBIA TRUST CO. v. RECCIUS et al.
(Court of Appeals of Kentucky. Dec. 2, 1908.)

1. LANDLORD AND TENANT (§ 291*)—FORCIBLE DETAINER—APPEAL AND TRIAL DE NOVO—LIABILITY ON TRAVERSE BOND.

Under Civ. Code Prac. § 464, providing that if a traverse bond shall be filed in forcible de-

tainer under section 463, and the traverser shall fail to prosecute his traverse with effect, he and his sureties shall be liable for withholding possession and the reasonable expenses of the traversee, a recovery of rents on a traverse bond filed by a tenant cannot be had up to the time the next tenant takes possession, but is confined to the time that the traversee is kept out of possession by the traverser.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 291.*]

2. LANDLORD AND TENANT (§ 291*)—FORCIBLE DETAINER—APPEAL AND TRIAL DE NOVO—LIABILITY ON TRAVERSE BOND.

Civ. Code Prac. § 464, providing that if a traverse bond shall be filed in forcible detainer under section 463, and the traverser shall fail to prosecute his traverse with effect, he and his sureties shall be liable for withholding possession and the reasonable expenses of the traversee, does not authorize a recovery on a traverse bond filed by a tenant of the sum paid by the landlord to compromise a claim for damages for failure to place another in possession of the property due to the tenant's failure to surrender possession.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 291.*]

3. LANDLORD AND TENANT (§ 291*)—FORCIBLE DETAINER—APPEAL AND TRIAL DE NOVO—LIABILITY ON TRAVERSE BOND.

Civ. Code Prac. § 464, providing that a traverse bond shall be filed under section 463, does not authorize a recovery on such bond filed by a tenant of the sum paid by the landlord to a real estate agent to obtain another tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 291.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by the Columbia Trust Company against J. W. Reccius and another. From a judgment in its favor, the Columbia Trust Company appeals. Affirmed.

Trabue, Doolan & Cox and George Durell, for appellant. Fred Forcht, Jr., for appellees.

NUNN, J. Appellant instituted an action in the lower court against appellees for something over \$1,100, the amount it alleged it had sustained in damages by reason of the execution by appellees of a traverse bond during the progress of a proceeding of a writ of forcible detainer. It alleged that it was kept out of the possession of a building owned by it for the term of four months, and that the reasonable rental value during that time was \$183 per month; that it had contracted to pay \$300 to its attorneys to represent it in the forcible detainer proceeding in the circuit court and the Court of Appeals, and that the amount was reasonable; that it had contracted with a tenant for the term of two years by which it was to receive \$183 per month for the premises; that this tenant was to receive the possession on a day named after certain repairs were made; that, Reccius having failed to surrender the possession of the property, the tenant referred to declined to take posses-

sion and made a demand upon it for about \$500 in damages for its failure to place him in possession of the property as per their contract, and that it had effected a compromise of the claim of the tenant by the payment of \$100, and it sought to recover of appellees this \$100. It also sought to recover \$85, the amount it paid to a real estate agent to obtain another tenant. The lower court struck from its petition its claim for the \$100 and the \$85 items.

The testimony showed without contradiction that the term of appellee Reccius' lease expired on the 10th of April, 1903, and the possession of the keys and house were delivered to appellant's agent on the 23d day of May, 1903, showing the time that he withheld the possession to be 1 month and 12 days. The witnesses varied in their opinion as to the rental value of the property. Appellee Reccius had occupied it for about 10 years, immediately preceding, at the price of \$125 per month; and appellant showed that it had made a contract with a tenant at the price of \$183 per month, but it was also shown that there were several hundred dollars' worth of repairs to be made on the house before the tenancy commenced. The witnesses also failed to agree as to what a reasonable fee would be for appellant's counsel for defending the traverse in the circuit court and the Court of Appeals.

The lower court gave to the jury the following instruction: "It will be your duty in this case to find for the plaintiff in such sum as you may believe from the evidence represents the fair and reasonable rental value of the property in controversy during the time that the plaintiff was kept out of the possession of the property by reason of the execution of the traverse bond sued on herein at a rate not exceeding \$183 per month, and you should find for the plaintiff in such a sum as you believe from the evidence represents the fair and reasonable value of the services rendered by counsel for the plaintiff in prosecuting the forcible detainer in the Jefferson circuit court, and also in the Court of Appeals of Kentucky, the amount to be measured by the scale of fees usually charged by the lawyers of the Jefferson county and Louisville bar, not exceeding, however, the sum of \$300 for attorney's fees." The jury returned a verdict for appellant in the sum of \$183 for 1 month and 12 days rent, and allowed it the sum of \$75 as attorney fees. Appellant contends that the lower court erred in confining the jury in allowing rent to the time only that it was kept out of the possession of the property, that it should have been permitted to recover for all the time up to the time the next tenant took possession of the property, and that the court erred in refusing to allow it to recover the \$100 and the \$85 items referred to. This action was institut-

ed on a bond prescribed by section 463 of the Civil Code of Practice. Section 464 provides what may be recovered from the principal and surety on the bond; that is, for the damages caused by the withholding of the possession of the property, as well as the reasonable expenses of the traversee in defending the traverse. Under these provisions of the Code we cannot understand how especially the surety on the bond could be made liable for the rents of the property after the possession was returned to the traversee. Reccius, as stated, only withheld the possession from appellant for 1 month and 12 days, for which a recovery was had. To permit appellant to recover for the time claimed would be in violation of section 464 of the Civil Code of Practice, and to establish such a rule as contended for would in every case bind the traverser and his surety to pay a reasonable rental value for the property until the traversee could obtain a tenant, even though it took twelve months or more.

The claim of appellant to the \$100 and the \$85 items cannot be recovered in an action on the bond. In our opinion the language of the Code will not authorize the recovery of such items of damages against a surety on the bond, for they are too remote and uncertain to be covered by the language used in the section of the Code referred to. If appellant is entitled to recover such damages, it must look alone to appellee Reccius. See *Evans' Adm'r v. Cleaver*, 29 S. W. 29, 16 Ky. Law Rep. 490, and *Caldwell v. McVean*, etc., 119 Ky. 30, 82 S. W. 992.

For these reasons, the judgment of the lower court is affirmed.

ETLY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 2, 1908)

1. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—CONCLUSIVENESS—CREDIBILITY OF WITNESSES.

The jury may rely on the testimony of a witness, and the court on appeal cannot disturb the verdict on the ground that the witness was unworthy of belief because of the impeaching testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. HOMICIDE (§ 178*)—EVIDENCE—ADMISSIBILITY.

Where, on the trial of a husband for the murder of his wife, the prosecution relied on a witness who was impeached, and the circumstances showed the possibility of another committing the offense, evidence that the latter committed the offense was improperly excluded.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 307; Dec. Dig. § 178.*]

3. HOMICIDE (§ 178*)—EVIDENCE—ADMISSIBILITY.

On a trial of one for murder, evidence that another caused decedent's death is admis-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sible, though insufficient to justify his conviction if on trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 307; Dec. Dig. § 178.*]

4. CRIMINAL LAW (§ 649*)—CONTINUANCE—ADJOURNMENT PENDING TRIAL—ABSENCE OF WITNESSES.

Where the testimony of a witness who had been subpoenaed for accused, and who had been sworn and put under the rule, and who did not appear when called late in the afternoon and at the time the court usually adjourned, was important to accused, the refusal to grant an adjournment until the following morning to enable accused to produce the witness was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1515; Dec. Dig. § 649.*]

5. CRIMINAL LAW (§ 687*)—RECEPTION OF EVIDENCE—REOPENING CASE—NEWLY DISCOVERED EVIDENCE.

Where, on the trial of a husband for the murder of his wife, the prosecution relied on the testimony of a witness who was impeached, and the circumstances indicated that another person might have committed the homicide, the refusal to permit accused to introduce newly discovered evidence on the morning following the conclusion of the evidence, to the effect that fresh print of a bloody thumb on the top of a board in the fence at the rear of the house was discovered, and that the blood was human blood, was an abuse of discretion prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1621-1625; Dec. Dig. § 687.*]

Appeal from Circuit Court, Jefferson County, Criminal Branch.

"To be officially reported."

John B. Etly was convicted of murder, and he appeals. Reversed and remanded.

John C. Strother and Clem W. Huggins, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, for the Commonwealth.

SETTLE, J. The appellant, John B. Etly, was indicted in the court below for the murder of his wife, Virginia Etly. The trial resulted in his conviction; the punishment awarded being confinement in the penitentiary for life. He was refused a new trial, and has appealed.

Mrs. Etly was murdered about midnight, November 8, 1906. The crime was brutal, both in its conception and execution, and naturally caused in the public mind great excitement and indignation. The family of appellant at that time consisted of himself, wife, and six children, the eldest, Anna Etly, being 14 years of age, and the youngest 11 months old. Appellant is 50 years of age, and his wife was perhaps 15 years his junior. The Etly home was a small house, consisting of three rooms, and shed room addition, situated on the west side of Brook street, near the corner of Brandies, in the city of Louisville; the locality being known as the "Bottoms." Policemen Reiss and Foe, whose beat included that locality, were summoned by appellant to his residence, which

they reached about 12:45 o'clock. They found there appellant and all his family, save a son, W. J. Etly, 13 years of age, who was at an infirmary ill of typhoid fever; also two or three women of the immediate neighborhood, and Dr. Molr, a physician, all of whom had been hastily called to his home by appellant. To each and all these persons he described the condition in which his wife was found by him and the manner in which he was informed of it, and the same story was told by him when testifying in his own behalf in the circuit court. His version of the matter was that while asleep in the front room in bed with a little daughter, Beulah, 7 years of age, he was awaked by his eldest daughter, Anna Etly, who came to his room and told him something awful had happened to her mother; that he immediately left his bed, and went into the second room, where his wife was occupying a bed with the two younger children, and, going at once to her, discovered her throat had been cut and was profusely bleeding; that he tried to ascertain from her how it had occurred, and who had wounded her, but could gain no information as she was unable to talk; that he then tried by tucking the bed clothing about her neck to stop the flow of blood, but, failing in this, ran in his sock feet to where he could telephone a physician and the police, and to the houses of two or three of his neighbors to get their assistance, after which he at once returned to his own home, and, in conjunction with the women whom he had summoned, did all that could be done for the relief of his wife, who died shortly after his return. Anna Etly, who slept in the same room, but in a different bed from that used by her mother, at that time told substantially the same story told by her father, with the addition that she was awakened by a noise from her mother which sounded as if she were strangling; that one of the little children who had been in bed with the mother was standing out in the floor, asking or crying for water; that she (Anna) went to her mother, and, seeing blood on the bed and hearing the peculiar noise as of strangling continue, then walked to the door leading into the room occupied by her father, and asked him to come to her mother's assistance which he at once did. When the policemen reached the house, they proceeded to look through the rooms and about the premises, seeking a clue to the assassin, but found nothing upon which to rest a safe conclusion. At their request appellant showed them his razor and the table knives in the house, also a butcher knife used in the kitchen for cutting meat. The razor blade was both clean and dry, and the table knives too dull to have inflicted the wounds received by Mrs. Etly. The butcher knife, while furnishing no appearance of having been recently used, had on the blade near the handle a stain which the policemen thought

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

might be blood, so they turned it over to a chemist for examination, who testified he was unable to say it was human blood. The three rooms of the Etly house, exclusive of the small shed room, are situated one behind the other, with a door in each of the two first rooms opening into the one behind it, and door in the third room opening onto a small back porch. There was a front door in the first room, through which passage was allowed to Brook street, and also a double window. The doors leading from the front to the second room, from the second to the third room, and from the third room to the back porch were found open immediately after Mrs. Etly was discovered to have been wounded, as was one of the double windows in the front of the first room. South of the Etly house was a vacant lot inclosed by a low board fence which was not over $3\frac{1}{2}$ feet in height. A panel of the picket fence separating the Etly house from the street had a day or two before the death of Mrs. Etly been removed to allow the hauling of dirt to fill the side and back of the Etly lot. On the night of and immediately following the killing of Mrs. Etly this loose or removed panel, which had previously been leaning against the fence at the side of the house, was found to have been placed against the wall of the house and under the open window at the front. The base of the window was from 5 to $5\frac{1}{2}$ feet from the ground, and a man, with the aid of the panel of fence leaning against the house, could easily have gotten through the open window into the front room and through its open door into the second room where Mrs. Etly slept, thence through that room and the third room out on the back porch, and from that point escape through the vacant or south lot, with but little danger of discovery. It is true no marks were found in the dust covering the lower sill of the open window, but the inspection of the window sill was apparently not made until the morning after the murder, and counsel for appellant insist that it is not unreasonable, in view of the number of people passing in and about the house the night of and morning following the murder, that dust should have again accumulated on the window, though displaced the night before. Besides, they argue that, according to the evidence, it was possible for one by the use of the loose panel of fence to step through the window without disturbing the dust on the sill. It appears from the evidence that two wounds were inflicted upon Mrs. Etly, each of which was fatal. One of these severed the carotid artery, and the other, a cut on top of and near the front of the head, penetrated the brain to a depth of $1\frac{1}{4}$ inch. Though in doubt as to the character of the weapon by which the cut on the head was inflicted, Dr. Kelly, the coroner, testified that it might have been produced by a butcher knife like that found at appellant's house, but it had more the appearance of having

been inflicted by a dirk, or the corner blade of an ax or hatchet. He was, however, positive that the wound upon Mrs. Etly's head could not have been received while she was in a recumbent position, and it was his opinion that she was sitting up in bed or standing upon her feet when that particular wound was inflicted. Dr. Kelly was confident that the wound on the neck was produced by a sharp-edged weapon, and expressed the opinion that the butcher knife could have inflicted it. But it was in contradiction of Dr. Kelly, proved by the testimony of at least two persons, one a policeman, that at the time of the autopsy he, upon seeing the butcher knife, expressed the opinion that neither of the wounds upon the person of Mrs. Etly had been inflicted with it.

Notwithstanding the account given by Anna Etly on the night of her mother's murder of what she saw and heard of the tragedy, and its complete exoneration of her father from all connection with the crime, she later, and after several days' separation from him, and the family, told certain representatives of the commonwealth a wholly different story, which charged him with the murder of his wife, and this story she adhered to when testifying as a witness on his trial. The last version was to the effect: That while lying in her bed several feet from that of her mother, by means of a lamp dimly burning in the room, she saw her father walk through their room into the kitchen, return to the bed occupied by her mother, and lie down upon it, at which time he had a knife in his right hand which he drew across her mother's throat on the right side of the neck; this being the location of the wound as told by Dr. Kelly. That her father then got up and went back to the front room, and she hearing the commotion made by her mother went to her, and seeing her condition, walked to the door and called her father, who came in to the room and to her mother's bed, telling her (Anna) if she ever told what he had done, he would kill her in the same way, after which he went out and summoned the physician, neighbors and police. Certain physical facts were brought out in evidence by appellant to discredit this story of the girl. Among others that if Mrs. Etly when cut with the knife on the right side of the throat was, as the daughter testified, lying on her back and with her right side toward the south wall, the blood, naturally following the least resistance would have spurted on the headboard on her right or against the south wall, instead if in the direction of the west wall as it did, and on which some of it spurted as high as five feet. The head of the bed was in the direction of where the west and south walls cornered and the foot extending out into the room about midway between the west and south walls. Again, the girl testified to but one stroke of the knife by her father when she said he drew it across the right side of her mother's throat, whereas

there was, as Drs. Kelly and Moir testified, another fatal wound on top of the head which penetrated the brain more than an inch, and which could not, according to their further testimony, have been inflicted unless Mrs. Etly was sitting up in bed, or standing upon her feet. Anna did not claim to have seen her in either position, but testified that she was lying on the bed throughout the attack upon her with the knife. It is further contended that Anna Etly's story of the crime was further discredited by her own conduct on the night of the murder. According to the testimony of some of the persons called to her home that night, when her father seemed overcome with grief because of the death of his wife, Anna sat upon his knee, and attempted to console him by telling him that she would help him raise the younger children. It is earnestly argued by appellant's counsel that Anna would not have so conducted herself towards her father, if he was, as she afterwards testified, such a monster as to kill her mother in her presence, and threaten her with a like fate if she informed on him.

It is also urged as a significant fact that Anna Etly continued to exonerate her father of the crime charged against him until she was placed under legal restraint, if not arrest, and became afraid the crime would be laid at her door, and, further, that the falsity of her last story was demonstrated by an affidavit which she gave her uncle, D. J. Etly, and one Hagan, after she was placed in the custody of the institution where she is yet confined. By the affidavit in question she repudiated the story implicating her father and reaffirmed the one told by her on the night of her mother's death, but later repudiated the affidavit, and returned to the story of her father's guilt. An attempt was also made, not wholly without success, to impeach the reputation of Anna. It was also proved that she was not fully subservient to parental control, and that her mother or father, perhaps both of them, shortly before the murder of the mother, whipped her on account of her disobedience. It does not seem to be contended by counsel for appellant that Anna Etly murdered her mother, but it is insisted that the evidence as strongly conducted to show her guilt as that of appellant; it being claimed that the resentment of the girl arising from the punishment for her disobedience inflicted by the mother, or by the father at the mother's instigation, together with the desire to be rid of the mother's constant surveillance and control, may have furnished a motive for the crime, whereas the evidence, it is claimed, furnished no proof of a motive on the part of appellant.

On the other hand, counsel for the commonwealth, while pointing to no proof of motive on the part of appellant, nevertheless insist that there was evidence conducing to show his guilt. For instance it is argued

that the bed on which he claimed to have slept in the front room with his little daughter gave no appearance of having been occupied by him, and that only the side of the bed in which the little girl was seen appeared to have been used. Two or three witnesses testified as to the appearance of the bed. Whether their inspection was more than a casual look does not appear. None of them seemed to know which side of the bed appellant had occupied, whether his little daughter had lain upon the side that did not appear to have been used, or whether she moved, after he left the bed, to the place his body had occupied. It seemed to have been known to Anna Etly and her seven year old sister that appellant and the entire family retired that night at 9 o'clock, and that he lay down on the bed in the front room with Beulah. The conclusion deduced by appellant's counsel from this undisputed fact is that if the bed contained a single mattress, as the proof seemed to indicate, it was not impossible that appellant could have slept upon it three hours without materially disarranging it or the bed cover. A further fact relied on by counsel for the commonwealth as evidencing appellant's guilt was the presence upon his shirt sleeves and drawers of blood. It is argued by his counsel that his explanation of that matter was altogether reasonable; that is, that he received the blood stains upon his clothes in ministering to his wife when he reached her bedside after being awakened by Anna, and that to the unbiased mind it is not perceivable that the blood upon appellant's clothes afforded any stronger proof of his guilt than did the appearance of blood, which the evidence shows was noticeable upon the clothing of Anna, prove her guilty of the murder of her mother.

Counsel for the prosecution lay great stress upon the statement which Beam and wife claim to have received from appellant when he asked them to go to his home and give their assistance to his wife, which was that his wife had fallen upon a door knob and cut her throat, and insist that the absurdity of this statement is a circumstance that tends to show his guilt. Appellant denied the statement attributed to him by the Beams, and claimed to have said to them what he said to the other neighbors whose services he sought that night, viz., that his wife had been cut or somebody had cut her. His denial of the statement testified to by Beam and wife was in some measure supported by the two women of the neighborhood to whom he applied before going to the house of Beam who testified that he informed them somebody had cut his wife. This also seems to have been the statement he made to the policeman. There was also testimony from the persons summoned to appellant's home the night of the murder which tended to show that he was then apparently inclined to the belief that his wife had committed sui-

cide; for before her death, and following an appeal to her to tell him who her assailant was, he asked her why she had done this, or words to that effect. It is also insisted for appellant that the evidence wholly failed to furnish a motive on his part for the crime, or show anything in his conduct at the time of, prior to, or following the assassination of his wife that was inconsistent with his innocence of the crime, and that not only was there no proof of a motive, but the evidence furnished indisputable proof of his good character, viz., that he was an honest, industrious, sober, and peaceable man, also that he apparently entertained a warm affection for and was invariably kind to his wife and children, was domestic in his tastes, and that he faithfully applied to the support of his family the wages of \$9 a week he was earning.

We have set out at length the substance of the evidence contained in the record because of the appellant's contention that it wholly fails to prove his guilt. It is not our province to express an opinion as to the guilt or innocence of appellant, nor is it our purpose to further discuss the evidence except to say that it shows the commonwealth to have been mainly dependent upon the testimony of Anna Etly for the conviction of appellant, and it is patent that the verdict must have resulted from the jury's acceptance of her testimony. This, however, the jury had a right to do, and we cannot disturb the verdict upon the ground that Anna Etly was unworthy of belief; that being a matter the jury could alone determine. To authorize a reversal, there must have been error in some ruling of the trial court prejudicial to appellant's rights.

Numerous grounds are urged by appellant for a reversal of the judgment of conviction, one of which is that the trial court erred in excluding the testimony of divers witnesses conducting to prove one James Holt guilty of the crime for which appellant was indicted and convicted. Briefly stated, the facts to which appellant's avowals show the witnesses in question would, if permitted, have testified, were that Holt was a desperate character and dangerous man, who had committed numerous felonies; that the day before Mrs. Etly was killed Holt was discharged from a long confinement in the city workhouse, his committal to that penal institution having been effected through the procurement and testimony of his mother-in-law, whom he greatly hated, and that both the mother-in-law and Holt's wife were so very much afraid of him that during his confinement in the workhouse they moved their residence without advising Holt where they had moved; that late in the afternoon, and in the early part of the night on which Mrs. Etly was killed, Holt then being under the influence of intoxicating liquor, and in an angry mood said to the witnesses referred to that his mother-in-law had testified against him and

caused his incarceration in the workhouse; that he intended to cut her throat and kill her, and inquired where she and his family had moved. It appears from the testimony heard by the jury that Holt's wife and mother-in-law had removed to Brook street in the "Bottoms," very near, perhaps next door, to the Etly residence, and, according to appellant's avowals, it would further have appeared by the testimony of the excluded witnesses that Holt late that afternoon learned of the place of residence of his wife and mother-in-law in the "Bottoms." By J. C. Jones appellant would, it appeared, have proved that he about dark of the day Mrs. Etly was killed met Holt near the Etly home, and pointed out to him at Holt's request the house next to that of Etly as the place of his (Holt's) wife and mother-in-law's residence. It appears from the affidavit of appellant that the witness Jones had been subpoenaed for appellant, and that he was present at the beginning and during some part of the trial, and had been sworn and put under the rule with the other witnesses. When called to testify, which was late in the afternoon and at the time the court usually adjourned, Jones did not appear, whereupon appellant, claiming to be taken by surprise at Jones' absence, asked that he be given until the next morning to produce and have him testify, which he alleged he could do, but the court refused to grant the adjournment, and over appellant's objection then completed the taking of the testimony. In excluding the testimony of the several witnesses in regard to Holt's conduct, and also in refusing to give appellant until the following morning to procure the attendance and testimony of Jones, we think the court erred. The excluded testimony was, we think, competent and of great importance to appellant. In connection with the admitted testimony in respect to the front window found open at the Etly house immediately after the assault upon Mrs. Etly, the open doors between the three rooms of the house, and the fact that the door leading from the rear room onto the back porch was then also found to be standing open, it might have been sufficient to satisfy the jury that Holt, in attempting to execute his threats against his mother-in-law, entered the Etly home, mistaking it for hers, and by a greater mistake inflicted upon Mrs. Etly the wounds of which she died, thinking she was his much-hated mother-in-law. As said in *Sidney v. Commonwealth*, 1 Ky. Law Rep. 120: "On the trial of one for murder evidence tending to show that others caused the death is admissible, though not sufficient to justify their conviction, if they were on trial." *Morgan v. Commonwealth*, 14 Bush, 106. We are of opinion that the lower court also erred in refusing appellant permission to introduce H. H. Wilson, who before the convening of the court on the morning following the conclusion

of the evidence informed appellant's counsel that he and a man by the name of Nelson on the next or second day following the murder of Mrs. Etly discovered the fresh print of a bloody thumb on the top of a board of the plank fence at the rear of the Etly lot near the coal shed and between the Etly lot and the vacant lot south of it; that he and Nelson sawed off a piece of the plank containing the blood mark, and had it examined by Dr. Robins, a chemist, who pronounced it human blood. When the court met and before argument to the jury began, appellant by affidavit brought to the attention of the court this newly discovered evidence, which it was made to appear he could not have sooner discovered, and asked leave of the court to introduce it, but was not allowed to do so, to which ruling appellant excepted. While the trial court has a broad discretion in such matters, in view of the peculiar circumstances surrounding this case and the contradictory stories of Anna Etly, the commonwealth's principal witness, without whose testimony it could not have convicted the appellant, and the further fact that the evidence introduced with that offered was sufficient to create a strong probability that the murder might have been committed by a person other than appellant, we think the importance of the newly discovered evidence warranted its admission by the trial court, and that the court's refusal to allow its introduction was an abuse of discretion highly prejudicial to appellant.

The instructions seem to have correctly given the jury the law of the case. We refrain from discussing other alleged errors relied on by appellant, as they are not likely to be repeated on another trial, but for the reasons given in the opinion we think the ends of justice require that appellant should be granted a new trial; and to that end the judgment is reversed and cause remanded for such trial, consistent with the opinion.

DAVIDSON v. JENKINS et al.

(Court of Appeals of Kentucky. Dec. 3, 1908.)

1. VENDOR AND PURCHASER (§ 233*)—BONA FIDE PURCHASER—NOTICE—UNRECORDED DEEDS.

Where the deed of the subsequent purchaser did not embrace any part of the tract included in a prior unrecorded deed, the question whether the subsequent purchaser was a bona fide purchaser of the property conveyed by the prior deed did not arise.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 233.*]

2. TRESPASS (§ 68*)—TRESPASS TO REAL PROPERTY—EVIDENCE—INSTRUCTIONS.

Where, in trespass for cutting timber, it was admitted that certain calls were the dividing line between the parties, and the evidence for plaintiff showed that he owned north of the line, and that the timber cut was removed from his land as alleged, and the evidence for defendant showed that the timber had been removed from the

land south of the line, an instruction authorizing a verdict for plaintiff for the timber removed from the land as described in the petition properly submitted the issue.

[Ed. Note.—For other cases, see Trespass, Dec. Dig. § 68.*]

Appeal from Circuit Court, Pulaski County.
"Not to be officially reported."

Action by Isaac Jenkins and others against William Davidson. From a judgment for plaintiffs, defendant appeals. Affirmed.

Campbell & Williams, for appellant. Virgil P. Smith, for appellees.

CLAY, C. This action was instituted in the Pulaski circuit court by Isaac Jenkins and others, the children and heirs of David Jenkins, deceased, to recover damages for the cutting and carrying away of timber from a tract of land described in the petition. The appellant, William Davidson, defended on the ground that he was the owner of the land in question, and that he had not wrongfully or unlawfully cut the timber therefrom. The jury returned a verdict in favor of plaintiffs for \$100, and from the judgment based thereon William Davidson appeals.

Both appellant and appellees claim under the B. Woodall patent of 200 acres. David Jenkins, the father of appellees, purchased from B. Woodall the northern portion of a 200-acre survey. Appellant claims title by virtue of a deed from William Edwards and wife. Edwards obtained title from James Stewart by deed, which was lost, but the execution of which was properly proved. Stewart obtained title by deed from B. Woodall and wife. There is some proof to the effect that the deed from Edwards and wife and that from Stewart to Edwards embraced all of the B. Woodall 200-acre survey; but the deed from B. Woodall and wife to James Stewart does not embrace all of the 200-acre survey, but embraces only that part which was left remaining after the previous conveyance to David Jenkins. Some contention is made that appellant was a bona fide purchaser of the property involved in the action without notice of the previous deed from Woodall to David Jenkins, inasmuch as the David Jenkins deed was not put to record until the year 1891, which was several years after appellant obtained his deed. This question, however, we do not think is involved in this case, for the reason that it does not appear that the deed from Woodall to Stewart embraces the 200-acre survey, or any portion thereof included in the deed from Woodall to Jenkins. During the course of the trial it was admitted that the calls "S. 89½° W. 130, more or less," constituted the dividing line between the land belonging to appellees and that belonging to appellant. The testimony for appellees is to the effect that the timber cut was standing north of this line, while that of appellant's witnesses other than

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

himself is to the effect that it was south of this line. Appellant himself admits that he cut the timber believing that he owned the whole 200-acre survey. One of the appellees notified him not to cut nor remove any of the timber on that portion of the survey claimed by them. Appellant replied that all the survey belonged to him, and that he was going to cut the timber from all of it. An injunction was then sued out, and he stopped cutting the timber. What he had cut he left lying on the ground, mainly rotted. He did not know how much of it there was, or what it was worth. Would have taken all the timber off the whole 200-acre survey had he not been stopped by the injunction.

The court instructed the jury to the effect that the plaintiffs were the owners of that portion of the 200-acre survey patented to B. Woodall in 1858 as set out and described in the petition and the deed from B. Woodall to D. Jenkins, and that they should find for the plaintiffs such a sum in damages as would fairly compensate them for any timber cut, destroyed, or removed from their said land as set out and described in their petition, not exceeding \$150. Counsel for appellant contends that these instructions were erroneous; that the court should have instructed the jury that the call, "S. 89½° W. 130 poles to the hickory and birch in the Ivy Branch," was the dividing line between the property of plaintiffs and defendant, and that they should find for the plaintiffs damages only for such timber as they believed was cut by the defendant north of that line. While such an instruction might have presented the issue in a form more intelligible to the jury, it was in effect the same as the instruction given by the court. According to the proof in the case, appellees owned to the call "S. 89½° W. 130," and by telling the jury to find for the plaintiffs the value of such timber as was cut north of this line, was the same as directing them to find the value of such timber as was cut from the land described in the petition. We therefore conclude that the court did not err either in the instructions given or in refusing those offered by appellant.

For the reasons given, the judgment is affirmed.

ROETTGER et al. v. REIFKIN et al.

(Court of Appeals of Kentucky. Dec. 10, 1908.)

LANDLORD AND TENANT (§ 318*)—RECOVERY OF POSSESSION—WRIT OF RESTITUTION—WRONGFUL ISSUE—MEASURE OF DAMAGES.

Where defendant landlord wrongfully procured a warrant of restitution to issue, and had a constable execute the writ, only compensatory damages could be recovered, and the measure of recovery was the damage to plaintiff's property by reason of the acts complained of.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1348; Dec. Dig. § 318.*]

"Not to be officially reported."

On rehearing. Petition overruled.

For prior report, see 113 S. W. 88.

HOBSON, J. The answer discloses the infirmity of the writ. Only compensatory damages may be recovered. The measure of recovery is the damage to the plaintiffs' property by reason of the acts complained of. The writ was not void, only an honest mistake was made in issuing it too soon. Petition overruled.

LITTLE v. BERRY.

(Court of Appeals of Kentucky. Dec. 2, 1908.)

1. ESTOPPEL (§ 95*)—EQUITABLE ESTOPPEL—ACQUIESCENCE.

Where the maker of a note, in order to secure plaintiff's signature as surety thereon, stated to plaintiff in the presence of defendant, who was also a surety, that his insurance and other property was sufficient to pay all his debts, in which statement defendant acquiesced, the latter by failing to disclose that he then held an assignment of the insurance to secure other debts was not estopped as to plaintiff to claim under such assignment.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 286; Dec. Dig. § 95.*]

2. ASSIGNMENTS (§ 48*)—EQUITABLE ASSIGNMENT.

Statements by the maker of a note in order to secure the signature of a surety thereon that his insurance and other property were sufficient to pay all his debts, without any offer to assign the insurance to secure the particular debt, did not constitute an equitable assignment of the insurance.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 48.*]

3. PLEDGES (§ 11*)—DELIVERY AND POSSESSION.

Ordinarily a pledge of personal property to secure indebtedness must be by a delivery of the thing pledged, or, in case of incorporeal property, a symbolical delivery, which is ordinarily by writing describing the thing pledged, and a mere promise of the debtor that he will hold certain property exclusively liable to a particular debt without delivery of it of any kind is not a pledge of such property.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 29; Dec. Dig. § 11.*]

4. ASSIGNMENTS (§ 31*)—CHOSE IN ACTION.

An assignment of a chose in action to secure a debt implies generally some kind of a written acknowledgment by the assignor setting it apart to the payment of the particular liability, and, though in equity a parol assignment may be valid, the assignment, whether written or by parol, must in fact set apart the chose in action to the payment of a specified liability.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 61; Dec. Dig. § 31.*]

5. EVIDENCE (§ 354*)—BOOKS OF ACCOUNT.

Entries in a pocket memorandum book, kept by the maker of a note, of accounts with various persons, showing what notes he owed, some of which he had paid, and reciting that defendant held an insurance policy to secure him as surety, none of the entries being dated, and it not appearing when they were made, were not admissible as book entries in an action against

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant by a co-surety claiming to be entitled to participate in the assignment of the policy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1483; Dec. Dig. § 354.*]

6. INSURANCE (§ 209*) — POLICIES — ASSIGNMENT—EVIDENCE.

An entry in a pocket memorandum book kept by deceased of a note given by him, reciting that defendant, a surety, held a \$5,000 policy to secure him, the entry not being dated and the policy not being described, was not an assignment of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 479; Dec. Dig. § 209.*]

Appeal from Circuit Court, Hickman County.

"Not to be officially reported."

Action by T. P. Berry against W. S. Little. From the judgment, defendant appeals. Reversed and remanded for judgment dismissing the petition.

W. S. Little and Bennett, Robbins & Thomas, for appellant. R. B. Flatt, for appellee.

O'REAR, C. J. E. L. Dunnevant and W. S. Little were partners in farming and merchandizing. Dunnevant was indebted to A. M. Jones in the sum of \$1,358.70 not connected with the partnership affairs, which was evidenced by note, with personal sureties. Appellee Berry was one of the sureties. Upon renewing the note, appellee refused to sign it, unless he was indemnified. Dunnevant thought he was solvent. He so represented to appellee, and assured him that, in the event of his death, his life insurance was ample to pay all his debts. Appellee still hesitated to renew the note, and was then promised that W. S. Little, the appellant, would also sign it as surety. Thereupon appellee and Dunnevant went to appellant, where the same conversation was had as to Dunnevant's life insurance being ample to pay his debts if he should die before satisfying them. There was also some talk about the probable outcome of a wheat crop, and possibly some other ventures of Dunnevant. Dunnevant died shortly thereafter without paying the Jones debt. This suit was brought by appellee against Dunnevant's administrator, appellant Little, and one Spicer, another surety, in which appellee charges that certain life policies of Dunnevant had been assigned by him to Little as indemnity to secure his suretyship upon the Jones debt, and that Little had collected them and applied them to other debts. It is also claimed in the petition that Dunnevant had equitably assigned this life insurance to appellee Berry, or to him and his co-sureties on the Jones debt as indemnity. The transaction between appellee, appellant, and Dunnevant above alluded to is the one in which it is claimed the last assignment took place. The circuit court held that the insurance policies had been assigned to secure the Jones debt, and, as appellant had collected \$2,000 on account of that insurance, he was adjudged to pay to Jones' administra-

tor so much of the insurance fund as represented one-third of the debt. The other surety, Spicer, who was also joined in the suit, made no defense, nor is he now complaining on this appeal. The question we are called upon by this record to decide is whether there was an equitable or other assignment of the insurance policies by Dunnevant to secure the payment of the note to Jones.

A written assignment of the policies is proven, by parol—the writing itself not having been produced—to appellant to secure him against loss by reason of the partnership enterprise between Dunnevant and appellant. Whether that assignment was sufficiently proven is not here for decision; for, though it may not have been, still, if the policies were not assigned to secure the particular indebtedness on which appellee was bound, he is not concerned in it. Nor is it pretended that there was an assignment of the policies to secure the Jones note or as indemnity to appellee, or to Little on that account, except by reason of what was said between the parties on the occasion of the last renewal of the note. It may be conceded that an equitable assignment might have been worked by the parol agreement of the parties without the assent of the insurer, and without the presence of the policies.

The question still remains: Was there such assignment. We quote the testimony of appellee on this subject; it being the only relevant evidence in the record offered to support his contention, which testimony is as follows: "He [Dunnevant] insisted on renewing the note, and he said that if I would go on it, that if he lived, he would be perfectly able to pay it, and, if he died, he had plenty of insurance to pay all his debts. And I told him that I did not expect Joe Spicer would be willing to do it, and he said that Wade would go on the note with Joe and me. And I still did not agree to do it, and he insisted and spoke about his insurance several times, and says: 'Now, you need not be a bit uneasy. I would not ask you to if I did not have plenty of insurance to pay all my debts if I die.' I said: 'Now, I will not do it until I see Mr. Little. I will see him.' He said, 'All right,' that Mr. Little was up home, and we would go and see him then. I went with him up to Mr. Little's and met Mr. Little out in the horse lot, and then Gene made about the same statement to Mr. Little that he had made to me. He said there in the presence of Mr. Little and myself that he was bound to have that note renewed, and that if he would go on it that he knew that we would not suffer. And then he still repeated that he had plenty of insurance to pay if he died, and, if he lived, he was confident that he would pay it all right. Then I asked Mr. Little what he thought of it. Him and Gene had been partners for a year or two on the Missouri farm, and I supposed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that Mr. Little understood his financial condition better than I did. I asked him what he thought of it, and he said he thought that it would be safe. Then I said to Mr. Little: 'At least see that this note is paid when it becomes due.' And then Mr. Little said: 'I think Gene is all right; but I am going to stay with him until he pays out of debt.' That was just about the words he used. Mr. Smith: I object to all statements on the part of the administrator of E. L. Dunnevant. Mr. Bennett: Attorney for defendant, W. S. Little, objects to all of the above answer, because it is incompetent. Q. What did W. S. Little say, if anything, with reference to the wheat crop in Missouri, that Gene spoke of at the time which you say he said he would pay the note if he lived? A. I don't remember that he said anything particular about the wheat crop; but Gene remarked that he thought he would be able to pay it out of the crop. I don't know whether Mr. Little said he would or wouldn't. Mr. Smith: Note our objections to that. Q. What, if anything, did Little say in reference to insurance on the life of E. L. Dunnevant at that time? A. If he said anything, I don't remember it. I know he did not say anything. Q. When Mr. Dunnevant made the statement that, if he died, this note would be paid out of the insurance on his life, was Little present, and heard this statement? A. He was present. He was there talking. Q. What, if anything, did Little say when Dunnevant declared to you in his presence that, if he died, this note would be paid out of the insurance then carried on his life? A. He did not say anything. Q. At what juncture in the conversation did Little tell you that he thought Gene was all right? Was that before or after Gene made the general statement that you related above? A. Gene, he made the statement before, because, when he went up there, Gene commenced talking and related the whole thing to Mr. Little like he did to me. The main thing with me was letting one man out that was good and taking in one man that was not good, and, too, increasing my liability or whatever you call it. I told Gene that I would not be willing to do it until I saw Wade Little. My idea was that he was in a condition to know Gene's financial condition. And I supposed that if he was willing to do it that it would be safe, and he just made the statement to Little and to me. Little thought it was all right, and I did too. (Objections.) Q. At that time or before had the defendant, Little, said anything to you about his having or claiming any insurance on E. L. Dunnevant's life? A. He did not. Q. Or of Dunnevant having assigned to him any part of the insurance carried on his life? A. I did not know Mr. Little had any insurance on Mr. Dunnevant at all until after Mr. Dunnevant's death. Q. Then, if I understand you, when Dunnevant told you if he died his insurance would pay the note, Little said nothing? A. No, sir; he did not say anything." It will

be observed there was no suggestion by the decedent that he would assign the policies of insurance to secure this debt. His whole talk was as to his ability, and the ability of his estate, in the event of his death, to pay all his debts. This debt was not specialized, nor was the insurance undertaken to be set apart, any more than the wheat crop or any other property of the principal to secure this particular debt.

Some stress is laid upon Little not saying then that he already held an assignment of the insurance policies to secure him upon other liabilities. Nor does it appear that he was called upon to do so. He may not have had the assignment at that time. But, if he had, it was not necessarily or apparently inconsistent with decedent's statement that his insurance and other property would pay all his debts. Little and decedent may have then believed it would. There is no estoppel in the occurrence. Ordinarily a pledge of personal property to secure the pledgor's indebtedness must be by a delivery of the thing pledged, or, in case of incorporeal property, a symbolical delivery, which is ordinarily by writing describing the thing pledged. A mere promise of the debtor that he will hold certain of his property as exclusively liable to a particular debt, without delivery of it of any kind, cannot, upon most obvious principles of public policy, be deemed a pledge of such property. An assignment of a chose in action implies generally some kind of a written acknowledgment by the assignor setting it apart to the payment of the particular liability. But in equity a parol assignment may be valid. *Newby v. Hill*, 2 Metc. 530. However, whether in writing or by parol, the assignment must in fact set apart the chose in action to the payment of a specified liability. In this case there was no assignment. Nor was there in any sense a pledge of the policies as collateral or indemnity.

It is asserted that there was written evidence of the parol assignment, in this: Dunnevant kept a small pocket memorandum book on which he entered accounts with various persons, and entered also memoranda of other transactions. It was not a shopkeeper's book of accounts kept in the usual course of business, on which entries of sales were made in their order, such as admits the book entries as evidence in behalf of the keeper. In this book is found this memorandum in Dunnevant's handwriting: "A. M. Jones, Mayfield, Ky. note \$1,358.70, No. int. T. P. Berry. Joe Spicer, W. S. Little. Little holds \$5,000 policy to secure him." Preceding and following this entry are a number of others reciting what notes he owed, and some he had paid, with statements interspersed as to his interest in certain properties. None of these entries are dated. Nor is it shown when they were made. They are not such as entitle them to rank as original entries in a shopkeeper's books. A party cannot thus make evidence for himself against strangers. The

book and its contents were not receivable as evidence against Little. Nor was this entry in itself an assignment of the policies. It does not describe them so that they might be identified. There being no competent evidence in the record as to the alleged assignment of the insurance policies in contest to secure appellee or appellant upon the note to Jones, it was error to have adjudged that the money collected upon the policies be applied to the payment of that note.

Judgment reversed, and cause remanded for a judgment dismissing the petition.

ILLINOIS CENT. R. CO. v. WILSON.

(Court of Appeals of Kentucky. Dec. 3, 1908.)

1. APPEAL AND ERROR (§ 1097*)—LAW OF THE CASE.

The decision on appeal that a party is entitled to a farm crossing over a railroad track at a particular point is the law of the case on a subsequent trial involving the damages sustained in consequence of the obstruction of the crossing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368; Dec. Dig. § 1097.*]

2. RAILROADS (§ 113*)—FARM CROSSINGS—OBSTRUCTIONS—DAMAGES.

A railroad company's roadbed passed through a farm separating the land on which the dwelling house and outbuildings stood from the land susceptible of cultivation. The owner had used a farm crossing, which furnished the only means of hauling crops from the cultivated portion of the farm to the other portion. An employé of the company obstructed the crossing with knowledge of the facts, together with knowledge that the owner had valuable crops standing on the cultivated portion of the farm, which portion, by reason of being low land, was subject to overflows. The crops were destroyed in consequence of an overflow. *Held*, that the railroad company was liable for the damages sustained.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 113.*]

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by Caleb Wilson against the Illinois Central Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed*.

H. P. Taylor and Trabue, Doolan & Cox, for appellant. Sweeney, Ellis & Sweeney, for appellee.

LASSING, J. This is the second appeal of this case. The suit was originally brought in equity. The lower court dismissed the petition, and plaintiff appealed. The judgment was reversed and case remanded for trial. See *Wilson v. I. C. R. R. Co.*, 92 S. W. 602, 29 Ky. Law Rep. 170. Upon its return to the circuit court the case was transferred to the common-law docket, and upon a trial before a jury plaintiff recovered a verdict for \$500. From the judgment entered upon that verdict, defendant appeals.

While this is the second appeal of this case,

it is the third time that the subject-matter of this litigation has been before us on appeal. In 1892 Dan T. Wilson, who owned a large body of land in Ohio county, Ky., conveyed to the Owensboro, Falls of Rough & Green River Railroad Company, its successors and assigns, a right of way through his land 66 feet wide and about 2 miles long. As a part of the consideration for this conveyance, the railroad company obligated itself to fence both sides of the right of way through the land of the grantor, and put in all necessary farm crossings which the grantor might require, and to put in a side track at such place as he might designate and move it twice for him, if required by him to do so. Thereafter the grantee sold its road, including the right of way in question, to the Chicago, St. Louis & New Orleans Railroad Company, from which road the present company, appellant, leased it for 99 years, and appellant is now operating said road.

Dan T. Wilson complained that the terms of the agreement were not being complied with, and he brought suit in the Ohio circuit court against the railroad company for breach of contract, and recovered a judgment for \$2,000. Later he and his wife conveyed to their son, the present appellee, about 105 acres of the land through which the right of way had been granted. The roadbed passes over the land which appellee bought from his father in such a manner that the dwelling house, barns, stables, and other outbuildings are separated from the bottom land, which was practically all of the farm which was susceptible of cultivation. About 25 acres of said farm lies upon the side of the railroad where the residence and other buildings are, but the remainder, which was bottom land, lies upon the other side of the railroad track. Some time before this suit was commenced, the railroad company had fenced the right of way on both sides through appellee's land, but had left an opening in its fence on each side at the point where the crossing, which is the subject of this litigation, is located. These openings in the fence were to afford appellee an opportunity to pass from the hill land, on which his residence and other buildings stood, to and from the bottom land on the opposite side of the railroad. Appellee, from the time he purchased this land from his father until some time during the latter part of 1902, used this crossing uninterruptedly. While it was being so used by him, and over his protest and objection, the servants of the railroad company closed the crossing by stretching barbed wire across the gates and fastening them so they could not be opened, and refused to permit the wires to be removed, or the gates to be opened, and thereupon this suit was instituted. The proof shows that the most of the land on the side of the railroad track opposite appellee's house is low bottom land.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and subject to annual overflows; that at the time the crossing was obstructed appellee had valuable crops standing upon this land which he was then engaged in gathering and hauling across the railroad over the crossing in question; that, by reason of his being denied the use of the crossing, his said crops were wholly destroyed. He asked for damages in the sum of \$1,500, and a mandatory injunction requiring the defendant company to remove the obstructions from the crossing. The railroad company answered, and, in addition to traversing the allegations of the petition, pleaded that Dan T. Wilson, the father of appellee, had reserved to himself the right of way in question, and that appellee had no interest in it. It further pleaded that Dan T. Wilson had previously instituted suit for \$1,999 damages on account of the alleged breach of contract for the purchase of the right of way, and that he had recovered a judgment against the railroad company in said suit, and defendant pleaded these facts in bar of appellee's right to prosecute this action. The trial court took the defendant's view and dismissed the petition, but, upon consideration here, that judgment was reversed and the case remanded for a new trial; it being held, in substance, that a judgment in favor of Dan T. Wilson, for breach of the covenants of the deed could not be made to operate as a bar against plaintiff's right to recover damages for any injury he might have sustained by reason of the defendant company having closed the crossing.

Appellant's chief complaint now is that the crossing in question is neither suitable nor safe. Upon the former appeal this court, in speaking of this crossing, said: "The land lays so that there is but one practicable way to reach one side from the other by wagons without going over other persons' property. This only route appellant had been using some time and finally put in gates and was attempting to fix a crossing upon the railroad track so as to pass over it with convenience and safety, when appellee's (appellant here) servants closed up the opening he had made in the fences, and removed his lumber from the railroad track, refusing to let him use the crossing at all, or to construct a crossing at that point. * * * It follows that appellant (appellee here) was entitled to a crossing at the point at which he opened it." It thus appears that in the former opinion of this court in this case it was decided that appellee was entitled to a crossing over appellant's railroad at the very point in dispute. We think that this was correctly decided by the court; but, even if the court in the former opinion had erred, that opinion, under the doctrine of *res judicata*, must be considered as the law of this case. The question as to whether or not the crossing is a suitable or safe one is no longer open for consideration.

The only other question presented on this appeal is whether or not the verdict is supported by the evidence. The testimony abundantly shows that, at the time appellant stopped up this crossing and prevented its further use by appellee, its servants who did so knew that appellee had no other means of hauling his crops from his bottom land to his home, and that by reason of the overflow the crops would necessarily be damaged. In fact, the man who wired up the fence posts and stopped the use of the crossing testified that at the time it was done the corn was being hauled from the bottom land, and that appellee told him that the flood would destroy his corn unless he could get it through. Notwithstanding this knowledge, the crossing was closed, and the crops destroyed. The damages awarded by the jury were authorized by the proof, and in our judgment were not excessive. Appellee is under the former opinion of this court entitled to the crossing at the place and in the manner in which he was then using it. If appellant desires that appellee should cross directly over its roadbed, and not in the manner in which it was alleged he was, it should construct a suitable approach on each side of its roadbed, so as to provide appellee with a safe and convenient crossing at that point, and, until this is done, appellee will continue to use the crossing in its present form.

The judgment is affirmed.

ALEXANDER v. GARDNER et al.

(Court of Appeals of Kentucky. Dec. 8, 1906.)

1. INJUNCTION (§ 235*)—BOND—LIABILITY.

Under Civ. Code Prac. § 278, providing that an officer granting an injunction shall fix the amount and the terms of the bond to be given, or otherwise the bond shall obligate the party to pay the damages sustained, a bond executed by a party obtaining a temporary restraining order from the clerk, who did not fix the amount of the bond, conditioned on the obligors paying to the adverse party the damages "not exceeding _____ dollars," sustained by reason of the injunction, if wrongfully granted, imposes a liability to indemnify the adverse party to the extent of the damage sustained by the wrongful issuance of the order; the quoted words being surplusage.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 529; Dec. Dig. § 235.*]

2. PLEADING (§ 246*)—AMENDMENTS—REFUSAL TO PERMIT.

It is error to refuse to allow an amended petition containing matter germane to the cause of action set out in the original petition, offered by plaintiff before the filing of the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 676; Dec. Dig. § 246.*]

Appeal from Circuit Court, Magoffin County.
"To be officially reported."

Action by William L. Alexander against R. A. Gardner and others. From a judgment granting insufficient relief, plaintiff appeals. Reversed, and remanded for a new trial.

Appeal from Circuit Court, Owen County.
 "Not to be officially reported."

Owen O'Bannion was convicted of violating Act March 21, 1906 (Acts 1906, p. 429, c. 117), as amended by Act March 13, 1908 (Ky. St. 1908, § 3941a), relating to the sale of pooled crops, and he appeals. Reversed for new trial.

James H. Settle, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for appellee.

CARROLL, J. The appellant, under an indictment charging him with a violation of the act of March 21, 1906 (Acts 1906, p. 429, c. 117), as amended by the act of March 13, 1908, now section 3941a of the 1908 edition of the Kentucky Statutes, was fined \$216. He asks a reversal of the judgment entered against him for this amount.

These acts legalize the pooling of produce raised by farmers, and the selection of agents for the purpose of receiving, holding and disposing of the crops so pooled, and further provide that: "It shall be unlawful for any owner of such crop to sell or dispose of the same, and for any person to knowingly purchase the same, without the written consent of such agent; and upon conviction thereof he or they shall be fined in any sum or amount, not exceeding \$250.00, for each offense, to be fixed by the jury in their discretion."

It is admitted that the appellant pooled his tobacco in the manner provided in these acts, and that the Owen County Burley Tobacco Society was an authorized agent to receive, hold, and dispose of the same. The agreement under which the tobacco was pooled is set out in the following writing: "This contract made and entered into this April 11, 1908, between the Owen County Board of Control, of the first part, and Owen O'Bannion, of the second part, witnesseth: For and in consideration of the party of the second part assuming all liability as to prizing and condition of tobacco hereinafter named, consent is hereby given for the said Owen O'Bannion to prize his own crop of tobacco, consisting of about 3,500 pounds, together with the following crops purchased by said second party, to wit: [Naming them.] Said second party is to prize said tobacco in good order, and is to take from each hogshead a good and perfect sample, and hold the said sample subject to the orders of the first party, and is to ship the said tobacco to the Farmers' & Shippers' Tobacco Warehouse, in Cincinnati, Ohio, for storage, and is to leave said tobacco in said tobacco warehouse until same is called for by first party. The said tobacco is to be held at all times subject to the orders and control of first party, and is to be sold in the ordinary channels and under the supervision of the Kentucky Burley Tobacco Society, and second party is to pay all storage and freight

charges and other expenses that are charged against pooled tobacco of 1907 crop. The said tobacco is to be marked 'Owen County Pool,' together with the name of the shipper." It will be observed that this writing permitted O'Bannion "to ship the said tobacco to the Farmers' & Shippers' Tobacco Warehouse, in Cincinnati, Ohio, for storage"; and the president of the board of control of the Owen County Burley Tobacco Society testifies that O'Bannion "took the tobacco out of the state with the knowledge and consent of our board for the purpose expressed in the contract." It is further admitted that the tobacco, after being shipped to Cincinnati, O., as provided in the contract, was there sold by O'Bannion.

As the Owen County Burley Tobacco Society, in whose custody the tobacco was placed as agent to hold and dispose of, consented to its removal from this state, its removal did not constitute any offense or breach of the contract on the part of O'Bannion. The breach of contract and consequent violation of the statute was not committed until the tobacco was sold and disposed of by O'Bannion. The fact that it was the intention of O'Bannion, when he entered into the contract and obtained possession of the tobacco, to take it out of the state for the purpose of selling it, and that in pursuance of this intention he did dispose of it in Ohio, cannot affect the question of his guilt or innocence under the statute. It is a sale or disposal in violation of the contract that constitutes the offense. There must have been a sale or disposal of the tobacco by O'Bannion within this state before he could be convicted under the statute, assuming that it is valid—a question not before us on this record. It is manifest that, as the offense, if any, committed by O'Bannion took place in the state of Ohio, it is not punishable in this state.

Wherefore the judgment of the lower court is reversed, with directions for a new trial in conformity with this opinion.

PHILLIPS et al. v. WILLIAMS et al.

WILLIAMS v. PHILLIPS et al.

(Court of Appeals of Kentucky. Dec. 4, 1908.)

1. DOWER (§ 59*)—ELECTION BETWEEN HOMESTEAD AND DOWER—EFFECT.

A widow may elect to take either homestead or dower in the land of her deceased husband, and where she takes the homestead she has no interest, except the right to occupy it so long as she lives.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 91, 207; Dec. Dig. § 59.*]

2. HOMESTEAD (§ 145*)—RIGHT OF WIDOW—ABANDONMENT BY SALE.

Where a widow elects to take homestead in the lands of her deceased husband, she abandons the same by an attempted sale thereof.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 268; Dec. Dig. § 145.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Virginia. Appellant took possession of it under his purchase, and occupied and used the whole property, which consisted of less than one-half acre. The buildings thereon consisted of an old and dilapidated house and stable. The court, in its judgment, charged appellant at the rate of \$120 per year rent for the time he occupied the property. The testimony on this point was very conflicting. When he first took possession of the property it was not worth more than \$6 or \$7 per month, according to a preponderance of the evidence; but on account of the construction of a railroad into the town of Pikeville the property increased in value, and at the latter part of his occupancy, as the testimony shows, it was worth \$10 or more per month. In our opinion, if appellant was chargeable with rent, the court should have, under the evidence, fixed the amount at \$100 per year.

The important question to be considered is: Did appellant take any interest in the property by reason of his deed from Harriett Williams? By section 2132, Ky. St. 1903, it is provided that after the death of a husband the surviving wife shall have an estate for her life in one-third of all the real estate of which he died possessed in fee simple during coverture. The granting clause of the deed from Harriett Williams to appellant is as follows: "That said party of the first part, for and in consideration of the sum of \$150.00, one hundred and fifty dollars, in hand paid, do hereby sell and convey to the party of the second part, his heirs and assigns, the following described property, to wit: All my right and entire interest in the following house and lot, my interest being the life estate in said property hereby conveyed," etc. There is nothing in the caption or habendum clause that conflicts with the granting clause in the slightest. The word "homestead" is not mentioned in the deed. There was no evidence introduced tending to show that she sold or attempted to sell her homestead right; nor was there any testimony tending to show that Mrs. Williams was ever put upon her election to take homestead or dower, or that she elected to take a homestead rather than a dower. The question, therefore, turns upon the language of the deed.

The lower court seems to have rested its decision upon the case of Deboe v. Rushing, 51 S. W. 613, 21 Ky. Law Rep. 423. The facts in that case are in some particulars unlike the ones in this case. In that case Mrs. Rushing abandoned the land, left her two infant children residing upon it, and ran off with a man. While the opinion does not show what interest she attempted to sell to Deboe from the language used we must assume that her attempted sale was of the homestead right, and that she had elected to take homestead, rather than a dower, although it had not been assigned to her by any legal proceedings. That portion of the opinion which gave Deboe the right to possess

himself, under the purchase from the widow of the property after the arrival of the children at the age of 21 years and hold it until the death of Mrs. Rushing, has, by subsequent decisions of this court, in effect been overruled. This court, however, did not establish that rule. The lower court had so decided in favor of Deboe, and there was no cross-appeal, and therefore this court permitted that part of the judgment to stand. Many of the opinions are cited in this case, and all of them, which touch the subject, hold that when a widow elects to take a homestead in lieu of dower, and abandons the homestead by a sale or otherwise, this ends her right to a homestead in the land; that she cannot change her mind and repossess herself of the homestead, or take dower therein instead of homestead, and the one to whom she attempted to convey gets nothing. No other construction can be placed upon that opinion and make it conform to the statutes upon the subject and other opinions by this court.

The case of Bryant v. Bennett, 61 S. W. 1004, 22 Ky. Law Rep. 1866, was where Ellen Fletcher, a widow, was left in possession of a house and lot worth less than \$1,000. She sold it to Harvey Bennett, left it, and moved to Christian county, Ky. The granting clause of the deed was as follows: "I do hereby sell and convey my dower and life interest in the property as surviving widow," etc. The lower court in that case decided that Harvey Bennett took the homestead of Ellen Fletcher and was entitled to it so long as she lived. This court, in reversing the judgment, used the following language: "Section 1707 of the Kentucky Statutes of 1903 provides that the homestead shall be for the use of the widow as long as she shall occupy same. And it was held in Freeman v. Mills, 101 Ky. 145, 39 S. W. 827, 'that occupancy was a continuing condition precedent to the widow's right of homestead, and that a sale of her interest was a complete and irrevocable abandonment thereof, and that the purchaser acquired no title under his purchase.' We are therefore of the opinion that, under the law as expounded in that case, Mrs. Fletcher did not pass any title to the homestead by her conveyance to appellee, and he only acquired by virtue of his purchase her dower interest as surviving widow, and, in fact, the conveyance from Mrs. Fletcher to him only purports to convey her dower interest therein."

In the case of Freeman v. Mills, referred to in the above quotation, was where Mrs. Freeman instituted a proceeding in court to have assigned to her a homestead in the lands of her deceased husband. She was allotted 136 acres of the land, which included the residence and outbuildings. After this she attempted to sell this homestead to one Mills, and the children of Freeman instituted an action to recover the land because of the sale and abandonment of it by

appellant, by his conveyance from the widow, took any benefit that was given her by the statute just quoted. As we construe the statute, it was enacted for the personal benefit of the widow, when she was grieved and in a helpless condition on the account of the loss of her husband. She had the right to the benefits of the property rent free, but she had no right to convey this privilege. Appellant by his deed received only her interest in the property as defined by section 2132, Ky. St. 1903, which was a one-third interest in the property during the life of the widow. As before stated, we are of the opinion that the lower court charged him too much per year as rent, and that he should only have been charged \$100 per year for the time he occupied it after his purchase from the widow, and that is subject to be credited by the value of the lasting improvements placed on the property by him and the taxes he paid thereon.

At the time the widow elected to take dower in the property the house and lot, according to the proof, was not worth more than \$1,200, one-third of which, \$400, represented the value of this life estate. Under the repeated decisions of this court, the widow's election to take dower, or even to abandon the homestead, could not have the effect to defeat the infant of his homestead right in the property. It has often been decided by this court that there cannot be two homesteads, or a dower and a homestead, taken out of the same property. Therefore, if the widow elects dower, and if it is of greater value than \$1,000, she must make provisions for the infant or infants. See *Warren's Adm'r v. Warren*, 104 S. W. 1199, 32 Ky. Law Rep. 82. But if her dower interest is worth less than \$1,000, as in the case at bar, under the statutes as we construe them, the infant is given a homestead of \$1,000 (as an infant cannot elect for himself, the law elects for him), but it must include the dower assigned to the widow; and if any of the property be left, then the excess should be apportioned among all the children, including the infant. The court should first charge appellant rent at the rate of \$100 a year for the time he occupied the property under his purchase, credit it with the value of the improvements and taxes paid by him, and divide the remainder as follows: One-third to himself, one-half to the infant, one-sixth to U. K. Williams for himself and as vendee of the adult children, less one-fifth of one-sixth, which should be paid to the infant in addition to its one-half as before stated. It appears, however, that appellant Phillips paid some of the rent during the pendency of the suit, and he should be given credit by what he has paid.

The subject of litigation in the second-styled action is, in substance, as follows: When appellant, W. T. Phillips, purchased

from the widow her dower at the price of \$150, he executed to her a separate writing by which it was agreed that the widow should take steps to have the court sell the infant's interest in the property, and appellant was to purchase the adult children's interest at the lowest price possible, and if it could all be procured at a price not exceeding \$850 he bound himself to pay to the widow \$150 more. The widow transferred this writing to U. K. Williams, the eldest child of the deceased. He transferred it to his son, A. L. Williams, who instituted an action against appellant, Phillips, to recover the \$150. Phillips answered, alleging that he had never been able to purchase any of the interests of the children, and made U. K. Williams a party, and alleged that he verbally agreed to sell him the interests that he owned at \$30 per share, and asked that he be compelled to convey, and, in case U. K. Williams failed to do so, asked damages. Upon the trial A. L. Williams dismissed his action, and the court adjudged that appellant, Phillips, presented no cause of action against U. K. Williams. In our opinion the lower court committed no error in the disposition of this case.

For these reasons the judgment in the first-styled case is reversed, and remanded for further proceedings consistent herewith; and the judgment in the second-styled case is affirmed.

HOWELL et al. v. UNION GROCERY CO. (Court of Appeals of Kentucky. Dec. 9, 1908.)

1. APPEAL AND ERROR (§ 1009*) — REVIEW — EQUITY SUIT—FINDINGS.

While the findings of the chancellor on questions of fact in a creditors' suit are entitled to considerable weight on appeal, the Court of Appeals will form an independent judgment and determine whether the facts authorize the judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3970; Dec. Dig. § 1000.*]

2. FRAUDULENT CONVEYANCES (§ 300*)—OWNERSHIP OF PROPERTY—EVIDENCE.

In a suit to subject property standing in the name of another to a judgment against H. evidence held insufficient to show that any part of the price of the property had been paid by H.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 300.*]

Appeal from Circuit Court, Carter County.
"Not to be officially reported."

Suit by the Union Grocery Company against J. W. Howell and others. Judgment for complainant, and defendants appeal. Reversed, with directions.

Theobald & Theobald, for appellants. H. R. Dysard, for appellee.

CARROLL, J. The appellee, Union Grocery Company, brought this suit in equity, upon a return of "No property found," against J. W. Howell, for the purpose of sub-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

TEXAS & N. O. R. CO. v. PARSONS.

(Supreme Court of Texas. Dec. 9, 1908.)

1. MASTER AND SERVANT (§ 301*)—INJURIES TO THIRD PERSONS—RELATION OF PARTIES.

That one was a deputy sheriff does not show that his act in injuring a trespasser was official.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1212; Dec. Dig. § 301.*]

2. MASTER AND SERVANT (§ 301*)—INJURIES TO THIRD PERSONS—RAILROAD WATCHMEN.

That one was a railway watchman does not show that his act in injuring a trespasser was that of a servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1212; Dec. Dig. § 301.*]

3. MASTER AND SERVANT (§ 301*)—RAILROADS—DEPUTY SHERIFF AND WATCHMAN—CHARACTER OF ACTS—HOW DETERMINED.

In an action against a railway company for injury to a trespasser inflicted by a deputy sheriff and watchman, whether the latter's acts were official or those of a servant must be determined by all the circumstances and evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1212; Dec. Dig. § 301.*]

4. SHERIFFS AND CONSTABLES (§ 18*)—DEPUTIES—APPOINTMENT FOR PRIVATE PURPOSE.

A sheriff cannot appoint or detail deputies to act as guards or watchmen over railroad property, except to prevent threatened injury thereto.

[Ed. Note.—For other cases, see Sheriffs and Constables, Dec. Dig. § 18.*]

5. MASTER AND SERVANT (§ 330*)—RAILROADS—EXISTENCE OF RELATION—EVIDENCE—SUFFICIENCY.

Evidence in an action against a railway company for injury to a trespasser held to show that the person who inflicted it was employed by the company as a watchman, and was acting in that capacity when he shot plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 330.*]

6. MASTER AND SERVANT (§ 304*)—RAILROADS—TRESPASSERS—DUTY OF WATCHMEN.

A railway watchman who was conducting trespassers out of railway yards owed them the duty to not injure them through negligent or reckless use of his revolver.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 304.*]

7. MASTER AND SERVANT (§ 301*)—RAILROADS—INJURY TO TRESPASSER—WATCHMAN'S MISTAKE—EFFECT.

That in shooting at one who approached him a railway watchman believed him to be a companion of trespassers the watchman was conducting off the premises does not alter his relation to the company as affecting its liability to one of the trespassers who was struck by the bullet.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 301.*]

8. MASTER AND SERVANT (§ 330*)—RAILROADS—INJURY TO TRESPASSER—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a judgment against a railway company for injury to a trespasser shot by a watchman employed by the company.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 330.*]

Error from Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Rush J. Parsons against the Texas & New Orleans Railroad Company.

From a judgment of the Court of Civil Appeals (109 S. W. 240) affirming a judgment for plaintiff, defendant brings error. Affirmed.

Baker, Botts, Parker & Garwood, and Lane Jackson, Kelley & Walters, for plaintiff in error. John Lovejoy, J. W. Parker, and J. B. Bisland, for defendant in error.

BROWN, J. The Texas & New Orleans Railroad Company owned and operated in 1903 a railroad from Houston to a place called Echo in Orange county, at which latter place were located a depot, shops, and yards. The yards extended about two miles in length and in width sufficient to embrace five separate tracks, all being inclosed by a fence on each side the length of the yards. Within the inclosure were all improvements and buildings which were located at Echo, including a hotel at which the railroad employees boarded. The railroad company had a large number of hands employed in the shops and otherwise about its yards. At times there were many cars standing upon the tracks inside of the yards, loaded and unloaded. A large number of transient persons, tramps, etc., collected about the place and frequently built fires outside and near to the fences. On several occasions they interfered with the railroad men in their work and it was not infrequently the case that depredations were committed upon the property, cars were broken into, etc. These conditions became so bad that the yardmaster reported to his superior officer, who applied to R. M. Johnson, then sheriff of Orange county, to appoint two deputies to be located at said place, Echo, to serve in protecting the property and premises of the said railroad company from trespassers and from depredations, and to enforce the law against all persons who might violate it. Johnson at first declined to make the appointment, on the ground that he could not afford to pay the deputies for their services. The railroad company agreed that it would pay the monthly salaries of each deputy so appointed, and upon this agreement Charles A. Futch and one Prejean were appointed and stationed as deputy sheriffs at said place. The only instruction that Johnson gave to the deputies was to enforce the law, and there is no evidence that any officer of the railroad company gave to said deputies any instructions. It seems to have been assumed by the deputies that they were to act as watchmen over the railroad property, and they so acted. One of them was on watch in the day, and kept the yards under supervision, going from point to point protecting the property from trespassers; the other was on guard or watch during the night, and likewise made the rounds as often as was necessary among the cars that might be standing upon the tracks to protect the property against depredations

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the inclosure against trespassers. It was the duty of the said watchman, if they saw persons trespassing upon the yard of the company, to put them out of the inclosure, which they did whenever such trespassers appeared. The two appointees of the sheriff continued their services from the times of their appointment up to December 18, 1905, something more than two years, during which time their wages or salaries were paid by the month by the railroad company.

On the 18th day of December, 1905, Parsons, with a number of other persons entered a box car on the Texas & New Orleans Railroad at Beaumont, and remained in it until the car reached Echo about 2 o'clock the next morning. An employé of the railroad company came to the car and saw that there were persons inside, and when he opened the door of the car and told them to get out they refused to do so, whereupon he shut the door and moved the car down to a point near the hotel where Futch was, and, by direction of the yardmaster, telephoned to Futch to come over; there were some hobos in a car. Futch went over to the car, and when the railroad employé opened the car door Futch had his pistol in his hand and ordered the men in the car to get out, which they did. He then told them that he did not intend to arrest them and had not arrested them for riding in the car, but he intended to put them off of the company's property, and ordered them to walk down the track towards the end of the yard. He told them if they did not move along that he would shoot just to see them jump, or some such language. After they had gone about 300 yards down the track they met another man going in the opposite direction, who asked Futch for a match, and also asked him when a train would go west. Just what occurred is somewhat in doubt, as the witnesses differ about the facts, but taking Futch's statement, he took the man who approached him to be one of the party that he was marching down to the end of the yard and ordered him to stop, not to come to him, but to go to his crowd. The man had nothing in his hands, made no threats, but Futch thought he was trying to get hold of him and fired at him, the ball striking Parsons in the leg, inflicting a wound that made amputation of the limb necessary. Futch testified that he did not receive any orders from the railroad officials, and the yardmaster testified that he never gave him any orders. It was also proved that the railroad officials at one time tried to get Johnson, the sheriff, to remove Futch because the latter would not obey orders of the railroad officers.

The first question which presents itself is, in what character did Chas. A. Futch act at the time the injury was inflicted on Parsons? The fact that Futch was a deputy sheriff does not prove that his acts were official, neither would the fact that he was likewise a watchman, employed by the railroad com-

pany, prove that his acts were those of a servant; that question must be determined by all the circumstances and facts placed in evidence. *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 41 Am. St. Rep. 441.

The lawless condition of things at Echo, and the exposure of the property of the railroad company to depredations by the tramps who assembled there, prompted the railroad company to apply to the sheriff of Orange county for the appointment of two deputies, the purpose of the company being to secure protection for the private property of the corporation. The sheriff had no authority to appoint or to detail deputies to act as guards and watchmen over the property of the railroad. *S. L., I. M. & S. Ry. Co. v. Hackett*, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105. In that case the court said: "An officer of the law cannot engage as such officer to guard the property of a private individual or corporation not in the custody of the law." We do not mean to say that an officer may not watch property to prevent threatened injury. It follows that whatever authority Futch had to guard and watch over the property of the railroad company and to expel from its premises trespassers thereon must have been derived from the company and not from the sheriff. Futch testified that he had authority to expel persons who were trespassing upon the property of the company, and that he had exercised that authority during his stay there, and it appears from the testimony that he had been so engaged continuously for about two years' time. During the time that Futch was so engaged the railroad company had paid his monthly wages without objection. It does not appear that there was any business to be transacted by Futch at that time and place except that which pertained to the property of the railroad company, except that on a few occasions one of the deputies may have served a subpoena or some process from the court. From the continued performance of this service for the railroad company for two years, which he could not have done as deputy sheriff, and the payment for the services by the railroad company, the conclusion is natural that Futch was employed by the railroad company to serve it as a guard and watchman over its property, and that while so engaged he was acting as its agent and servant.

Notwithstanding Futch was both deputy sheriff and watchman for the railroad company, it does not follow that the railroad company would be responsible for his acts done in his official character. It therefore becomes necessary to inquire in what capacity Futch was acting at the time the shot was fired. When Futch was called to remove the men from the car, he might lawfully have arrested them for violation of the statute against unlawfully riding in such cars. *Laws 1895, p. 178, c. 113*. Futch testified that when he ordered the men to get

out of the car he told them that he did not intend to arrest them, and did not arrest them for any violation of the law, but that he intended to put them off the company's property, which he could not have done as deputy sheriff, but was authorized to do for the corporation. It therefore appears that at that time he was acting as the agent and servant of the railroad company. *Brill v. Eddie*, 115 Mo. 605, 22 S. W. 488. In the case last cited a policeman who was authorized to make arrests for violations of ordinances of the city took hold of a boy who was riding a train in violation of such ordinances and pulled him from the car. The policeman had the authority to arrest the boy for the offense, but he did not intend to arrest him, only intended to take him off the car and put him out of the yard. The policeman was also an employé of the railroad company, and charged with the duty of keeping boys off the yard and away from the company's property. It was contended that, he being a policeman, the railroad company was not responsible for his act, and the court said, in substance, that if it appeared from the evidence that he was acting officially and was arresting the boy, then the company would not be responsible; but as it appeared from the policeman's evidence, and also from other circumstances, that he did not intend to make any arrest, but simply to remove the boy from the car and from the railroad company's premises, the court held that his act was not official, but that of a servant of the company. We think the evidence in this case shows that at the time Futch marched the men, including the plaintiff, down the railroad track to put them off the company's property, he was acting in the capacity of watchman and agent of the company, and if he fired the shot which caused the injury while in the performance of or in furtherance of that duty, then the railroad company must be held liable for the consequences.

It is contended that Futch departed from the service of the railroad company and became involved in a difficulty with a third person, and that he did not fire the shot in the discharge of any duty due to the railroad company. The following charge was asked by the railroad company, and was refused: "Gentlemen of the jury, you are instructed that if you find from the evidence that, on the occasion of plaintiff's injury, the defendant Charles A. Futch had required the plaintiff and his associates to leave the premises and yard of the defendant railway company, and that while they were in the act of departing therefrom another person, unknown to plaintiff and his associates, approached the defendant Futch, and that a personal controversy thereupon ensued between such person and the said defendant Futch, and that as result of such controversy the defendant Futch discharged his pistol,

and thereby inflicted injury upon the plaintiff, but that such injury of the plaintiff was not intentional, nor for the purpose of coercing him or his said companions to leave the said yard and premises of defendant railroad company, then, and in such event the plaintiff is not entitled to recover, and if you so believe, you will return your verdict in favor of the defendant railroad company." If the charge had been given, the jury must have found for the railroad company, although they believed Futch was negligent or reckless in firing the pistol. Futch had plaintiff under his control, and he owed it to him and his associates not to injure them through negligent or reckless use of his gun. Under the requested charge the jury must have found for defendant railroad company, although they believed Futch acted recklessly in firing his pistol, and the evidence would justify that conclusion. The charge was properly refused.

The facts stated by Futch show that at the time he fired the shot he did it for the purpose of compelling the man at whom he fired to return to the parties that he had under control and whom he was putting off the yards. Futch believed that the unknown man was one of the party that he had started to put off the yard, and, so believing, he had ordered him to rejoin the company in order that all might be put off the grounds, and upon his refusal to do so he fired at him. Futch's evidence does not show that he had at any time abandoned the purpose he had when he started with the men from the car to take them down the track to the end of it and across the bridge. To do this he sought to keep them together. The fact that he was mistaken as to the unknown man's relation to the others does not affect his relation to the railroad company.

We are of opinion that the evidence is sufficient to sustain the judgment of the court whereby the railroad company was held liable to Parsons for the injuries inflicted upon him by Futch. We therefore affirm the judgments of the district court and court of Civil Appeals.

MISSOURI, K. & T. RY. CO. OF TEXAS v. STATE.

(Supreme Court of Texas. Dec. 9, 1906.)

1. STATUTES (§ 110½*)—TITLE—SUFFICIENCY.

Under Const. art. 3, § 35, requiring the subject of a bill to be expressed in its title, Act March 25, 1907 (Laws 80th Leg. pp. 92, 93, c. 41), making it unlawful for railroad companies to run trains outside of yard limits with less than full crews of a specified number of men each, is invalid for insufficiency of its title. "An act to protect the lives and property of the traveling public and the employes of the railroads in the state of Texas."

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 110½.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

roduced. Nearly all of the cases relied on are of this class, and the general language used was with reference to titles such as were under consideration. Other cases deal with statutes treating in a comprehensive way of subjects which are themselves comprehensive and which require titles equally broad. For instance, the title "An act to adopt the common law of England" is regarded as sufficient for a statute the body of which corresponds with it. Other instances might be given. The reason is that the titles truly and adequately express the subjects of the acts—that which they purport to do. We should have a different question if, under the title just stated, an act were passed merely to adopt the rule in Shelley's Case. The question then would be whether or not the title expressed the subject of the act. While it is true that the Constitution does not define the degree of particularity with which the title of an act shall express the subject, it is equally true that it does require the subject of the act to be expressed in the title. In this the statute under consideration so clearly fails to comply with the requirement that we must hold it to be invalid.

It follows that the judgment should be reversed, and that the cause should be dismissed.

WINN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1908.)

1. WITNESSES (§ 345*)—CHARACTER—PRIOR CONVICTIONS—RE MOTENESS.

Where, in a prosecution for homicide, accused was a witness in his own behalf at the trial in May, 1908, it was error to permit the state, in order to discredit him, to prove that he had been indicted for killing a Mexican in 1887 or 1888, and had pleaded guilty to theft in 1894, in the absence of evidence that he had not reformed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1126; Dec. Dig. § 345.*]

2. HOMICIDE (§ 166*)—TRIAL—EVIDENCE.

Where, in a prosecution for homicide, the state claimed that the killing resulted from defendant's animosity toward decedent and W., because he believed they had burned his barn, it was incompetent for the state to prove a complete alibi for deceased and W. so far as the barn burning was concerned, unless the circumstances so proposed to be proved were known to defendant when he accused deceased and W. of burning the barn.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 166.*]

3. HOMICIDE (§ 116*)—SELF-DEFENSE.

Where accused claimed that he killed deceased in self-defense, the circumstances surrounding the killing must be viewed from defendant's standpoint, and it is immaterial whether subsequent evidence showed him to have been in danger or not.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 159; Dec. Dig. § 116.*]

4. HOMICIDE (§ 116*)—SELF-DEFENSE.

If the danger appeared real to the defendant, and under the belief that it was real he

shot and killed deceased, believing his own life was in danger, or his person of serious bodily injury, the homicide was justified.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

5. HOMICIDE (§ 39*)—MANSLAUGHTER.

If defendant met deceased, and defendant's previous belief that deceased had burned his barn and threatened his life caused sudden anger or resentment, rendering his mind incapable of cool reflection, and defendant thereupon killed deceased as deceased pointed a pistol at defendant, the offense was manslaughter.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 39.*]

Appeal from District Court, Limestone County; L. B. Cobb, Judge.

S. H. Winn was convicted of manslaughter, and he appeals. Reversed and remanded.

James Kimbell and Harper, Jackson & Harper, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at three years' confinement in the penitentiary.

Bill of exceptions No. 1 shows that after the state had closed its evidence counsel for appellant asked the court to retire the jury, and requested the court to instruct the state's counsel not to ask the defendant, when he was put on the stand as a witness in his own behalf, about having been indicted for killing a Mexican in Leon county, Tex., in or about 1887 or 1888, nor to ask the appellant about having pleaded guilty to theft of hogs in Robertson county in the district court in 1894, unless the state expected to further attack the appellant's character, either for his general reputation for truth and veracity, or by showing other offenses committed by defendant after said time, because said transactions were committed too long ago to affect defendant's standing now. The court refused to so instruct the state's counsel, and notified counsel for appellant the same was a proper question for the state to ask the appellant. Thereupon the jury was recalled, and the appellant was placed upon the stand as a witness in his own behalf, and upon cross-examination counsel for the state asked the appellant if he did not kill a Mexican in Leon county in or about 1887 or 1888, and was indicted and tried therefor, and he further asked him if he did not in July, 1894, plead guilty to theft of hogs in Robertson county. Appellant then and there objected. The court permitted the same to be asked appellant, to which ruling of the court appellant excepted, because said testimony was immaterial to any issue in the case, and would not tend to prove any fact, and it was not permissible to prove these two isolated transactions, happening so long ago, because they were too remote to show moral turpitude. The trial took place in May, 1908, and under a long line of author-

by an unbroken line of authorities. We hold that said testimony was inadmissible.

Bill of exceptions No. 4 complains of the following charge of the court: "If the defendant killed the deceased through sudden terror or fear, under an unreasonable belief that his life was in danger, his offense, if any, was no more than manslaughter. If he acted under a reasonable belief that his life was in danger, he should be acquitted." Appellant's objection to this charge is that it limits the jury's right to turn appellant loose only on the ground that his life was in danger, when the jury might have believed that deceased only intended to inflict on defendant some serious bodily injury, or they might have believed that in the condition of the pistol that he could not have inflicted any injury and that his life was not in danger; that this charge takes away the appearance of danger, and limits the jury to the killing as they see it, and not as viewed by the defendant at the time of the killing. The court in addition should have told the jury that the circumstances must be viewed from defendant's standpoint, and it was immaterial whether subsequent events showed he was in danger or not. If the danger appeared real to the defendant, and under the belief that it was real he shot and killed deceased, believing his life was in danger, or his person of serious bodily injury, he would be entitled to an acquittal; but if he met the deceased, and his previous belief that deceased had burned his barn and had threatened his life caused sudden terror, anger, rage, or resentment, such as rendered his mind incapable of cool reflection, coupled with the conduct and acts of deceased at the time, then appellant would be guilty of manslaughter.

For the errors discussed, the judgment is reversed, and the cause remanded.

BROOKS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1908.)

1. CRIMINAL LAW (§ 1144*)—APPEAL—RECORD—PRESUMPTIONS—SUBSTITUTED INDICTMENT.

Where accused was convicted on a substituted indictment, and the record on appeal fails to show that the substitution was made by permission of the court, the conviction will be reversed, as the rule of presumptions cannot be indulged in to verify the substituted indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2746, 3018; Dec. Dig. § 1144.*]

2. INDICTMENT AND INFORMATION (§ 14*) — LOST INDICTMENT—RECORD ENTRIES.

Record entries of an order permitting substitution of a lost indictment may be amended nunc pro tunc, even at a subsequent term.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 14.*]

Appeal from Bowie County Court; Sam H. Smelser, Judge.

F. M. Brooks was convicted of swindling and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of swindling, and his punishment assessed at imprisonment in the county jail for one day and a fine of \$25.

The record contains no statement of facts. Appellant filed a plea to the jurisdiction of the court, the first ground of which is that the substituted indictment or pretended substituted indictment nowhere shows that said cause was transferred by the district clerk of Bowie county to the county court of Bowie county; and, second, because said pretended substitute indictment fails to show that any order was ever made by the district judge of the Fifth judicial district, and of which Bowie county is one of the counties composing said district, transferring said cause to the county court of Bowie county; and, third, because there nowhere appears on the face of said pretended substitute indictment that any order was ever asked as required by law for said substitution or ever granted by the court; and, fourth, because said county attorney, Patrick G. Henry, has never made a written suggestion to the court, as required by law, that an indictment, if any, was ever filed in this cause. The indictment appears to be in the usual form, and immediately following same, in this transcript, we find the following statement: "I, Patrick G. Henry, county attorney of Bowie county, Texas, representing the state in said cause, do hereby state that the foregoing indictment in the case of State of Texas v. F. M. Brooks, No. 2,879 upon the docket of this court, is substantially the same as the original indictment which has been lost, and is the same which I have prayed the court to substitute for said lost original." Signed officially by the county attorney.

This record fails to show that the substitution of the lost indictment was made by permission of the court, and is, therefore, fatal on this appeal. *Graham v. State*, 43 Tex. 550. Presumptions cannot be indulged in to verify the substituted indictment; but the record entries may be amended nunc pro tunc, even at a subsequent term. *Turner v. State*, 7 Tex. App. 596. For further authorities on this question, see article 470, White's Ann. Code Cr. Proc. In the absence of a proper order of the court authorizing the substitution, the motion of appellant is well taken.

The record not showing that the court had jurisdiction to try the case under the substituted indictment, it follows that the judgment must be reversed, and the cause remanded, and it is accordingly so ordered.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

effect that they were in fact going fishing at the time they met deceased, when the fatal difficulty occurred. This testimony may have been cumulative. If we could consider the statement of facts, it would be clearly so. Without the statement of facts, therefore, we are of opinion that the application is not in such condition as to require us to reverse the judgment on account of the loss of this testimony. There is enough, perhaps, within the bill of exceptions, to show that this was cumulative, and the statement of the parties as to their purpose in going in the direction they were traveling at the time of the difficulty. The application for continuance and the bill fail to show that the evidence was not cumulative.

The second bill was reserved to the testimony of the witness Duke in regard to the purchase by appellant's father of some shells loaded with buckshot on the morning of and prior to the homicide in the evening; the theory being that there was no conspiracy shown, or at least not sufficient evidence introduced as a predicate for the conspiracy in order to admit the purchase of shells loaded with buckshot in the absence of defendant. This bill further shows, in this connection, the state had shown by John Davis, Milage Davis, and George Davis, each, certain statements and conversations made by the father of appellant, who was indicted as a principal in the same transaction in a separate indictment, these statements being made in reference to the deceased, and the bill refers to the statement of facts in order to show what those witnesses testified with reference to those conversations, acts, and doings of M. B. Dobbs, father of appellant, as made or done in the presence of defendant, all of which refer to the deceased. As the bill is presented, and in the absence of statement of facts, no error is shown in admitting this evidence. The same question was passed on, as we understand the former appeal, cited *supra*.

Another bill of exceptions was reserved to the court overruling some exceptions of appellant to certain questions asked the mother of appellant on cross-examination. The bill discloses that she testified on the former trial for her husband, M. B. Dobbs. The stenographic report of her testimony was used by the state's attorney in asking questions, and from that report it seems he asked questions of the witness. After reading such questions and answers as he desired her to answer, and at the conclusion of such questions she stated she did not remember that she so testified upon the trial of her husband. The state did not offer this in evidence—simply used it in asking questions, apparently for the purpose of laying a predicate for impeachment. When this was done, appellant then introduced all of her testimony before the jury as taken on the trial of her husband, including the very questions and answers that had been

read to her by the state's counsel. As the bill shows the matter, we fail to see any error.

With reference to the testimony of the witness Bass, in the absence of the testimony introduced on the trial, we are of opinion that the matter is not so presented as to show any material error. Without the facts before us we are of opinion the bill of exceptions does not sufficiently show such error as would require a reversal of the judgment, even if any is shown at all.

The error in the charge suggested for reversal, in the absence of the statement of facts, will not be revised. These may have sufficiently presented the issues suggested by the testimony.

As the record is presented, we find no error which would require a reversal. Therefore the judgment is affirmed.

BROOKS, J., absent.

On Rehearing.

DAVIDSON, P. J. At a former term of the court the judgment herein was affirmed, without reference to the statement of facts, on the theory that the statement of facts could not be considered, having been filed after the time allowed by the court, to wit, 20 days. Upon a review of the matter we are satisfied now that that conclusion was erroneous. The judgment of the court allowed 20 days, whereas the act of the Thirtieth Legislature authorized 30 days, in which to file statement of facts. The theory upon which the affirmance was had was that 30 days were allowed appellant, but that it did not compel him to take that time if he saw proper to take less time, and, having obtained an order for that purpose, he would be confined to the time requested by him and set forth in the judgment. A review of the question convinces us that that conclusion was erroneous. We now follow the rule announced by the Court of Civil Appeals in *Garrison v. Richards et al.*, 107 S. W. 861, and *St. Louis Southwestern Ry. Co. of Texas v. Nelson*, 108 S. W. 182. We are of opinion, upon a review of these cases, that they announced the correct doctrine. The judgment of affirmance, without reference to the statement of facts, is set aside, and the case will be now decided upon its merits. A sufficient statement of the case will be found in the former appeal, as reported in 51 Tex. Cr. R. 113, 100 S. W. 946.

Appellant sought a continuance of the case on account of the absence of quite a number of witnesses. This was overruled, and process ordered for the absent witnesses, except Henry Honzell, who was alleged to reside in Parmer county. Process was served on all of the absent witnesses, and they were brought into court, except Henry Honzell. By him it was proposed to be shown that on the evening of the homicide appellant and

pocket, where the evidence tended to show a conspiracy between them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

8. WITNESSES (§ 268*) — CROSS-EXAMINATION.

Accused's wife having testified that she saw the homicide and to facts tending to show that decedent was the aggressor, the state could ask her on her cross-examination whether she saw decedent's son, who was with him, and ask her whether decedent was driving a horse or a mule, and just where she was when the encounter occurred, and concerning her opportunity to see the killing, to test her credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.*]

4. CRIMINAL LAW (§ 404*) — DEMONSTRATIVE EVIDENCE—DECEDENT'S CLOTHING.

It was proper to exhibit decedent's shirt, and to allow a witness, who was about decedent's size, to put it on in the jury's presence, where such exhibition aided the jury in determining the controversy as to the situation of the parties when the homicide occurred, though some of the facts sought to be shown were conceded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

5. CRIMINAL LAW (§ 822*) — INSTRUCTIONS — BURDEN OF PROOF.

An instruction that if the jury believed beyond reasonable doubt that accused intentionally and unlawfully killed decedent, and found that the facts did not establish express malice beyond reasonable doubt, and that the facts established beyond reasonable doubt that the homicide was not of the grade of manslaughter and was not justified on the ground of self-defense, as manslaughter and self-defense were thereinafter defined, then the facts did not tend to mitigate or justify the act, and there was nothing to reduce the killing below murder, "as these expressions are used in the above charge on murder in the second degree, and you may find implied malice and that the offense is murder in the second degree," was not erroneous, as shifting the burden of proof and as infringing the doctrine of reasonable doubt, when considered with other instructions distinguishing murder in the first and second degrees, defining implied malice and manslaughter, and giving accused the benefit of any doubt as to the grade of the offense committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990-1995; Dec. Dig. § 822.*]

6. CRIMINAL LAW (§ 809*) — INSTRUCTIONS.

The instruction was not erroneous, as being confusing and misleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961-1967; Dec. Dig. § 809.*]

7. CRIMINAL LAW (§ 763*) — INSTRUCTIONS — PROVINCE OF COURT AND JURY—WEIGHT OF THE EVIDENCE.

The instruction was not erroneous, as being on the weight of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748; Dec. Dig. § 763.* Homicide, Cent. Dig. §§ 579, 603, 631, 648.]

8. HOMICIDE (§ 295*) — INSTRUCTIONS — MANSLAUGHTER.

An instruction on manslaughter was not erroneous, as limiting the jury, in determining provocation or adequate cause, to things happening at and immediately before the difficulty, where, in connection therewith, the court instructed that any condition or circumstance creating sudden passion, whether accompanied

by bodily pain or not, is deemed adequate cause; that, where there are several causes to arouse passion, it is for the jury to determine whether all such causes combined might do so; and that, in passing upon the sufficiency of the provocation and on the effects of the passion on accused's mind, the jury might consider all the evidence in the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.*]

9. HOMICIDE (§ 300*) — INSTRUCTIONS — SELF-DEFENSE.

Where accused and his son were charged with homicide as principals, the son having done the shooting, an instruction on self-defense was not erroneous, as infringing the doctrine of apparent danger and as omitting to direct the jury to judge the case from the son's standpoint in passing on the question of appearances of danger to accused, where the court instructed that a reasonable apprehension of death or great bodily harm will excuse one in using all necessary force to protect his life or person; that it is not necessary that there be actual danger, if he acts upon a reasonable apprehension of danger as it appears to him from his standpoint; and that in such case one acting under such real or apparent danger need not retreat to avoid the necessity of killing, and where the same doctrine was applied in another paragraph to the connection of the son with the case as creating reasonable apprehension of danger in his mind.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Appeal from District Court, Titus County; P. A. Turner, Judge.

M. B. Dobbs was convicted of homicide, and he appeals. Affirmed.

Ralston & Ward and Sam D. Snodgrass, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This is the second appeal in this case. A report of the first appeal will be found in 51 Tex. Cr. R. 629, 103 S. W. 913. The companion case of Milton Dobbs is reported in 51 Tex. Cr. R. 113, 100 S. W. 946. A full statement of the case and the facts of the killing are deemed unnecessary. The record is quite voluminous, and many reasons are urged why the case should be reversed.

1. The testimony shows that the deceased was killed on a public road leading from Pittsburg to Mt. Vernon, a short distance from appellant's home. It is claimed by the state that appellant and Milton Dobbs knew that the deceased would pass near where he was killed, and that they met him there for the purpose of injuring or killing him. Appellant's theory was that the meeting was accidental, and that immediately on their meeting the deceased assaulted appellant; that they engaged in a scuffle over a shotgun, which was broken, deceased retaining the barrel, and was in the act of striking appellant with it when he was shot by his son to prevent death or serious injury to appellant, his father, as shown by the testimony of appellant's wife. There is much testimony in the record tending to show a very

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tions in respect to the little boy of deceased, who was with him, and developed from her, in substance, that she had not seen the boy. They also asked her in reference to whether deceased was driving a horse or a mule. They also asked her many questions in respect to just where she was when the fatal encounter ensued and her opportunity of seeing the killing. We think all the matters were so inextricably and closely connected with matters testified to on direct examination that her testimony would under any fair rule be admissible. This court has gone quite far enough in limiting the scope of the cross-examination of the wife. We think, however, in this case there can be no doubt that the matters inquired had such relation to the direct testimony of the wife, and were so necessarily important to elucidate the truthfulness of her testimony in chief, and so obviously related thereto, as not to be the subject of substantial complaint. This case is easily distinguishable from the cases of *Stewart v. State* (Tex. Cr. App.) 106 S. W. 685, and *Jones v. State* (Tex. Cr. App.) 110 S. W. 741.

4. Again, complaint is made of the action of the court in permitting the state to offer in evidence the clothing worn by the deceased when shot. Before this was done Dr. J. B. Florence had given minute and particular testimony as to the location and range of the shots which killed Micham, the deceased, as well as the exact location of the powder burns on the shirt, both at the point of entrance of the wound and on the shirt sleeve. After this had been done the state introduced the sheriff, D. H. Carpenter, who produced the bloody shirt that deceased wore at the time he was shot, and testified it was in the same condition as it was when taken off the deceased, except the blood on the shirt was now dry and it was wet when taken off. At the instance of the district attorney the witness put on the shirt in the presence of the jury, and showed them a large hole in it that he testified was burned there by powder. The witness also, at the instance of the state, testified there was blood on the collar of the shirt. The production of this article of clothing was objected to by appellant, and appellant also objected to the witness Carpenter putting said shirt on in the presence and sight of the jury, upon the following grounds: "Because said shirt did not tend to explain any controverted issue in this case, and it is only offered for the purpose of inflaming the minds of the jury against the defendant in this case; that the defendant had not controverted any fact proven by the state as to the location and character of the wound on the deceased, nor had not controverted any fact proven by the state as to the location or extent of the powder burn on the shirt, but that the defendant's counsel did, in making his objection to the introduction of said bloody shirt in evidence, state to the court, in the presence of the jury, that the

defendant admitted that the wound was located exactly as the state's witness, Dr. J. B. Florence, testified it was located, and that the defendant did not controvert any fact proven by the state as to the location of the said wound." These objections were by the court overruled, and testimony admitted, as we have briefly indicated.

This bill of exceptions was approved, with a lengthy explanation by the court substantially as follows: "It had been proven that the deceased was about the height and size of said witness Carpenter. A wound was found on the side of deceased's head, near the top. It was about two inches long and went to the skull. This wound was found for the first time by Dick King after he had shaved him and was combing his hair preparing the body for burial. This was about 2 or 3 o'clock in the morning after deceased was killed. The state contended that defendant struck deceased on the head with his double-barrel gun, and broke the gun, and inflicted this wound on the head, and knocked him out of his buggy, and that Milton Dobbs then shot him. There was a great deal of evidence about the wound. Was it contuse or incisive? What was its length and depth? When and how and by whom was it found? Defendant proved by physicians that such a wound would bleed immediately and profusely—would saturate the hair and shirt with blood. Much testimony as to color, amount, and length of the deceased's hair. There was much testimony, and very conflicting, as to the blood in the hair and on the shirt of the deceased—some witnesses saying the whole collar, bosom, and shoulders of the shirt were saturated with blood; others saying there was no blood on the shirt and none on his hair. The defendant contended that this wound was not inflicted in the manner contended by the state—no blood in his hair, nor on his face, nor on his shirt; that the wound must have been inflicted after death, because it did not bleed. It may have been inflicted in putting the body in the wagon, or while hauling it home in a wagon over rough roads, or in some way after death. It was a sharp issue whether or not the shirt was bloody. I allowed the shirt to be introduced in evidence on this issue. It was bloody all over the collar, shoulders, and bosom. This shirt could not have been bloodied from the wound in the side. Where the blood was on the shirt showed conclusively that the blood came from the wound in the head. The wife of the defendant testified that the husband was down on the ground, and that the deceased was standing over him with the gun barrels drawn in a striking position, when Milton Dobbs shot deceased to save his father. The state contended that the holes in the shirt sleeves and in the body of the shirt could not have been made by one shot, and there was only one, if Mrs. Dobbs told the truth. Carpenter being in size just

stance which is capable of creating and does create sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, whether accompanied by bodily pain or not, is deemed adequate cause; and where there are several causes to arouse passion, although no one of them alone constitutes adequate cause, it is for you to determine whether or not all such causes combined might be sufficient to do so. In passing upon the sufficiency of the provocation and on the effects of the passion upon the mind of the defendant, you may consider all the evidence in this case."

7. Finally, it is objected that the charge of the court submitting the law of self-defense is erroneous, in that, as framed, it is an infringement of the doctrine of apparent danger, and that it nowhere told the jury that they would judge the case from Milton Dobbs' standpoint in passing on the question of appearances of danger to M. B. Dobbs. This criticism seems not to be borne out by the record. Among other things, in connection with the law of self-defense, the court instructs the jury as follows: "A reasonable apprehension of death or great bodily harm will excuse a party in using all necessary force to protect his life or person, and it is not necessary that there should be actual danger, provided he acted upon a reasonable apprehension of danger as it appeared to him from his standpoint at the time, and in such case the party acting under such real or apparent danger is in no event bound to retreat in order to avoid the necessity of killing his assailant." The same doctrine is applied in another paragraph to the attitude and connection of Milton Dobbs with the case and the facts and circumstances as raising and creating reasonable apprehension of danger in his mind.

The case seems to have been well tried, and, as we believe, there was no error committed by the trial court. It is therefore ordered that the judgment of conviction be, and the same is hereby, in all things, affirmed.

JONES v. STATE

(Court of Criminal Appeals of Texas. Nov. 18, 1908.)

CRIMINAL LAW (§ 594*)—CONTINUANCE—ABSENT WITNESSES.

A first continuance should have been granted for want of several witnesses residing in a city in the country; the application stating the house residence of each, and that defendant expects to prove by them a complete case of self-defense, and showing that a proper subpoena issued for them, and the sheriff's return showing they were not found, and defendant and another having at the trial sworn to a perfect self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321-1332; Dec. Dig. § 594.*]

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

Irene Jones, alias Irene Harris, appeals from a conviction. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and her punishment assessed at 15 years' confinement in the penitentiary.

There is but one question that we deem necessary to pass upon in this case, and that is appellant's first application for continuance. The same has all the legal requisites of a first application, and asks for a continuance for the want of three or four witnesses who reside in the city of Dallas and the application shows that proper subpoena had been issued for same; but the return of the sheriff shows the witnesses not found. The application states the residence of each witness in the city, street and number, and says that said testimony is desired, and that appellant expects to prove by said witnesses a complete case of self-defense. Appellant and her sister, during the progress of the trial, swore to a case of perfect self-defense. This is the condition of this record. It follows that the court erred in refusing to grant the continuance.

The judgment is accordingly reversed, and the cause is remanded.

HOLLOWAY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 11, 1908.)

1. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS.

Requested charges that a mere invitation or request to a woman to have carnal intercourse did not constitute an attempt to commit rape, and unless accused at the time attempted to use such force to accomplish his purpose without her consent as would have been sufficient, considering the relative strength of the parties, was sufficiently covered by a charge that a mere invitation from a man to a woman to have intercourse does not constitute a punishable offense, and if accused requested prosecutrix to have intercourse, but did not attempt to have carnal knowledge of her by force without her consent and against her will, he should be acquitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

2. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR.

In a prosecution for attempt to commit rape, prosecutrix's answer to a question whether she knew what accused meant by his remark, when she ran off at the time of the attempted rape, "If it is all right with you, it is all right with me," that she knew very well what he meant, was not reversible error; she not having given her opinion as to what he meant.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.*]

3. RAPE (§ 46*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for attempt to commit rape, evidence that the morning after the alleged attempt accused and another were approaching the house of prosecutrix's father, and when they saw him come out in the yard with a gun they turned and rapidly rode away, was admissible to show guilty knowledge, though it had not been shown that accused or his companion knew the person with the gun, or that he was prosecutrix's father.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 54; Dec. Dig. § 46.*]

4. RAPE (§ 46*)—ATTEMPT TO COMMIT RAPE—EVIDENCE—WEIGHT.

That accused and his companion did not know the relationship between the person with the gun and prosecutrix only went to the weight of the evidence, and not to its admissibility.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 46.*]

5. WITNESSES (§ 329*)—CROSS-EXAMINATION—TO TEST CREDIBILITY.

In a prosecution for attempt to commit rape, after accused had induced prosecutrix to ride with him to a place where he stated her husband was sick, a question, on cross-examination, to a witness who had furnished liquor on which prosecutrix's husband became intoxicated at the time of the alleged rape, whether, if he promised accused to keep prosecutrix's husband at his house while accused raped her, he would come into court and tell about it, and a question to another witness, who was seen with accused on the night of the rape at the place where prosecutrix's husband was drunk, whether he should tell of it in court if he kept watch while accused went to rape prosecutrix, were proper, to test the credibility of the witnesses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1104; Dec. Dig. § 829.*]

6. WITNESSES (§ 329*)—CROSS-EXAMINATION—SCOPE.

Great latitude is allowed on cross-examination; any question tending to show the credibility of the witness regarding the matter testified to, or the probability of the testimony, being proper, if it does not call for hearsay.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1104; Dec. Dig. § 329.*]

7. RAPE (§ 46*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for attempt to commit rape, where the evidence showed that accused had on a white hat at the time, the state could prove the color of the hat he had on at the examining trial, and that during that trial he exchanged the white hat for a black one.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 46.*]

8. RAPE (§ 45*)—EVIDENCE—COMPETENCY—EXCLUSION AS RES INTER ALIOS ACTA.

In a prosecution for attempt to commit rape, where the evidence showed accused had on a white hat at the time, testimony that the witness noticed accused had on a white hat on the day of the examining trial, and that when he alighted from the train witness remarked, "There he is now, with the same white hat he had on the night of the offense," was highly prejudicial and inadmissible, as *res inter alios acta*.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 45.*]

9. CRIMINAL LAW (§ 419*)—EVIDENCE—HEARSAY.

The testimony was also inadmissible as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 419.*]

10. CRIMINAL LAW (§ 448*)—EVIDENCE—OPINION EVIDENCE—ADMISSIBILITY.

In a rape prosecution, where the evidence showed that accused wore a white hat at the time of the rape, testimony by a witness that he remarked, when accused came to the preliminary examination, that prosecutrix would surely identify accused, because he then wore the same white hat, was inadmissible as opinion evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 448.*]

11. CRIMINAL LAW (§ 719*)—TRIAL—ARGUMENT—IMPROPER STATEMENTS.

In a rape prosecution, statement by the state's attorney in argument that if the jury found accused not guilty he might enter their homes and take their wives away and rape them, and that accused and one of his witnesses were gambling companions, being out of the record, were improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1669; Dec. Dig. § 719.*]

12. RAPE (§ 15*)—"ATTEMPT TO COMMIT RAPE"—"FORCE."

Under Pen. Code 1895, art. 640, providing that if it appears, on a trial for rape, that the offense, though not committed, was attempted by the use of any of the means stated in articles 634, 635, and 636, but not so as to make it an assault to commit rape, the jury may find accused guilty of an attempt to commit rape, and article 634, making the definition of "force" in assault and battery applicable to the crime of rape, in which case it must be sufficient to overcome resistance, considering the relative strength of the parties, etc., in order to constitute an "attempt to commit rape," there must have been an intent to use such force as would constitute rape or an assault to commit rape, but the attempt to apply the force must have failed, so that it did not amount to rape or an assault to commit rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 14; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 1. p. 627; vol. 8, pp. 2868-2870.]

Appeal from District Court, Gonzales County; M. Kennon, Judge.

J. T. Holloway was convicted of an attempt to commit rape, and he appealed. Reversed and remanded.

P. J. Greenwood and J. W. Rainbolt, for appellant. F. J. McCord, Asst. Atty. Gen., and R. F. Nixon, Co. Atty., for the State.

BROOKS, J. Appellant was tried and convicted of an attempt to rape, and his punishment assessed at five years' confinement in the penitentiary.

The testimony of the prosecutrix, Marcy Smith, is in substance as follows: "About 11 o'clock at night, on March 1, 1907, some one came to my house and holloed, and I went and woke up my father-in-law, Mr. E. W. Smith, and told him that some one was at the front gate, and for him to see what he wanted. Mr. Smith went out to the front gate, and came back and delivered me a message to the effect that my husband was sick and wanted me to come to Mr. George Gray's house, where he was. My father-in-law, the baby, and myself started; Mr. Smith carrying the baby. After we had started on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

road leading to Mr. Gray's house, a man whom I took to be Tonnie Gray, riding horseback, said to my father-in-law to let him carry the baby, and, after he (the defendant) had the baby, he said to me to get up behind him on his horse, as he could carry me to Mr. George Gray's much quicker than I could walk, and I refused, saying that I was afraid of the horse; but the defendant insisted on me riding, saying that the horse was perfectly gentle, and that he would not run. I was excited and worried about my husband's condition, and wanted to get to him as quick as I could. I consented to ride behind the defendant, believing at the time that he was Tonnie Gray, and I got behind him, and we started off in an ordinary gait for a short distance, and then started off in a gallop, and we had not gone very far before the defendant turned off to the right, off of the well-traveled road on a dim path leading in the direction of an old lake, called Sour Lake, where some out-houses were situated, belonging to Mr. Henderson; and I immediately told him that he was not on the road leading to Mr. Gray's house, and for him to let me down, and that I didn't want to go any further, and he said, 'No,' and continued to go in a lively gait, and said to me, 'Your husband was not sick, but drunk,' and that his name was Johnson, from Luling, until we got to an old gate leading into a field, and then stopped, and he got down to open the gate and handed me my baby before getting off the horse, and then I jumped off the horse and started to run, when the defendant said to me, 'It is all right with me, if it is all right with you,' and I said, 'No,' and broke and ran in the direction of Mr. John Glover's house as fast as I could, and he ran after me some distance, and then got his horse and followed me through the brush. I was very much excited and crying, and ran all of the way to Mr. John Glover's house, the distance of 300 or 400 yards, and woke them up, and called for Mrs. Glover, and told her all that had transpired, and then I went into the house, and I was crying, and Mr. Glover asked me what was the matter, and I told him that some one had insulted me, and he asked me who it was, and I told him I did not know his name, but he said his name was Johnson, from Luling. Shortly after I got in the house my father-in-law came to the house, and I told him what had happened, and returned to my home with him. I did not find out that it was not Tonnie Gray that had offered to take me to my sick husband until the defendant turned off of the main road, and then I saw my mistake. This defendant was dressed in a dark suit of clothes, with a white broad-brim hat on, and had boots on with his breeches in his boots, and was riding a brown horse. I identified this defendant at Harwood, on the day of the examining trial, to be the man who commit-

ted this crime on me, shortly after he had committed the crime, and I now identify him as the man. This occurred in Gonzales county, on the 1st day of March, 1907. The defendant had on a black hat on the day of the examining trial, and I have testified to the same facts to-day as I did on the examining trial, and I have always said that he run after me and tried to catch me at the gate." The husband of the prosecutrix testified, in substance, that he was away from home on the night of the attempt to rape, drinking, but not sick. The defendant, Holloway, and one Leehin, were at the home of George Gray the night of the alleged crime, prior to its commission. They were there drinking. The husband of prosecutrix was quite drunk. This is, in substance, the testimony for the state. The defense relied upon an alibi.

Appellant asked the court to give the following charges, which were refused, to wit: "A mere invitation extended by a man to a woman to have carnal intercourse with her, or a request from him to her for that purpose, does not constitute the crime of attempt to rape. Therefore, even though you should believe from the evidence in this case that the defendant made such proposition to the prosecuting witness, then you will acquit the defendant, unless you further find that said defendant at such time attempted to use such force to accomplish his purpose as, if not prevented, would have been sufficient to accomplish such purpose." The other charge is as follows: "In this case you are charged that a mere proposal from a man to a woman to have carnal knowledge of her does not constitute an offense under the law, and before you can convict the defendant you must find that in addition to such proposal, if any was made, that the defendant by his acts evidenced an intention to have carnal knowledge of said Marcy Smith, by force and without her consent; and unless you so find that at said time he evidenced by his acts an intention to have such carnal knowledge with said Marcy Smith by the use of such force as might be necessary, considering the relative strength of the parties, and without her consent, and unless you so find beyond a reasonable doubt you will acquit the defendant." In the main charge the court gave the following: "A mere invitation or request from a man to a woman to have carnal intercourse with him does not constitute an offense punishable under the law. So, if you should find from the evidence that on the occasion under investigation the defendant did request or invite the said Marcy Smith to have carnal intercourse with him, but fail to find from the evidence, beyond a reasonable doubt, that he also made an attempt to have carnal knowledge of her by force and against her will and without her consent, as the term 'attempt' has hereinbefore been defined, you

Charles Leehin testified for the defendant, the county attorney asked him the following question: "Now, Charles, if it is a fact that you did go off up there in the brush to keep watch while Bud Holloway (meaning defendant) went down to Albert Smith's house and took his wife out and raped her, you would come into court and tell all about it, wouldn't you?" To which question appellant presented practically the same objections he did to the above testimony, all of which being overruled, the witness answered that, "If I should do such a thing, I would crawl into a hole and never show my head again." The evidence in this record shows that Charles Leehin was a companion of appellant. They were seen together at George Gray's the night of the attempt to rape. They left there together, or at least the circumstances suggest that they did. The evidence further shows that George Gray was furnishing the whisky or wine upon which the prosecutrix's husband became drunk. In the light of this evidence we do not think it was amiss for the county attorney, on cross-examination, to propound the questions above copied. It was a legitimate cross-examination of the witness to test his credibility. The answer of Charles Leehin indicates that he would be ashamed if he did such a thing. This would be a circumstance to give credence to his testimony, and would not be a fact of which appellant could complain. Great latitude is allowed on cross-examination. Any question that throws light upon the credibility or probability or veracity of a witness concerning the matter that he is called upon to testify to, that is not hearsay, is admissible on cross-examination. We must say that this testimony comes clearly within the rule.

Bill of exceptions No. 7 shows that while W. O. Brown was testifying in rebuttal for the state, and had testified that he was in Harwood on June 16, 1907, the day upon which the examining trial of defendant was had, and after the witness had testified that he saw defendant get off the train that day, said witness was asked by R. F. Nixon, county attorney, who was conducting the examination for the state, the following question: "If he noticed the kind of hat the defendant had on when he got off the train." To which appellant objected, because it was irrelevant and immaterial testimony; because said question was calculated to and did raise in the minds of the jury a prejudice against the defendant—which objections being overruled, the witness stated that "when the defendant got off the train that evening he had on a white hat." Thereupon the county attorney asked the following question: "How came you to take notice of the kind of hat the defendant had on that day?" Appellant objected to this, because irrelevant and immaterial, and because it could prove no fact in this case and was calculated to and did prejudice the minds of the jury against the

defendant, which objections were overruled and the witness answered: "You (meaning R. F. Nixon, county attorney) and I were there near the depot waiting for the train to come in. We said, one to the other, that we did not believe that the defendant would come to his trial, and wondered if he would have on the same white hat that he had on the night of the commission of the alleged offense, and when he stepped out on the platform of the car I remarked, 'There he is now, with that same white hat that he had on the night the offense was committed, and that Mrs. Smith will surely identify him now.'" Said witness was further asked the following question by state's counsel: "What kind of a hat did the defendant have on the next time you noticed him that evening?" To which question and answer the same objections were interposed as stated above. The witness answered: "The next time I saw the defendant he had on a black hat, which was shortly after he reached the town of Harwood." It was permissible for the state to prove the character of clothing and color of hat appellant had on, on the day of the examining trial, since the record shows that on the night of the attempt to rape he had on a white hat. It is further permissible and proper to prove that during the progress of the examining trial, or at any time during the trial, he changed the white hat and put on a black one; but it was very improper to permit the witness to state that "we did not believe that the defendant would come to his trial, and wondered if he would have on the same white hat that he had on the night of the commission of the alleged offense, and when he stepped out on the platform of the car I remarked, 'There he is now, with that same white hat that he had on the night the offense was committed, and that Mrs. Smith will surely identify him now.'" This was hearsay evidence, out of the presence of the defendant. In no way could he be bound by the statement. It is what the law terms "*res inter alios acta*," and highly prejudicial. Certainly it is not proper for the witness to express a doubt as to whether the defendant would come to his trial, thereby indicating his opinion that defendant was guilty and therefore would flee. Nor was it proper to say that "Mrs. Smith would surely identify him now." This is an opinion, and highly prejudicial to the rights of appellant. As stated, if the witness saw him change hats, or saw him have on a hat of any character or color, he could testify to this fact, but certainly cannot give, in that connection, an opinion, as above stated. It follows, therefore, that the court erred in admitting this part of the witness' testimony. As stated by appellant, it was highly prejudicial to the rights of defendant, was hearsay, and utterly inadmissible.

Bill of exceptions No. 8 shows that the county attorney, in his closing argument to the jury, used the following language: "If

to use force, such as is defined in article 634, we might then conclude that what was done by the accused in this case was an attempt to commit rape, because, as we have said above, rape can be accomplished on a girl under 15 years of age with her consent. But our statute is particular in regard to this matter, and requires that the proof must show that the defendant intended to use that particular force which is defined in article 634. To these acts and intentions our Code has affixed a penalty. This offense is called an 'attempt to commit rape.' This offense has been defined, and the punishment affixed, and we know of no other attempt to commit rape, except as named in article 640." That portion of the above-cited opinion, however, in reference to an assault on a female under 15 years of age, has no application to the case now at bar, and, in fact, has been overruled by subsequent decisions of this court; but we cite same as being a proper, terse, and logical presentation of the distinction between an attempt and an assault to rape. For further definitions of an attempt to rape, see *Melton v. State*, 24 Tex. App. 284, 6 S. W. 39, *Moon v. State* (Tex. Cr. App.) 45 S. W. 806, and *Walre v. State* (Tex. Cr. App.) 64 S. W. 1061.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

MORGAN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1908.)

1. CRIMINAL LAW (§ 596*)—CONTINUANCE—CUMULATIVE EVIDENCE.

The general rule that a second or subsequent application for a continuance will not be granted to obtain testimony which is only cumulative does not apply where the testimony sought is cumulative of that of accused; and hence, in a murder case, where accused claimed that he acted in self-defense, a continuance to obtain an absent witness, who would testify that before the difficulty she had communicated to accused threats made against him by decedent, was erroneously denied on the ground that the testimony would be cumulative, in that another witness had testified that he had communicated the threats to accused's mother, and accused had testified that his mother had communicated them to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1328-1330; Dec. Dig. § 596.*]

2. CRIMINAL LAW (§ 595*)—CONTINUANCE—ABSENT WITNESS—MATERIALITY OF TESTIMONY.

Accused claiming self-defense, the testimony of the absent witness was material.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1324; Dec. Dig. § 595.*]

3. CRIMINAL LAW (§ 614*)—CONTINUANCE—STATUTORY PROVISIONS—"CANNOT BE PROCURED FROM ANY OTHER SOURCE KNOWN TO THE DEFENDANT."

The statutory provision that a second or subsequent application for a continuance in a criminal case must show that the absent testi-

mony "cannot be procured from any other source known to the defendant" does not contemplate accused's testimony as another source, but refers to other sources besides accused himself.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 614.*]

4. HOMICIDE (§ 203*)—EVIDENCE—DYING DECLARATIONS—SENSE OF IMPENDING DEATH.

Before dying declarations can be admitted in evidence, it must be shown that they were made under a sense of impending death, but they need not be stated at the time of making to be so made, it being sufficient if it appear in any manner that they were made under that sanction; and hence, where decedent had been fatally shot, and had lain for more than an hour before the arrival of a physician, who told him that he could not live, that nothing could be done for him, and the physician told him that if, knowing that he was going to die, he had any statement to make, to do so, and decedent immediately, without any dissent or suggestion that he believed himself to be in any other than a dying condition, made a statement, it sufficiently appeared that the statement was made under the sense of impending death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.*]

Appeal from District Court, Madison County; Gordon Boone, Judge.

Joe Morgan was convicted of manslaughter on a charge of murder, and appeals. Reversed and remanded.

E. A. Berry, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Madison county, charged with the murder of one John B. Williams, which is alleged to have been committed on or about April 26, 1907. On trial he was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant submits three assignments and propositions on which he relies for a reversal: First, the court erred in overruling his application for a continuance; second, the misconduct of two members of the jury trying him; and, third, that the court erred in admitting the testimony of Dr. J. E. Morris as to the dying declarations of the deceased. We think the court erred in overruling appellant's application for a continuance. In view of the fact that the case is to be reversed, it becomes unnecessary to discuss the assignments of error in respect to the supposed misconduct of the jurors named. Again, we think there was no error in the action of the court in overruling the objection to the testimony of Dr. Morris. In view of the importance of the issues raised, and the fact that a correct statement of the law may in future become important, we shall discuss at length the first and third errors assigned. Briefly stated, the evidence of the state tended to show that the appellant and deceased had become involved in a difficulty on the morning of the homicide and a few hours be-

the defendant was evidently acting under the immediate influence of sudden passion produced by the assault and battery committed upon him by deceased in the first difficulty, and the jury having found the defendant guilty of manslaughter, and the jury having before it the evidence of threats made and communicated as shown by the record, uncontradicted by the state, it does not appear to the court that the testimony of the said Sue Morgan could reasonably have had any other effect than that of the uncontradicted testimony of the witness Webber and the defendant on said issue."

It will be noted by reference to the statement of the court that it is not claimed that the testimony of the witness Webber went to the extent that he had communicated the threats in question to appellant; nor, indeed, that there was testimony of communicated threats by any person other than appellant. It is clear, as stated by the court, that if the testimony of his mother related only to the subject of the misconduct of the deceased with his sister there could be no just reason for reversing the case on account of the absence of this testimony, because, having been convicted of manslaughter only, and having received the lowest punishment known to the law, if the killing was unlawful, the production of any amount of testimony as to insulting conduct or words towards his sister could not reduce the offense below the grade found by the jury, and the absent testimony, therefore, could not have changed the result. But it is to be noted that it was proposed to be proved by the missing witness that she had, a short time before the fatal difficulty, in person communicated the threats made to Webber to the appellant. The fact that Webber testifies he had made a statement of these threats to Sue Morgan would seem to rebut any suggestion that she would not, if present, testify to the facts stated as well as any suggestion that such testimony was probably untrue. Appellant claimed that he acted in self-defense. On this issue proof of communicated threats was of the highest importance. What weight the jury would have given to this testimony, if produced, we cannot say; nor do we believe that the court below was justified, or that we would be justified, in holding that such testimony should be treated as immaterial. The rule ordinarily is that a second or subsequent application for a continuance will not be granted for testimony which would be only cumulative. *Harvey v. State*, 35 Tex. Cr. R. 545, 34 S. W. 623. This rule, however, is subject, as our decisions have declared, to an exception where the testimony sought by the continuance is cumulative of that of the appellant. In the case of *Phipps v. State*, 34 Tex. Cr. R. 500, 31 S. W. 397, which was a case of murder, the conviction was reversed in part on account of the failure of the court to grant a second application for a continuance. In that case, as in this, self-defense was

claimed. The appellant there testified to certain demonstrations and conduct on the part of the deceased from which an inference of his threatened attack might, if believed, be drawn. It was averred in the application for a continuance that Phipps could prove by the absent witness, Bob Linebarger, that defendant had ordered deceased out of his house the third time, and that immediately thereafter deceased leaned his body forward and moved his right hand towards his hip pocket as if to reach for a pistol. Passing on this case, the court, speaking through Judge Davidson, says: "In our opinion, the diligence shown was sufficient, and under the circumstances of this case the evidence was very material. It is true, if we refer to the statement of facts, that several of the witnesses say that they did not see Linebarger there; but it appears that all the time there was a great deal of excitement, that there were a number of persons in the store, and that they all immediately ran out when the difficulty began. So we see nothing unreasonable in the statement that Linebarger was there, and may have seen what was alleged. As stated before, all of the witnesses who were in the store when the difficulty began ran out, and evidently much of what they saw occurred while they were in the act of running, and while they were outside of the store, and getting out of the way. The only witness who testifies to these particular demonstrations is the defendant himself, and the jury might not be disposed to lend credit to his statement, though it is not gainsaid by other witnesses, except in a negative way; and, if this testimony was calculated to corroborate the statement of the defendant himself, under the circumstances of this case it certainly would have been very valuable to him, and the court should have awarded him an opportunity to procure same by continuing the cause until next term of the court." In the case of *Gilcrease v. State*, 33 Tex. Cr. R. 619, 28 S. W. 531, in passing on an application for continuance, Judge Hurt says: "An application to continue was made for the want of testimony of the witnesses to prove threats made by the deceased to kill defendant, which were communicated to him; also to prove that deceased, as well as his brother, had guns at the place and time of the shooting. The theory of the state was that appellant, unprovoked, killed the deceased; that of the defendant was self-defense. Both theories were supported by testimony; hence a conflict in the testimony as to who was the aggressor—who began the violence. Threats, whether communicated or not, in such a conflict, are of very great importance, as they tend to solve the problem at issue. The state's witnesses deny that the deceased was armed with a gun at the time he was shot. If this be true, appellant was in no actual danger when he shot deceased, and self-defense was not in the case. The application should have been granted,

opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind. We think, tested by this rule, that it is placed beyond doubt that this young negro boy, when he made the declarations in question, must have done so under a sense of impending death. The wound, as the evidence discloses, was a horrible one. He had lain for more than an hour in the wagon where he was shot. On the arrival of the physician he was told that he could not live, that nothing could be done for him, and that, knowing he was going to die, if he had any statement to make, for him to make it. Immediately following this, without any dissent or suggestion that he believed himself to be other than in a dying condition, he makes the statement offered in evidence. We think there can be no doubt that this was a sufficient predicate under the authorities.

For the error noted above, the judgment is reversed, and the cause remanded.

PRYSE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 18, 1908.)

1. CRIMINAL LAW (§ 697*)—TRIAL—RECEPTION OF EVIDENCE—SUFFICIENCY OF EXCEPTION.

A bill of exceptions relating to testimony elicited on defendant's cross-examination to prove his failure to testify on his preliminary trial, which states that his counsel remarked, "I believe we can explain these things in our argument," and that there was no further objection to the examination, does not show a proper exception to the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1649; Dec. Dig. § 697.*]

2. CRIMINAL LAW (§ 1091*)—APPEAL—RECORD—BILL OF EXCEPTIONS—CONSTRUCTION.

A bill of exceptions, which recites that, defendant's counsel having interrupted the district attorney's argument several times, not as objections, but more as corrections of statement, the court directed counsel to make no further interruptions except on permission of the court, and that no further interruptions were made, nor any request for permission to interrupt, and that no exception was taken and the court heard no complaint until the motion for a new trial, shows that defendant did not except to the argument.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1091.*]

3. CRIMINAL LAW (§ 706*)—EVIDENCE—PRESUMPTIONS—FAILURE TO TESTIFY.

Testimony elicited on defendant's cross-examination to prove his failure to testify on his preliminary trial is inadmissible, if a proper exception is made.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 706.*]

4. CRIMINAL LAW (§ 364*)—EVIDENCE—RES GESTÆ.

Statements made by defendant on reaching jail, about 30 minutes after he shot deceased, that he did it to protect his life and prop-

erty, are not a part of the res gestæ, but are self-serving declarations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 817; Dec. Dig. § 364.*]

5. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR.

To prove defendant's failure to testify on his preliminary trial is reversible error, if proper exception is taken.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1169.*]

6. WITNESSES (§ 405*)—CONTRADICTION—TESTIMONY SUBJECT TO CONTRADICTION.

Testimony elicited on defendant's cross-examination to prove his failure to testify on his preliminary trial, being illegal, cannot be contradicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1273; Dec. Dig. § 405.*]

7. HOMICIDE (§ 340*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

A conviction of manslaughter will not be reversed for error in charging on murder in the first and second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 716-720; Dec. Dig. § 340.*]

8. HOMICIDE (§ 124*)—EXCUSABLE HOMICIDE—DEFENSE OF PROPERTY.

A person has a right to use all the force necessary to protect his property, and in doing so, if his life or person becomes in danger of death or serious bodily injury, he has a right to kill to protect his person and maintain possession of his property.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 184-187; Dec. Dig. § 124.*]

9. CRIMINAL LAW (§ 782*)—TRIAL—INSTRUCTIONS.

A charge that, if the jury acquit defendant "altogether," they should find him not guilty, is not objectionable as requiring them to acquit him of any wrong whatever before they could find him not guilty.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 782.*]

Appeal from District Court, Potter County: J. N. Browning, Judge.

J. M. Pryse was convicted of manslaughter, and he appeals. Reversed.

J. W. Crudginton and Reeder, Graham & Williams, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at two years' confinement in the penitentiary.

The evidence shows that appellant walked into a saloon in Amarillo and remained there the greater part of the day drinking. Appellant finally proposed to treat all in the house, among others, the deceased, who was a Mexican. After the parties took a drink, the appellant, having expressed a desire to go off on the train, was informed that he had but 10 minutes to reach the train. Appellant replied, "I want to talk to this party a while," and he and the deceased started back, and went into a little room at the back part of the saloon building, and in about a minute the shooting occurred. Appellant:

after he shot the Mexican, and immediately on reaching the jail, his person was searched by one C. J. Huskey, deputy sheriff, and certain articles on his person taken therefrom; that he then and there discovered that his pocketbook, which had contained two \$10 bills, was not on his person, and that he (defendant) at that time informed said deputy sheriff that he had said pocketbook containing said bills in his hand at the time he entered the room in the saloon with the Mexican, and that immediately on entering the room the Mexican sought to take from him said pocketbook, and that the Mexican at that time drew a knife and attempted to use it on the defendant in his effort to take said pocketbook, and that the defendant, under these circumstances, shot and killed the Mexican, believing it necessary to protect his property and his life, and for no other purpose, and, further, that he had not seen the pocketbook or the money since he (defendant) and the Mexican were struggling over it in the saloon.

Before approving this bill of exceptions the court makes the following explanation: "The testimony sought to be elicited by the question set out in this bill was not *res gestæ*, but was self-serving declarations, pure and simple, because the witness showed by his own evidence that, after he killed the Mexican in a room with no one present but themselves, he (defendant) walked out into the barroom, where he silently waited some time for an officer to come, and then, after the officer came and made a cursory examination of the killing and walked out of the saloon in charge of defendant, traveled several blocks to the county jail, and there, after he had been searched by the officer, the defendant claims to have mentioned, for the first time, that his pocketbook and money were missing. No offer was made to prove that defendant made any request of the officer or any one else to go to the place of the killing and search for the missing articles, although the defendant testified in substance that the pocketbook was dropped while in the struggle with deceased. The undisputed testimony showed that the Mexican was instantly killed; that the room, in which the killing occurred, was immediately closed and kept closed until the justice of the peace arrived to hold an inquest over the body of the deceased, and no one entered the room until the justice and his assistants entered it, which appeared from the testimony to have been something like an hour after the killing."

It will be seen from the explanation of the court that the testimony is not *res gestæ*, since appellant remained about the saloon some time before making this statement, and, furthermore, did not make same until he reached the jail with the officer. The court does not say how long this was, but the circumstances related in the explanation show

it must have been something like a half hour or an hour. At any rate, we are not informed how long it was. Appellant in his bill says about 15 minutes, but the court does not approve this statement, and hence to that extent appellant has no bill. But, as we understand the explanation, it shows that many things intervened before the statement was made, and much time also elapsed before said statement was made. Furthermore, the testimony would not be admissible on theory, as appellant insists, to contradict the inference that the district attorney drew from the failure of the appellant to testify in the examining trial, since said testimony was not legal testimony; defendant having failed to testify in the examining trial. If proper exception had been made, and the court had not sustained it, it would have been reversible error to have proved said fact. Therefore, when illegal testimony is introduced, it does not afford a basis for introducing testimony to contradict.

Bill of exceptions No. 3 shows that appellant attempted to prove by C. J. Huskey the same facts in reference to the statement of appellant at the jail above discussed.

We find in the motion for a new trial that appellant insists that the court erred as contained in various other bills of exception; but we have discussed all the bills of exception we find in this record.

The thirteenth ground of the motion for a new trial complains that the court erred in charging on murder in the first degree. The fourteenth ground of the motion complains that the court erred in charging on murder in the second degree. Neither of these objections are tenable, in view of the fact that appellant was convicted of manslaughter.

The fifteenth ground of the motion for a new trial complains that the court erred in charging on manslaughter. The sixteenth ground of the motion complains that the charge is contradictory and misleading, in that, among other things, the court informed the jury, in substance, that any person who killed another to prevent a forcible taking from him and his possession of his property, under a belief that it was necessary so to do to protect his said property, would be guilty of manslaughter. After telling the jury that an attempt to forcibly take money or other personal effect from a person would be adequate cause in law, and would, if not otherwise justifiable, reduce a homicide to manslaughter, the court proceeds and gives the following charge: "Now, if you believe from the evidence beyond a reasonable doubt that the defendant with a deadly weapon, under the immediate influence of sudden passion aroused by adequate cause, as the same has been hereinbefore explained, and not in defense of himself against an unlawful attack reasonably producing a rational fear or expectation of robbery, death, or serious bodily injury, with intent to kill, did in

Appeal from District Court, Maverick County; B. C. Thomas, Judge.

Fred S. Franks was convicted of murder in the second degree, and appeals. Affirmed.

Walter Gillis, Henry I. Moore, Sanford & Douglas, and C. K. McDowell, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree; his punishment being assessed at 10 years' confinement in the penitentiary.

On the evening of the 8th of May, 1906, about 4 o'clock, appellant and deceased, Stanley, had a personal difficulty on the street in a little country village, called Juno, in Val Verde county. Appellant had just bought a small ranch, containing three sections of land, from Babb, and went to the store, under the control of deceased, and made a couple of purchases and borrowed \$6.05 with which to pay the wages of one of his employes, Sam Williams. When he made the trade with Babb it was understood that the stock then in the pasture should remain, at least some of it, and two horses belonging to the deceased were mentioned among the stock. Appellant did not agree to pasture the two horses, and in that connection made some remark about not liking the deceased, but that, although he did not like him, he would have the cheek or gall to borrow money from him. There is further evidence that appellant had been trading at the store, under control of the deceased, and on two previous occasions some words had occurred between them in regard to a settlement—one in regard to a settlement, and the other in regard to some premiums that had been offered as prizes in regard to the sale of some goods that had been purchased. Babb informed the deceased of the remarks appellant had made. Deceased accosted appellant in regard to it, which ended in a difficulty between them, in which deceased had his knife in his hand, and caught the bridle of the horse which appellant was riding, and later threw a rock of considerable size at him, and struck his hand. Appellant rode away, remarking: "Stanley, will you wait for me two hours?" When appellant made this remark, Stanley said: "All right." Williams rode away with appellant, and started out in the direction of appellant's ranch house, which is some 2½ or 3 miles southwest of the little town of Juno. While riding along together, this witness urged appellant to drop the matter, or go to law with it, and let the law take its course, and that he would be a witness through it all. Appellant replied to this: "You just keep your damn mouth shut. You will be a witness soon enough. This is not the first time Stanley has run over me, and he need not think that he can live in Juno and run over me that way." When this conversation occurred between the parties they were about three miles from the appellant's ranch. This

witness rode on with the appellant until they reached the Babb pasture and there separated—witness for the purpose of driving some cattle to water—and appellant went on to the house at his ranch, changed horses, took his gun, and returned to a point somewhere in the neighborhood of a half mile from Stanley's residence. The gun that he procured was what they call a 30-30 Marlin rifle. Deceased in the meantime had gone home, it being about sundown, and after going to the house prepared himself to do the chores around the place, and among other things to milk the cow. He and his wife went to the cowpen, which is something about 135 or 140 feet from deceased's house. Deceased was engaged in milking, and his wife was sitting nearby. She observed a man coming through the pasture towards the cowpen and called her husband's attention to it; but he kept on milking, and did not heed her, and paid no attention to what she said. Again she spoke to him, and he paid no attention. Finally appellant had reached a cross fence between deceased's property and one on the west belonging to and known as the "Bill West place."

Mrs. Stanley's testimony at this point is as follows: "There is a road leading from the gate in front of the Bill West place up through the Bill West lot and north of his house back to his barn, and the person that I saw when I first observed him was coming right along this road or pathway, a little north of the Bill West house. No one was living at the Bill West house at that time. The house was vacant. Mr. West had moved out about a week before. When I first saw this person coming along this pathway, I saw that he had something in his hand, but at first I did not know what it was, but I thought it was some one stealing wood, and I said to Mr. Stanley, 'There is a man.' It looked as though it was some one taking something out of that place. Mr. Stanley paid no attention, but went on milking, and I kept on watching the party as he came on down in an easterly direction bearing towards our fence until he stopped at a place that I afterwards pointed out to Mr. Ratchford when he was there to make a map. I know where there are some small bushes in the Bill West yard. I think this person stopped along here near the fence—right against the fence. He came carrying his gun in his hands, and was peeping and stooping. There was a plank fence around the cowpen. Some time before this person got there to where he stopped, I discovered that what he had was a gun. I did not know anything about my husband having had a difficulty with the defendant at that time. As he was coming along, and after I could see that he had a gun, I said to my husband: 'It is a gun. Some one has been hunting.' I said this because I noticed it was a man with a gun, and supposed he had been hunting. When the man got up there to the place where he stopped, he said to me, 'Mrs. Stan-

that after the difficulty, about 4 o'clock, appellant went to his ranch, some three miles from town, changed horses, got his Marlin rifle, returned, and hitched his horse, as he states on this trial, about 700 yards from deceased's house, and on the examining trial about three-fourths of a mile, went through the pasture between sundown and dark, within 120 feet of the deceased and called for him. Finally deceased arose from where he was milking his cow, and according to Mrs. Stanley's testimony appellant fired two shots at him; one of them proving fatal. According to appellant's theory, at this point he went to talk to deceased, and deceased started in the direction of his house as if to get a gun, and he then shot, with no intention to kill deceased, but to shoot him in the leg, or as some of the testimony puts it, shoot off his leg. Under this state of facts appellant urged that the court erred in not charging the law of self-defense. This case does not come within the rule of the case of *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17. When appellant approached deceased, he called him and told him to come there, and under one phase of the testimony deceased did not respond, but started towards his house. This in no sense required the court to charge self-defense. See *Lynch v. State*, 24 Tex. App. 350, 6 S. W. 190, 5 Am. St. Rep. 888; *Bush v. State*, 40 Tex. Cr. R. 539, 51 S. W. 238; *Courtney v. State* (Tex. Cr. App.) 57 S. W. 654; *Herrington v. State* (Tex. Cr. App.) 63 S. W. 563.

Appellant also contends there was error in not charging the jury with reference to appellant's intent in shooting at the deceased, which he states was not for the purpose of killing. We are of opinion that under the facts of the case this was not necessary. Appellant shot for the purpose either of killing or of inflicting serious bodily injury. He shot with a Marlin rifle at a distance of less than 40 yards, which proved fatal. If appellant shot with a view of killing he would be guilty of criminal homicide, or if he shot under the circumstances as detailed by himself it is patent that it was intended to inflict upon deceased serious bodily injury. The court charged the jury, if the shot was fired for the purpose of killing or inflicting serious bodily injury, which in its necessary and probable consequences might result in his death, he would be guilty, if actuated by malice, of murder in the second degree, and in substance, if otherwise, he would be guilty of manslaughter, if his mind was at the time incapable of cool reflection.

The court submitted a charge on the theory of manslaughter. Considerable criticism is indulged in regard to this charge, especially that part of it which instructs the jury that it must be a sudden passion, and not produced by former provocation, and cites quite a number of authorities in support of this proposition. Many of these authorities discuss the question of insulting conduct to

a female relative, when the insulting conduct did not occur in the presence of the accused. That line of cases has no bearing upon the questions here. The statute requires passion, and that it must be engendered by provocation, and that it must grow out of provocation at the time of the difficulty, and must not be the result of a former provocation. This is the statute, and is the law until the Legislature changes it.

The court also instructed the jury, in regard to cooling time, that if appellant's mind was aroused to such a degree of anger, rage, sudden resentment, or terror as resulted or may have resulted from the difficulty something like two hours before the shooting, to the effect that if his mind had not cooled and that it was still agitated to incapability of cool reflection by reason of that, they would give him the benefit, and find him guilty of manslaughter. There was no adequate cause occurring at the time of the difficulty, unless it is under appellant's statement that he thought deceased was going to his house, 135 or 140 feet away, to get a gun. This would not constitute adequate cause. Therefore we are of the opinion that the provocation, if any existed by reading of this record, was the previous difficulty in the evening in which the deceased is said to have attacked, or sought to have attacked, appellant with his knife, and, falling in this, threw a rock at him and struck him on the head, which produced pain. To meet any exigencies of the case, and favorable to appellant, although this difficulty was two or three hours prior to the homicide, the court gave him the benefit of that adequate cause as a basis of acquitting him of murder and convicting him of manslaughter under the theory of cooling time. This was as favorable as appellant was entitled to have the jury charged under the facts. It may be more than seriously doubted, under the facts of the case, if appellant's mind was in any manner moved other than by revenge; for he testified that he was a very fine shot and that he fired the first shot three feet in front of him (deceased) in order to stop him, and falling in this, he shot him in the leg while he was moving in the direction of the house, as appellant supposed, to get the gun. This shows a very cool and calm condition of the mind, it occurs to us, and precludes the idea of a mind that was excited beyond the point of cool reflection.

Taking the charge as a whole, we are of opinion there is no sufficient error under our decisions to require a reversal of this judgment, and that the facts show that appellant rode three miles, changed horses, because the one he was first riding was wild to get another horse upon which he could carry his gun, and returned to somewhere between a half and three-quarters of a mile, and went up the pathway to the pen where deceased was in the habit of milking his cow in the evening, calling him up from behind,

Action by William Seidel against the Mutual Reserve Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

West, Chapman & West and Fowler & Fowler, for appellant. G. E. Pope, for appellee.

FLY, J. This is a suit instituted by appellee to recover of appellant \$282.63 evidenced by a promissory note for \$282.63, given by appellee to one Underwood, an agent for appellant, in payment of the first premium on a policy for \$10,000, which policy was rejected by appellee when it was tendered to him by appellant. The cause was submitted to the court, and judgment rendered in favor of appellee for the amount of his claim.

It was alleged by appellee that he made an application to appellant on one of its printed forms, at the instance and solicitation of its agent, for a policy of insurance for \$10,000, and at the same time executed his note payable to the agent in the sum of \$282.63 to pay the first premium. It was further alleged that appellee had an agreement with the agent that he would not accept the policy after its issuance, unless he so desired, and that he might reject said policy and that the note was to be held by Underwood, and, in case appellee concluded not to accept the policy, then the note was to be delivered to appellee, and he was not to be bound by the same. It was alleged that a fraud was perpetrated by appellant's agent in obtaining the execution of the note, and that on the day of its execution, before the policy was issued, he had sold the note to the First National Bank of Goliad, which was an innocent purchaser of the same, and that the money realized therefrom was sent to and accepted by appellant. The testimony of appellee substantiated the allegations of the petition. He did not accept the policy when it was sent to him through the mail, but promptly rejected it and demanded return of the note. He afterwards learned of the negotiation of the note by the agent of appellant. There is no provision in the application or policy copied into the record that restricts the power of Underwood, the agent of appellant, in the making of verbal agreements with those seeking insurance. The parts copied into the record have reference to other matters, and do not touch upon the powers of the agent. Such being the case, Underwood was held out to appellee and the general public as fully authorized to make any contract that appellant could make. The insurance company could no doubt have entered into the agreement charged to the agent, and therefore the question must be considered as though it entered into the agreement with appellee.

There are allegations of fraud upon the

part of the agent, and, though they are not as full and explicit as might be desired in the absence of special exceptions being urged to the allegations, they will be considered sufficient to form the basis for the introduction of evidence. In this connection it may be stated that the fraud of the authorized agent will invalidate a contract entered into by him on behalf of his principal, though in perpetrating the fraud he acted without the knowledge or consent of the principal. *Henderson v. Railway*, 15 Tex. 560, 67 Am. Dec. 675; *Wright v. Calhoun*, 19 Tex. 412; *Aultman v. York*, 7 Tex. 261, 9 S. W. 127; *McFarlane v. McGill*, 18 Tex. Civ. App. 298, 41 S. W. 402. This principle applies to the ostensible as well as the actual agent; for, having put an agent in a position where he may perpetrate a fraud upon innocent parties, the principal will not be allowed to profit by such fraud by the claim that he had not authorized the perpetration of the fraud. Appellant in this case, having clothed Underwood with authority to solicit and obtain insurance on the lives of persons, is responsible for the fraudulent as well as fair means resorted to by him in the line of his agency. *Mechem, Agency*, § 743, and note. It is the general rule that a promise to perform some act in the future will not amount to fraud in the eyes of the law; and although it may have been the propelling inducement to the execution of the contract, and though it may have been totally disregarded, it could not be made the basis for a rescission. There is, however, an exception to the rule recognized in Texas, in this: that if at the time the promise is made it was the design and intention of the party making it to disregard it, and no intention to perform it, and it was only made to deceive and entrap the other party, then such promise in case the refusal to perform took place would amount to such actual fraud as would justify and authorize the rescission of a contract induced by such promise. *Railway v. Titterton*, 84 Tex. 213, 19 S. W. 472, 31 Am. St. Rep. 39; *Collinson v. Jefferies*, 21 Tex. Civ. App. 653, 54 S. W. 28; *O'Brien v. Camp* (Tex. Civ. App.) 101 S. W. 557. Now, if this be an act of deceit, and not to rescind the contract, the action could not be maintained against appellant unless it was impliedly authorized by it, for an incorporated body cannot, it is stated, be held for false representations even of its directors, unless it authorize such representations. *Railway v. McKinney*, 55 Tex. 176. In this case, while there is no direct prayer for rescission, the effect of granting the relief sought by appellee is to destroy the contract of insurance, and render it null and void. It is to all intents and purposes a suit to rescind the insurance contract and return the premium paid by appellee. The facts in this case indicate clearly that the promise to hold the note

the garnishment was pending; that the market price of the rice declined 35 cents a sack between January 22 and March 15, 1904; that on March 16th the said suit against Moore & Bridgeman was tried, and it was adjudged that the debt sued on did not exist. The present action was instituted by Moore & Bridgeman against the appellee, the surety on the garnishment bond, the petition alleging substantially the above facts, and that Aultmann, Miller & Co., the principal in said bond, was beyond the jurisdiction of the court, and was insolvent, and prayed for damages in the sum of \$1,933.76, alleging as the measure of damages the difference between the market price of the rice on January 22, 1904, when the writ was served, and March 15, 1904, when it was decreed in the county court that Moore & Bridgeman were not indebted to Aultmann, Miller & Co. The petition also alleged that the garnishment suit was dismissed on May 9, 1905, that the rice in question was converted into money under orders of the county court, and sold for \$14,566.91, which was held by the Port Arthur Milling Company under orders of the court, as garnishee, until the garnishment proceeding was dismissed on May 9, 1905, and thereby the said Moore & Bridgeman were wrongfully and unlawfully deprived of the use of the said property from January 22, 1904, until May 9, 1905, to their damage in the sum of 6 per cent. interest on said sum between said dates. The amended petition set up substantially all the above facts, and alleged that plaintiffs' cause of action had been assigned to Fleming & Fleming, who were admitted to prosecute the action. The court sustained demurrers to the petition, and, on plaintiffs declining to amend, dismissed the cause.

Appellants' propositions are: "(1) A garnishee holds property of the defendant in his possession after service upon him, as a receiver or officer of the court, and he cannot thereafter change the form of the property, and thereby place an additional burden upon it; nor has he the right to sell and dispose of it, although he may have authority from the defendant to do so. (2) Sureties on attachment and garnishment bonds are liable for actual damages resulting from a wrongful issuance and service of such writs. (3) Where a writ of garnishment is wrongfully sued out and served, and money of the defendant is thereby wrongfully detained in the possession of the garnishee, the defendant is entitled to recover as actual damages 6 per cent. interest on the money during the period it is unlawfully held by such garnishment proceeding." The above propositions are indisputable, but they find no application in this case. This is an action against the surety on the garnishment bond, and its liability for damages extends no further than to consequences which followed

as the proximate result of the suing out of the writ. *Shinn on Attachment & Gar.* § 184. If, notwithstanding the service of the writ upon the milling company, it had the right to proceed to fulfill its contract with Moore & Bridgeman, but it saw fit not to do so for a reason unfounded in law, such act cannot legitimately be attributed to the suing out of the writ, so as to charge the surety for the consequences thereof. That, notwithstanding the writ, the milling company had the right, and was obligated, to proceed with the performance of its contract previously entered into with Moore & Bridgeman is well settled. *Mensing v. Engelke*, 6 Tex. 537, 4 S. W. 202; *McClellan v. Routh*, 15 Tex. Civ. App. 344, 39 S. W. 607; *Shinn, Att. & Gar.* §§ 487, 516. The garnishment operated merely to substitute the plaintiff in garnishment pro tanto, to the rights of Moore & Bridgeman. The wisdom of the above rule is clearly vindicated in the conditions exhibited in this proceeding, when a different rule would arrest the performance of a contract involving large interests on a garnishment for a few hundred dollars.

Our conclusion is that the surety on the bond is not liable for the consequences to plaintiffs of a course which the garnishee elected to pursue under a mistaken and unwarranted view of the obligations of the writ.

The judgment is affirmed.

CHEMICAL NAT. BANK v. KIAM.†

(Court of Civil Appeals of Texas. Nov. 7, 1908.
Rehearing Denied Nov. 25, 1908.)

1. MARSHALING ASSETS AND SECURITIES (§ 1*) —RELATION OF PARTIES.

Bankr. Act July 1, 1898, c. 541, § 68, "a," 30 Stat. 565 (U. S. Comp. St. 1901, p. 34), provides that, in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid. The payee of a note, having on deposit in his bank sufficient funds of the maker to pay the note, transferred such note, and before maturity thereof became a bankrupt. Held, that the maker and transferee did not stand in the relation of debtor and creditor merely, so as to exclude the doctrine of marshaling of assets and securities, and the maker was entitled to compel the transferee to first resort to the assets of the bankrupt estate, and to collateral security delivered to him by the payee prior to bankruptcy, and to enforce such right, was entitled to an injunction, restraining the prosecution of a suit on the note by the transferee until such transferee had exhausted his remedies against such assets and securities.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. APPEAL AND ERROR (§ 920*)—REVIEW—PRESUMPTIONS.

In an action on a note, in which defendant on cross-bill was granted an injunction staying the suit until plaintiff had exhausted ot. r

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

securities, it will be presumed, on plaintiff's appeal from the restraining order, that the court found, in accordance with an allegation of the cross-bill, that the award of an injunction would not delay or inconvenience plaintiff in the collection of the note.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3717; Dec. Dig. § 920.*]

B. MARSHALING ASSETS AND SECURITIES (§ 8*)
—ENFORCEMENT OF RIGHT—INJUNCTION—EXISTENCE OF REMEDY BY SUBROGATION.

The payee of a note, having on deposit in his bank sufficient funds of the maker to pay the note, transferred such note, and before maturity thereof became a bankrupt. *Held*, that the maker was entitled to an injunction restraining the prosecution of an action on the note until plaintiff, the transferee, had exhausted other securities which were delivered to him by the payee prior to bankruptcy; the right of subrogation to such securities affording defendant a less practical, prompt, and efficient protection.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. § 11; Dec. Dig. § 8.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by the Chemical National Bank against Edward Kiam. From a restraining order in favor of defendant on his cross-bill, plaintiff appeals. Affirmed.

O. T. Holt and W. H. Haynes, for appellant. Baker, Batts, Parker & Garwood, for appellee.

PLEASANTS, C. J. The appellant brought this suit to recover upon a note for \$10,000 executed by appellee in favor of T. W. House, and transferred by House to appellant.

Appellee answered by general demurrer and general denial, and by cross-action sought affirmative relief. The allegations of the cross-bill are, in substance, that the note sued on was transferred to appellant by T. W. House, along with other notes payable to said House, and certain stocks and bonds owned by him as collateral to secure the payment of notes due by said House to appellant, of the aggregate amount of \$110,000; that since the transfer of said notes and other collateral to appellant, the said House, who was engaged in the banking business in the city of Houston as a private banker, has been adjudged a bankrupt, and his estate is now being administered in the District Court of the United States for the Southern District of Texas by J. S. Rice, trustee appointed by said court; that at the time House was so adjudged a bankrupt the appellant had in its possession, as collateral to secure House's said indebtedness to it notes, stocks and bonds of value in excess of said indebtedness, and in addition thereto had a cash deposit in its hands of \$36,131.44, which it was duly authorized to apply to said indebtedness; that since said adjudication in bankruptcy appellant has applied said cash

upon said indebtedness, and has made collections upon other of the notes held by it as collateral, and has applied same upon said indebtedness, the total amount of collections and cash deposit so applied being \$85,979.89, leaving a balance due on said indebtedness of House to it of not exceeding \$24,920.11; that to secure said balance due it by said House appellant has in its hands, in addition to the note herein sued on and the other notes transferred to it by House as aforesaid, stocks and bonds of the aggregate value of \$78,900; that said stocks and bonds have a fixed, definite cash market value of not less than the amount above stated, and that under the terms of the assignment from House to appellant it is fully authorized to sell said securities without notice, and apply the proceeds to the payment of any indebtedness due it by House; that the note herein sued on was not due at the time House was adjudged a bankrupt, and that appellee at said time had on deposit in the bank of said House the sum of \$16,860.42; "that under the law the defendant is entitled, against the said T. W. House and his estate and the trustee thereof, to a lien on the note herein sued upon for the payment of the amount due from said estate of House to this defendant on account at the date of the bankruptcy of the said House, and is entitled to have the note sued on herein canceled, and the amount thereof set off, and applied to the payment of appellee's claim against the estate of the said House; that the note sued on herein, therefore, is charged with a double lien, to wit, a lien in favor of said appellant to secure the payment of the indebtedness of said House to it, and a lien in favor of the appellee to secure the payment of his claim against the estate of said House; that said stocks and bonds are not subject to a double lien or double liability, no one having a lien upon them except appellant, and that in equity the appellee is entitled to have the assets in the hands of appellant to secure its indebtedness marshaled, and to have said stocks and bonds, upon which no lien exists in favor of any person except appellant, first sold or realized upon, under the terms of said contract between said House and appellant, and the proceeds applied to the payment of the remainder of the indebtedness of said House to appellant, before appellant is entitled to resort to the note sued on in this cause, and if said stocks and bonds should produce sufficient funds, as appellee alleged they would do, to pay off the remainder of said indebtedness of House to appellant, then appellant could not in equity collect the note sued on and apply the proceeds to payment of its claim, but appellee would be entitled to have said note canceled and surrendered

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to him, and the amount thereof set off and entered as part payment of his claim against said House's estate. It is further alleged that, among the notes of said House's customers held by appellant as collateral, there are many which are not subject to any equities or rights of set-offs on the part of the makers of said notes, and these notes furnish additional security to which said appellant should resort before attempting to enforce collection of the note sued on in this case; but that, ignoring appellee's rights and equities, appellant has reached some kind of agreement or understanding with said trustees of said House's estate and his attorneys, to the effect that appellant would not proceed to realize upon said stocks and bonds and notes, upon which it, and it alone, has a lien, but instead would proceed to bring this suit for the unjust and inequitable purpose of obtaining judgment against appellee and cutting off and depriving him of his equitable rights in the note herein sued upon, to wit, his right to have said notes subjected to a lien in his favor, and set off and applied to the discharge and payment, pro tanto, of the claim and account which this defendant has against said estate of House on his deposit account, as before explained; that to permit this would work a manifest wrong and injury upon appellee, and deprive him of his right of set-off without producing any benefit whatever to the estate of said House or to said plaintiffs. It is further alleged that appellant has filed a claim in the bankruptcy court, admitting that it holds the stocks and bonds and notes, above referred to as collateral, to secure the payment of an alleged indebtedness of T. W. House to it; that if appellant be required to proceed upon the other collateral held by it, it will be able to collect its notes in full, without realizing upon the note herein sued upon, and thereupon this note will revert to the estate of said House, and defendant will be enabled to assert his right to said note as a security for the payment, pro tanto, of his account against said House's estate, but that the estate of House is insolvent, and will not pay its general creditors exceeding 40 cents on the dollar, and if the appellant is allowed to proceed and take judgment against the appellee on the note sued on herein and exact payment thereof from him, he will entirely lose the benefit of his security, and will be obliged to accept 40 cents on the dollar, or less, upon his indebtedness against the said House, but if appellant is required to realize upon said stocks and bonds, they will more than pay off the indebtedness of said House to appellant, and it will be compelled to return the note sued on to the trustee of said House, and the said trustee will be compelled to settle with appellee by surrendering said note and deducting the amount thereof from his claim against said

House, and appellee will only be required to accept dividends on the remainder of his said claim against House after deducting said note."

The prayer of the cross-bill is for process, and that the court will enter an order staying proceedings in this suit, and grant an injunction restraining the appellant, its agents, attorneys, employes, and successors from proceeding further with this suit, or in any manner attempting to institute suits, actions, or proceedings of any kind, in any court or tribunal, for the purpose of attempting to collect the note sued on in this case, until the further orders of the court may permit; that the court will require appellant to make an exhibit, showing in detail all amounts owing by the estate of said House to appellant on the notes and indebtedness before mentioned, showing all collections made by it from the securities which it held at the time House became bankrupt, showing, also, a complete list of the securities it now holds of said House, which are not subject to a lien in favor of any other person by way of security, set-off, or otherwise, including a complete list of the stocks and bonds held by it, and that the court will further order that, before proceeding further with this suit, or with any action or proceeding to collect the indebtedness sued on herein, it shall realize upon said stocks and bonds, and other securities in its hands which are subject only to a lien in its favor, and if said stock and bonds and other securities which are subject only to its lien produce a sufficient amount to pay off the remainder of the indebtedness of House to it, then the further prosecution of this suit, or of any suit, by the appellant to collect the indebtedness herein sued on may be permanently stayed and enjoined, and that appellant be directed and required by the court to turn back the note sued on herein to said trustee, or to deliver the same to the appellee, in order that the amount thereof may be set off and applied pro tanto to the appellee's claim on the estate of T. W. House. This cross-bill was verified by affidavit of appellee. Appellant replied to appellee's cross-bill by general demurrer and general denial, and by special plea, in which it admits that it holds the note sued on as collateral to secure an indebtedness due it by T. W. House, which it alleges is about \$50,000. It is further alleged in said special plea that appellant holds collateral of the face value of about \$133,000, including the note sued on to secure the payment of said indebtedness, said collateral consisting of promissory notes, stocks, and bonds, but alleges that some of the notes are almost worthless—the makers have been adjudged bankrupts—that if appellant is forced to sell the stocks and bonds held by it at this time, the same will have to be sacrificed and sold at a discount, which loss will fall on

the creditors of the bankrupt estate of T. W. House. This pleading is not verified.

The cause was heard on the pleadings, the substance of which has just been stated, and the court entered an order reciting that: "The court, being of the opinion that the proceedings in this suit ought to be suspended temporarily until the said plaintiff (appellant) shall exhaust its recourse against the stocks and bonds held by it as collateral to secure the indebtedness of the estate of T. W. House, bankrupt, to it, as prayed for in the defendant's cross-petition, and it appearing that the defendant has given bond in the sum of \$25,000, the amount fixed by the court, and that said bond has been approved by the clerk of this court, it is therefore ordered, adjudged, and decreed by the court that said plaintiff, the Chemical National Bank, its agents, and attorneys be and they and each of them are hereby enjoined and restrained from the further prosecution of this suit until the said Chemical National Bank shall have exhausted its recourse against the stocks and bonds held by it as collateral to secure the indebtedness of the estate of T. W. House, bankrupt, to it; that further proceedings in this suit be and the same are hereby suspended temporarily, and the suit shall stand continued, from term to term of this court, without further order, until said plaintiff shall have exhausted its remedies against said collateral, as hereinbefore provided, after which this cause shall stand for the further orders of this court." Then follows a description of the stocks and bonds referred to, which it is unnecessary to set out. This appeal is prosecuted from the order above set out. We are strongly inclined to the opinion that no appeal lies from this order, and that therefore the appeal should be dismissed; but, as both parties insist that the order is one from which the right of appeal is given by our statute, and that we have jurisdiction, we have deemed it proper to resolve the doubt in favor of our jurisdiction.

Under the single assignment presented in its brief appellant assails the order above set out, on the ground that the doctrine of marshaling securities, upon which said order is based, can only be applied as between creditors, and appellee, being a debtor of appellant, cannot invoke such doctrine against it. It is unquestionably true that the doctrine of marshaling securities has, as a general rule, no application as between a debtor and creditor; and, as between a creditor and one who occupies, as to him and the subject-matter of the suit, only the relation of an original and primary debtor, there can be no exception to this general rule. We think the facts of this case, however, distinguish it from those cited and relied on by appellant, in which the general rule above stated is enforced. Appellee and appellant are both creditors of the estate of the bankrupt, T. W. House, and by the

plain and unambiguous terms of the bankrupt statute, as against said estate and its general creditors, appellee had the right to a credit, at par, of a sufficient amount of the sum due him by said estate to cancel and discharge his indebtedness thereto evidenced by the note sued on. Bankr. Act July 1, 1898, c. 541, § 68, subd. "a," 30 Stat. 585 (U. S. Comp. St. 1901, p. 3450); Collier on Bankruptcy, p. 573; In re Little (D. C.) 6 Am. Bankr. Rep. 682, 110 Fed. 621; Meyer v. Dickinson (D. C.) 5 Am. Bankr. Rep. 593, 107 Fed. 86; In re Shults (D. C.) 13 Am. Bankr. Rep. 84, 132 Fed. 573, while this right to have his claim against said estate paid in full to the amount necessary to discharge his note may not be considered technically as giving him a lien upon said note, it gave him such an interest in the note as entitled him, we think, to invoke, as against appellant, who holds said note only as collateral security, the equitable doctrine of marshaling securities which, to quote from 19 Am. & Eng. Enc. Law, p. 1256, "depends upon the principle that a person having two funds to satisfy his demands shall not by his election disappoint a party having but one fund. The general rule is that, if one creditor, by virtue of lien or interest, can resort to two funds, and another to one of them only, the former must seek satisfaction out of that fund which the latter cannot touch." Again, on the same page, the author says: "The basis of the doctrine of marshaling is the equitable principle that a person having a right to satisfy his debt or claim out of two funds, to but one of which another person can resort, shall be compelled first to exhaust the fund to which the other cannot resort before coming upon the one available to both. Thus the person having an interest in the double fund is prevented, by a court of equity, from exercising his right to enforce that interest to the prejudice of a person having an interest in the single fund only. In cases where the claim of paramount creditor would, if satisfied out of the single fund, defeat wholly or in part the claim of the other creditor, a court of equity, proceeding upon the principle that such an exercise of the paramount creditor's power would be most unjust and unconscientious, will interfere, not, indeed, to alter or destroy the power, but to prevent it from being made an instrument of injustice." Again, on page 1259, the same author says: "The right of marshaling is not founded on what may be considered as a contract between debtor and creditor, but rests upon a natural and moral equity that the will and caprice of one creditor, who has within his reach a double fund, shall not be allowed to determine whether another creditor is to be disappointed of his payment." Still further the same author, on page 1263, says: "If the senior creditor will not thereby be unreasonably delayed or inconvenienced or prevented from obtaining full payment of his debt, he

may be restrained by injunction from proceeding against the doubly charged security."

The doctrine of marshaling of securities, as well as the principle upon which it rests, as stated in the above quotation, is recognized and applied in authorities too numerous to cite, and has been expressly applied by decisions of the higher courts of this state. *Brown v. Thompson*, 79 Tex. 58, 15 S. W. 168; *Cultivator Co. v. National Bank*, 22 Tex. Civ. App. 643, 55 S. W. 765; *Willis v. Holland*, 13 Tex. Civ. App. 689, 36 S. W. 329; *Wahrmund v. Edgewood Distilling Co.* (Tex. Civ. App.) 32 S. W. 228. In support of his order the trial judge must be presumed to have found that the allegations of appellee's cross-bill to the effect that appellant would not be delayed or inconvenienced in the collection of its debt by requiring it to first exhaust its other securities before proceeding to enforce the collection of the note sued on are true; and, such being the case, no wrong or injustice will be done appellant by the enforcement of said order. It seems clear from the authorities before mentioned that, unless the fact that appellee occupies the dual relation of a debtor to appellant, as well as that a creditor with appellant of their common debtor, *T. W. House*, so shortens the arm of equity as to render it impotent to prevent appellant from using its power as a paramount creditor as an instrument of injustice to appellee, the trial court did not err in granting the relief prayed for by appellee. In none of the cases relied on by appellant to sustain its contention did the debtor bear any relation to the party against whom the doctrine of marshaling of securities was invoked other than that of a primary debtor, who had no lien upon, and no interest in, the subject-matter of the suit other than that of maker of the obligation sued on. In the case of *Rogers v. Meyers*, 68 Ill. 92, the maker of the note sought to enjoin suit for its collection by an assignee thereof until such assignee should first foreclose a mortgage on real estate given by the maker to secure the payment of said note, the equity of redemption in said real estate having been previously purchased by a third party at sale under execution against the maker of the note and mortgage. In deciding the case the court says: "We are unable to perceive any right held by Meyers to which appellant has any just claim to be subrogated. He is legally and equitably bound to pay the debt to Meyers, and should pay the bank (the purchaser of the equity of redemption) or lose the property they have purchased. We do not see that the principle that, where a creditor has a lien on two funds, and another creditor has a lien on one of those funds, the former will be required to satisfy his claim out of the fund upon which the other has no lien can be applied in this case. That

is a rule that may be invoked as between different creditors, but has, so far as we are aware, never been applied as between debtor and creditor. There is no pretense that appellant does not justly owe the debt nor is any just reason urged why he should not pay it, or why it should not be enforced in the suit at law. We can see no ground for enjoining the suit on the note and the court below did right in dismissing the bill and the decree is affirmed." As before said we think this case easily distinguishable from the one we are considering, in that no other relation than that of debtor to creditor was shown between the party invoking the doctrine of marshaling securities, and the defendant who was sought to be enjoined from the collection of his debt and the plaintiff had no lien of any kind upon said note, nor interest therein, other than as the maker. The case of *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N. W. 85, can be distinguished in the same way.

There is no merit in the contention that, because appellee may upon payment of the note be entitled to subrogation pro tanto to appellant's rights in the other securities held by it, he is therefore not entitled to the remedy of injunction. The remedy by subrogation not affording as practical, prompt, and efficient protection to appellee as the relief afforded by injunction, its existence cannot defeat his right to injunction. *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994.

We are of opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

PACIFIC EXPRESS CO. v. JONES.

(Court of Civil Appeals of Texas. Nov. 19, 1908.)

1. CARRIERS (§ 105*)—DELAY—SPECIAL DAMAGES.

To render a carrier liable for special damages from a failure or delay in transportation of freight, notice of the conditions from which such damages will result must be given the carrier at the time the contract of carriage is made.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 451-452½; Dec. Dig. § 105.*]

2. CARRIERS (§ 105*)—TRANSPORTATION OF FREIGHT—DELAY—SPECIAL DAMAGES—NOTICE.

Where special sawmill machinery was ordered from Marshall, Tex., through an intervening concern to be manufactured and shipped from Huntsville, notice given to the carrier's agent at Marshall of special damages resulting from delay in transportation was insufficient to charge the carrier therewith, in the absence of any proof that the machinery ever reached Marshall or was under the control of such agent.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 105.*]

3. CARRIERS (§ 104*)—TRANSPORTATION—DELAY—BURDEN OF PROOF.

Where notice of special damages from the delay of freight was given to the carrier's agent

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Company to Walter Conley & Co. at Tyler for the last order.

Complaint is made that the damages allowed in this case are too remote and are not such as might reasonably be considered within the contemplation of the parties at the time the contract of carriage was made, and that, in the absence of notice, such damages cannot be recovered. We think the objections here urged must be sustained. It is evident from the undisputed facts that there were three shipments made for the benefit of the appellee. The first consisted of a shipment of the broken pieces from the McPhail Hardware Company to Walter Conley & Co. at Tyler; the second, from the latter company to Benton McMillan at Huntsville; and the third, the new casting from McMillan to the McPhail Hardware Company at Marshall. No complaint is made of any delay in any of those shipments except the last. It is conceded that the damages in this case are of such a character that they could not be recovered in the absence of notice given to the appellant; but it is also insisted that such notice was given, and, in order to sustain this contention, appellee relies upon the communication from Jones to appellant's agent at Marshall after the order was sent to McMillan at Huntsville and after the first piece was delivered by McMillan to appellant's agent at Huntsville for shipment to Marshall. The undisputed facts show that, when McMillan delivered the new piece of machinery to the appellant's agent at Huntsville, no notice whatever was given of the use for which it was intended or the damages that might result from delay in its transportation. The general rule is that, in order to render a carrier liable for such special damages resulting from a failure or delay in the shipment of freight, notice of the conditions from which they would result should be given the carrier at the time the contract of carriage is made. *M., K. & T. Ry. Co. v. Belcher*, 88 Tex. 549, 32 S. W. 518; *Bourland v. C. & G. Ry. Co.*, 99 Tex. 407, 90 S. W. 483, 8 L. R. A. (N. S.) 1111; *Wells Fargo & Co. v. Battle*, 5 Tex. Civ. App. 532, 24 S. W. 353. In the *Belcher* Case above cited the court uses the following language: "The rule seems to be settled that plaintiff, in order to recover special damages for breach of a contract, must show that at the date of the contract defendant had notice of the special conditions rendering such damages the natural and probable result of such breach under circumstances showing that the contract was to some extent based upon or made with reference to such conditions. *Waller v. Railway*, L. R. 4 C. L. Ir. 876; *Harvey v. Railroad Co.*, 124 Mass. 421, 26 Am. Rep. 673. Various reasons have been assigned for the limitations thus placed upon the right to recover such damages. For instance, it is

against such special or extraordinary liability by declining to make the contract, by asserting stipulations protecting himself against such liability, by charging additional compensation to cover the extra risk, or by making immediate extra preparation to guard against the breach; and, again, it has been said the plaintiff 'ought not to be allowed to obtain an advantage which he has not paid for.' It is true that in both the *Bourland Case* and *Wells Fargo & Co. v. Battle* the court permitted a recovery of special damages for delay in the delivery of freight upon notice given to the receiving agent after the contract of carriage was made. But it will be observed that such recovery was limited to those damages which accrued by reason of the delay caused by the receiving agent after he received the notice of the consequences of delay in the delivery of the freight. In the *Bourland Case* the court says: "The notice relied on in such cases subsequent to the contract appears to have been given at a time when its effect, if held sufficient, would have been to impose an additional liability resulting from the contract itself, to that within the contemplation of the parties when they made it. In none of them were the facts like those in the present case, in which the contract to carry to Washita had been fully performed, and the property was at the point of destination, and could have been delivered when the notice was given. All that remained to be done was to make delivery, and this it was then in the power of the carrier to do at once. It had no right to demand extra compensation for a transportation already performed for making delivery, nor had it the right to refuse or delay delivery because of the conditions of which it then received notice. No extra or unusual preparations were necessary for delivery, or, if there were, the defendant was at the time in as good a position to make them as it would have been, had the notice been given when the contract was made." And, again, it is said: "The charge of the trial court, when applied to the evidence, was substantially correct, and stated the rule which we regard as controlling this case. It refers, it is true, to notice given to the agent at Washita before the arrival of the cars containing the cake, and, if there were anything in the case requiring the distinction between notice before arrival and that given while the cars were at Washita, questions might arise which we find it unnecessary to determine at this time. The first notice given was on the very day when the cars reached Washita and were ready for delivery. The charge requires that the freight should have been within the control of the agent when the facts making the delivery so important were brought to his knowledge, and evidently refers to the one transaction which took place on the 21st of

, and means that the notice then given have been either before or after the al of the cars, so that the agent knew acts while controlling them." Had it shown in this case that the failure to er the piece of machinery was due to the rformance of any duty devolving upon ppellant's agent at Marshall, then, unhe rule announced in the language quothe appellee would have the right to re-special damages. But it is not shown the freight ever reached Marshall or under the control of the agent at that . In the absence of evidence sufficient tablish those facts, the notice given to Marshall agent was not notice to the any.

unsel for appellee insists that the bur-s upon the express company to show af-tively that the freight did not reach its hall office or was not there when Jones notice of the damages he was suffering the delay; and that, it having failed to arge this burden, we should assume that machinery had arrived and was within ontrol of the agent at that place. To do would be presuming negligence under tions unwarranted by law. Courts are alled upon to adopt such extreme meas-in order to protect shippers from imposi-by carriers. In every instance the ship-as it within his power to protect him-against all damages, both general and al, caused by delays or losses in ship-s, by giving notice to the carrier when contract is made. If he fails to avail elf of this privilege, he must suffer the equences of his own neglect. The car-has the right to be apprised of the im-nce of its undertaking and of the conse-ces that may follow from a failure or de-lin the transportation of freight at the It is called upon to perform the service. is also insisted by the appellee that he ld recover because of the failure of the lant to notify him that the piece of ma-ery was lost. Liability for such failure the entire consequences legally following d be determined by the same rules of that govern in fixing and measuring the ges that might be recovered for losing freight. It is not contended that any l or deception was practiced by the Mar-agent. We cannot assume that he at the article was lost; and, unless ld, there certainly would be no basis for gment for special damages on account of allure to notify Jones that such was the

There is nothing in the record that to show that the agent at Marshall was than the local agent charged merely the duty of receiving and transmitting delivered to him for shipment over the lant's line, and of receiving and deliv-goods which were consigned to parties Marshall. We cannot assume that he

had any control over any of the other agents in the employ of the appellant at other points on its line. The item of \$6 allowed for the time and expense lost and incurred by the ap-pellee in making successive calls for the freight at the appellant's office cannot be al-lowed, for the additional reason that the evi-dence fails to show that any notice of the value of that time or the attendant expense or the distance that would have to be travel-ed in making calls was communicated to the appellant's agent. On the contrary, it ap-pears from the pleadings of the appellee him-self that the freight was consigned to the Mc-Phall Hardware Company, whose place of business was in Marshall, and who could probably call without any material loss of time. The item of 75 cents does not appear to have been pleaded by the appellee. While it is among the items in the account, yet it is not alleged in the pleading that such ex-pense was incurred. *City of Bowling Green v. Bowling Green Gas Co. (Ky.) 112 S. W. 917.*

We think the judgment of the trial court should be reversed, and judgment here rendered in favor of the appellant. The judg-ment is accordingly reversed and rendered.

LEAZEN v. STATE

(Court of Criminal Appeals of Texas. Dec. 9, 1908.)

Appeal from Criminal District Court, Dal-las County; W. W. Nelms, Judge.

John Leazen, alias General Kuze, was con-victed of an offense, and he appeals. Af-firmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The record is before us without a bill of exceptions or statement of facts, and as presented there are none of the questions suggested for reversal which can be revised.

The judgment is affirmed.

DOTY et al. v. MOORE.

(Court of Civil Appeals of Texas. April 2, 1908. On Rehearing, Dec. 3, 1908.)

1. ATTACHMENT (§ 117*)—AFFIDAVITS.

An attachment affidavit averring that the attachment was not sued out to injure or harass the defendants was not defective for failure to negative that the writ was sued out to injure or harass one or less than all the defendants, as required by *Sayles' Ann. Civ. St. 1907, art. 187.*

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 241; Dec. Dig. § 117.*]

other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where, in an action between partners for contribution, one of the defenses was that the partners and the creditor had mutually divided the debt, and that each partner had given security to the creditor for his portion, an instruction that the members of a firm are each liable for all the firm's debts, and that the separation of the indebtedness, etc., did not release the other members of the firm unless the creditor had released the individual members of the firm therefrom, was erroneous, as on the weight of evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

3. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

Where, in an action for contribution between partners, it was claimed that the debt had been divided between the partners with the consent of the creditor and security given for the part chargeable to each, and it was proved that each member executed a mortgage to secure his portion of the debt, an instruction that if the agreement was made, and two of the partners were released by the creditor from payment of more than one-fourth each of the debt, and that the other two partners were released from paying more than half of the indebtedness, the jury should find for defendant, was erroneous, as on the weight of the evidence.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.*]

4. ASSIGNMENTS (§ 55*)—EXECUTION—CONSIDERATION.

Where plaintiff and C. both testified to an assignment of C.'s claim against defendants in controversy to plaintiff, and that, though nothing had been paid for it, its value was to be considered in a settlement between plaintiff and C., plaintiff acquired C.'s interest in the claim and could recover therefor.

[Ed. Note.—For other cases, see Assignments, Dec. Dig. § 55.*]

Appeal from District Court, Jefferson County; E. E. Easterling, Judge.

Action by Sam Moore against N. B. Doty and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Crook, Da Ponte & Lawhon, for appellants. Fleming & Fleming and Glass, Estes & King, for appellee.

WILLSON, C. J. In 1904 N. B. Doty, H. W. Doty, one Walkinshaw, Sam Moore, and one Corliss were partners as farmers, and as such grew a crop of rice in Jefferson county. They were to share equally in the profits and in the losses. At the end of the year the copartnership was dissolved. For supplies, etc., furnished, it was then indebted to the Port Arthur Rice Milling Company in a sum in excess it seems of \$7,000. This indebtedness afterwards was paid in part by N. B. and H. W. Doty, and in part by Moore and Corliss. Claiming that he and Corliss, whose right he had acquired, had paid \$2,190.60 more than their proportionate part of the debt, Moore brought his suit against the Dotys and Walkinshaw to recover of them the part of the sum properly chargeable against them. In the same suit Moore sought a recovery on account of

threshing he claimed the Dotys and Walkinshaw were liable to pay him for. He procured the issuance of a writ of attachment which was levied upon certain mules, wagons, etc., as the property of the Dotys and Walkinshaw. The property so levied upon was claimed by appellants, the Dotys and Walkinshaw, J. M. Herbert and J. H. Beard becoming the sureties on their replevy bond. On the verdict of a jury in favor of appellants on May 13, 1907, a judgment was rendered in favor of appellee against Walkinshaw and the sureties on the replevy bond for the sum of \$1,451.40, against H. W. Doty and said sureties for the sum of \$834.20, and against N. B. Doty and said sureties for the sum of \$427.63. From the verdict so rendered the Dotys, Walkinshaw, and the sureties on the replevy bond prosecute this appeal.

In his affidavit made to procure the issuance of the writ appellee averred that the attachment was "not sued out for the purpose of injuring or harassing the defendants." On the ground, among others, that the language quoted did not negative the fact that the writ may have been sued out to injure or harass one, or a less number than all of the defendants, a motion to quash the attachment was urged. It was overruled, and the action of the court in overruling it is assigned as error. On the same ground the sufficiency of an affidavit made for a like purpose was questioned in *Lumber Co. v. Bank*, 91 Tex. 103, 41 S. W. 67. Because in disposing of the case it was not thought necessary to do so, the question was not decided. But the view taken by the Supreme Court of the question was clearly indicated, and we think should be held as controlling in this case. In discussing the question Chief Justice Gaines said: "Could a prosecution for perjury be maintained upon such an affidavit upon proof that the intent was to injure or harass one defendant, and not the others? Unless the intent is to injure or harass both, is the affirmation false? It would seem not, and, if not, the purpose of the statute is defeated." Appellee insists that the reason given for the ruling in the case cited does not apply in this one, because it is made to appear from his affidavit made a part of his answer to the motion to quash the attachment that he in fact did swear in his affidavit made to procure the issuance of the writ that it was "not sued out for the purpose of harassing the defendants or either of them," and that it was due to a clerical error that his affidavit for the writ did not so show. In support of this contention *Webb Bros. v. Chipman*, 3 Tex. Civ. App. 104, 22 S. W. 225, is relied upon. There the word "plaintiff," instead of the word "plaintiffs," was used in one part of the affidavit. The court said: "It sufficiently appears from the recitals in the affidavit that Lockhart [the affiant] appeared as attorney for the plain-

terest in such land, were barred by the statute of limitations, and stale demand, as pleaded by the plaintiffs.

In the trial the defendants, appellants in this court, offered in evidence the transfer indorsed on the bond for title, and which was obscured by the paper pasted over it, as above stated, without proof of its execution. To the introduction of this transfer plaintiffs objected on the grounds "that there was no proof of its execution and delivery in its original or present condition; that it appeared suspicious on its face, and such suspicions were not explained." The trial court sustained the objections, excluded the transfer, and this is made the basis of appellants' first assignment of error. It is contended that, as the transfer was over 30 years of age, it proved itself and needed no explanation, because of the paper pasted over it. We are of the opinion there was no error in the exclusion of this evidence. The rule laid down by Mr. Greenleaf in regard to the admissibility of an ancient instrument, without proof of execution, and which has been approved and followed by the courts of this state, is that such instrument must be free from just grounds of suspicion, must come from the proper custody, and have been acted upon so as to afford some corroborative proof of its genuineness. 1 Greenl. on Ev. § 510; *Stroud v. Springfield*, 28 Tex. 649. Just what corroborative evidence will be necessary to authenticate the instrument, if there are circumstances of suspicion connected with it, will depend upon the particular facts in each case. The circumstances of corroboration, however, in such case must be at least sufficient to raise a reasonable presumption of genuineness. *Stroud v. Springfield*, supra. The practical obliteration of the transfer offered in evidence by the paper which had been placed over it cast such doubt and suspicion upon its genuineness as called for a satisfactory explanation of it by appellants. The rule of evidence announced has not been complied with in this case. There is no evidence that the bond for title with the transfer in its original form was delivered to J. O. Hicks and Mary A. Hicks, or to one of them, or was ever in their possession, or in the possession of either of them, in the lifetime of the said J. O. Hicks as an instrument of conveyance. Nor is there any evidence that J. O. Hicks ever claimed the land in controversy under the said transfer; and it is apparent, we think, that his wife, Mrs. Hicks, was not claiming under it. In *Holmes v. Coryell*, 58 Tex. 680, after laying down the rule with reference to the admissibility of a deed 30 years old substantially as we have stated it above, it is said that such deed "must come from the proper custody, among other reasons, mainly that its delivery may be evidenced by the possession of the person claiming under it." The possession of the land by Hicks and wife

antedates the transfer in question about two years, and the evidence tends to show that it began in subordination to the rights of R. B. Tutt, and aside from said transfer, which cannot be considered, we see nothing in the record that would justify the conclusion that the holding of the land by J. O. Hicks and Mrs. Hicks after his death was not consistent with the claim of Mrs. Hicks that her father, R. B. Tutt, gave her said land. The mere fact that the land was inventoried as a part of the estate of J. O. Hicks, in view of the other facts, was insufficient to authorize such conclusion. The burden of explaining the suspicious change made by covering up the transfer was upon appellants, who offered said transfer in evidence, and not upon appellees, as contended by counsel for appellants.

The second and third assignments are to the effect that the trial court erred in finding the property in controversy to have been the separate property of Mary A. Mayfield. We think the evidence is sufficient to support the court's finding. It appears that the legal title to the property in controversy was in the said Mrs. Mayfield and had been for twenty-five years or more before her death, during all of which time she claimed it as her own. It was also shown, without objection, that Mrs. Mayfield stated repeatedly to different persons who testified at the trial that her father gave her the land, and that during her occupancy valuable improvements were made upon it; and consistent with her declarations that she had received the land as a gift and her asserted separate right thereto, and inconsistent with any recognition on her part, or claim of the appellants that said land was the community property of herself and her second husband, J. O. Hicks, she on different occasions sold to different persons after the death of the said Hicks sold parcels of said land, apparently dealing with it as her separate property, the deeds to which were placed upon record and possession taken. There is also evidence to the effect that up to the time of Mrs. Mayfield's death appellants never claimed the land in controversy was other than the separate property of Mrs. Mayfield, and seemingly recognized it as such, for that the evidence shows that Robert Mayfield continued to reside on the land after the death of Mrs. Mayfield and divided the rents arising from the land between the appellants and appellee, upon the basis of ownership, as alleged by appellees, which was accepted by them without protest or claim by either that she owned a greater interest; that is, Robert Mayfield paid to appellee one-third of said rents, to Mrs. Morgan one-third, and to Mrs. Witherspoon and Mrs. Workman one-third.

It is also assigned "that the court erred in his fifth conclusion that the defendants were barred by limitation as against any

the sureties of a postmaster for loss caused by his embezzlement of money order funds, etc., should be construed with reference to the federal laws imposing a liability upon postmasters in such cases, in determining what constitutes an embezzlement within the contract, and not under the state statutes defining the offense.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 430.*]

3. POST OFFICE (§ 38*)—OFFENSES—“EMBEZZLEMENT” OF MONEY ORDER FUNDS.

Under U. S. Comp. St. 1901, § 4046, making every postmaster guilty of embezzlement who converts to his own use any money order funds, any appropriation of such funds by a postmaster to his own use is embezzlement, regardless of the intent or purpose of the conversion.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2350-2358; vol. 8, p. 7649.]

4. POST OFFICE (§ 37*)—OFFENSES—ILLEGAL DISPOSITION OF POSTAGE STAMPS—“EMBEZZLEMENT.”

Under U. S. Comp. St. 1901, § 4053, making it embezzlement for a postmaster to neglect to account for stamps intrusted to his care, it is not necessary that there be an intent to convert, as under the state statutes; a mere neglect to account for stamps constituting embezzlement.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 37.*]

Appeal from Gregg County Court; Edwin Lacy, Judge.

Action by Larkin P. Griffin and others against D. H. Zuber and another. From a judgment for one of defendants, plaintiffs appeal. Reversed and remanded.

Turner & Campbell, for appellants. Young & Stinchcomb, for appellees.

HODGES, J. This is a suit instituted by the appellants, as sureties on the bond of D. H. Zuber, to recover of the Fidelity & Deposit Company the sum of \$229.44. The facts show that during the year 1903 D. H. Zuber was appointed postmaster at the town of Kilgore; that the appellants were sureties on his bond as such; that they became such sureties with the understanding that they were to be indemnified against certain liabilities that might arise by reason thereof. Shortly after the induction of Zuber into office, for the purpose of indemnifying the appellants, he executed a bond with the Fidelity & Deposit Company as surety, conditioned: “Whereas, Daniel H. Zuber has been appointed Postmaster at Kilgore, Texas, and whereas, the rules and regulations of the Post Office Department of the United States required said Daniel H. Zuber (hereinafter called ‘postmaster’) to file with it a bond, with approved sureties, guaranteeing the faithful discharge of all duties incumbent upon him by reason of his appointment as

Philip E. Barton, George A. Erwin, William A. Crim and Richard W. Wynn, Jr. (hereinafter called the ‘assured’), all of the state of Texas have qualified or consented to qualify as sureties upon said bond, conditioned as above on behalf of said postmaster with the express understanding that a bond of indemnity would be given them, indemnifying them to the extent of the sum of two thousand (\$2,000) dollars collectively, and no further, from loss which might accrue to them by reason of any personal act or acts of larceny or embezzlement committed by the said postmaster in the discharge of his duties as postmaster as aforesaid; and whereas, for a valuable consideration the Fidelity & Deposit Company of Maryland (hereinafter called the ‘company’), a corporation of the state of Maryland, Baltimore, Maryland, has consented to join with said postmaster in a bond of indemnity, indemnifying said assured, as aforesaid: Now, therefore, in consideration of the foregoing premises, and the payment of five (\$5.00) dollars per annum to the company, receipt of which is hereby acknowledged, the said postmaster for himself his heirs, executors and administrators, and the said company for itself, its successors and assigns, jointly and severally, do hereby covenant, promise and agree to indemnify and keep indemnified the said assured to the extent of the sum of two thousand (\$2,000) dollars collectively, and no further, during the period beginning December 23, 1903, and ending December 23rd, 1907, from and against any and all loss which they might be put to, incur or suffer, by reason of any personal act or acts of larceny or embezzlement committed by the said postmaster in the performance of the duties of postmaster, and committed during the continuance of this bond and discovered at any time within six months after the expiration or cancellation of this bond, or in case of the death, resignation or removal of the said postmaster from the said office prior to the expiration or cancellation of this bond, within six months after such death, resignation or removal,” etc. Zuber remained postmaster at Kilgore until the 21st day of March, 1906, at which time he either resigned or was removed from office. It was then found that he was short in his account with the government in the sum sued for. This sum was paid by his sureties, the appellants in this case; and they bring this suit against Zuber and the Fidelity & Deposit Company for reimbursement.

The testimony shows further that Zuber, as postmaster, kept two accounts—one called “the money order account,” of which he was required to make monthly reports to the Post

at any time became guilty of the offense of embezzlement within the meaning of the statute governing the duties and prescribing penalties for their violation, he would be amenable to the federal law, and that law should determine the meaning of the word "embezzlement" as used in the bond. Whatever may be the interpretation placed upon the word "embezzlement" in common parlance, or whatever signification it should have in construing the statutes of the different states, we think in this controversy the sense in which it is used in the federal statute governing Zuber's line of duty should be the one to which we must look for the proper construction. Whether or not Zuber is guilty of having embezzled any of the funds committed to his custody must be determined by the laws of the United States made for his guidance in handling those funds. Section 4046, U. S. Comp. St. 1901, provides: "Every postmaster, assistant, clerk or other person employed in or connected with the business or operations of any money order office who converts to his own use in any way whatever, or loans, or deposits in any bank except as authorized by this title, or exchanges for any other funds any portion of the money order funds, shall be deemed guilty of embezzlement." Section 4053 provides that "if any officer, agent, postmaster, clerk or other person employed in any branch of the postal service," etc., "and any person intrusted by law with the sale of postage stamps or of stamped envelopes, who shall refuse or neglect to account for the same, or who shall pledge or hypothecate or unlawfully dispose of them for any purpose, shall be deemed guilty of embezzlement," etc. From the foregoing extracts it will be observed that the offense of embezzlement may arise from two different courses of conduct in regard to public funds. The law undertakes to define specifically the conduct which is prohibited, and then denominates it "embezzlement," and fixes the penalty. It follows, therefore, that, when one is guilty of the acts there denounced, he is guilty of embezzlement within the meaning of the term as used in this bond. Zuber, as the postmaster at Kilgore, was intrusted with money order funds as well as postage stamps and stamped envelopes. If he converted the one, or failed to account for the other, he was guilty of embezzlement. We think section 4046 was intended to absolutely prohibit any appropriation by the postmaster or any other employé of any of the money order funds coming into his hands as such. U. S. v. Gilbert, Fed. Cas. No. 15,205; State v. Silva, 130 Mo. 440, 32 S. W. 1007. So guarded is the law in this respect that it makes it embezzlement to deposit any of the funds in any bank except as authorized by that title, or to exchange them for any

the purpose was fraudulent or otherwise. In the first case above cited the court says: "It would seem that the agreed statement of facts substantiates the embezzlement by both these methods, and although it is true that the funds were subsequently paid in to the Cleveland post office, and although it may also be and probably was true that these funds when thus converted were intended and expected to be replaced, so that the government should sustain no loss, which go very far towards mitigating the offense, yet it is obvious that the enforcement of this section in all its strictness is essential to this class of government funds, and to the discouragement of postmasters from even temporarily using them for private purposes. The intention of replacing them, however honestly entertained, cannot be accepted as an excuse or an apology for violating the law, as one may be disappointed by unexpected circumstances, and thus not only endanger the moneys of the government, but involve himself in difficulty and criminal prosecution. The law intends that funds of this character should be kept absolutely separate and sacred as the best method not only of keeping the funds themselves secure, but of guarding the officers themselves from temptation and delinquency. The diversion of money order funds in any way whatever prohibited by this section, or for any time, however short, constitutes embezzlement under this act, and is punishable as such." The conversion of money order funds is the forbidden act; and when that act is knowingly done the offense is complete, it matters not what the intention of the wrongdoer may have been in doing it, or as to making reparation in the future. Section 4053, relating to accounting for postage stamps and stamped envelopes, is equally as guarded in its language. Here even the neglect to account for those articles is made an offense denominated "embezzlement."

In view of the facts developed in the trial of this case, and the construction which the court announced in his conclusions of law he had placed upon the term "embezzlement," we think the judgment should be reversed. We think the court was in error in placing so restricted an interpretation upon the term, unless he meant by the language used a criminal intent within the meaning of the federal law which should determine what should constitute embezzlement as applied to the particular facts of this case. It would appear, however, from the authorities upon which he seems to rely, that he adopted the general signification of the term; and, if so, this probably determined the character of the judgment he rendered.

The judgment is reversed, and the cause remanded.

contemplation of the parties at the time, that the show case be allowed only as a premium or inducement for the purchase of the goods and full payment of the debt. The assignment is overruled.

The case is ordered affirmed.

SPRINGMAN v. HAWKINS et al.

(Court of Civil Appeals of Texas. Nov. 6, 1908.)

1. APPEAL AND ERROR (§ 1003*)—REVIEW—PREPONDERANCE OF EVIDENCE.

The Supreme Court will not reverse a judgment merely because the record shows that the evidence preponderates in favor of the losing party or against findings, and an assignment of error which only complains that the preponderance of the evidence is against a finding upon which judgment was rendered will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3388; Dec. Dig. § 1003.*]

2. VENDOR AND PURCHASER (§ 254*)—VENDOR'S EQUITABLE LIEN.

A vendor who has delivered possession has an equitable lien upon the land for the unpaid purchase money, though he has taken no distinct agreement or separate security for it, and though the deed recites full payment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 641½; Dec. Dig. § 254.*]

3. VENDOR AND PURCHASER (§ 281*)—VENDOR EQUITABLE LIEN—WAIVER—BURDEN OF PROOF.

In a suit to enforce a vendor's equitable lien, the burden is on the purchaser to show waiver of the lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 792; Dec. Dig. § 281.*]

4. VENDOR AND PURCHASER (§ 266*)—VENDOR'S EQUITABLE LIEN—WAIVER—EVIDENCE.

Waiver of a vendor's equitable lien is not shown merely because the clause in the form used providing for the retention of a lien was eliminated in drawing the deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 713, 723; Dec. Dig. § 266.*]

5. EVIDENCE (§ 419*)—PAROL EVIDENCE—CONSIDERATION FOR DEED.

Parol evidence is admissible to show the real consideration for a deed, a recital in a deed as to the consideration not being conclusive between the original parties; and it is unnecessary to allege fraud, accident, or mistake as a ground for failing to express the full consideration in the deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1912; Dec. Dig. § 419.*]

Appeal from District Court, Houston County; Benjamin H. Gardner, Judge.

Action by J. D. Hawkins and another against George Springman. From a judgment for plaintiffs, defendant appeals. Affirmed.

Aldrich & Crook, for appellant. Adams & Adams, for appellees.

ing that they had sold to appellant 67 acres of land of the Marsh survey, 110 acres of the W. H. L. Burton survey, and 213 acres of the William Watson survey, in Houston county, executing and delivering to him their general warranty deed therefor for the recited consideration of \$866.66, and for the further consideration, which was not recited in the deed, of the assumption and agreement by appellant to pay two-thirds of four outstanding vendor's lien notes against the land, that upon the delivery of the deed to appellant he executed and delivered to appellees his check on Robinson Bros. of Palestine for the amount of the recited cash consideration, and immediately went into possession of the land, and then stopped payment of the check, and refused to pay same or any part thereof, and refused to surrender the land to appellees; that the check was protested at the expense of \$1.00, and that the check, having been given in part payment for the land, constituted a vendor's lien on the same. They prayed for judgment for their debt and for foreclosure of the lien on the land. Appellant answered, admitting the execution and delivery of the check sued on and that it was given for the purchase money of the land sued for, and for certain personal property situated on the land, and further pleaded that believing he was getting a good and perfect title to the property, free from all liens and incumbrances, he executed and delivered the check in question, but afterwards discovered, and charged the fact to be, that at the date of the sale there was an unsatisfied vendor's lien on the land for the sum of \$1,600 and interest, and that since the sale to him the land had been sold in satisfaction of said lien, and that the purchasers of same under the foreclosure proceedings held the superior title, and that appellant's title so acquired by him from appellees had wholly failed; that the appellees had designedly and wrongfully concealed from him the existence of said outstanding vendor's lien notes for the purpose of cheating and defrauding him and of obtaining said sum of \$966.66; and that they did actually deceive and lead him to believe that he was getting a good title to the land free from incumbrance. He prayed that, in the event appellees recovered against him on said check, he be given judgment on the warranty for a sum equal to the amount of the check. Appellees by their first supplemental petition charged that appellant had actual notice of the outstanding vendor's lien notes, and had agreed and assumed to pay two-thirds of the amount of same as part of the consideration for the land. The case was tried by the court without a jury and resulted in a judgment for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

erest, and protest fees; and from the judgment appellant prosecutes this appeal.

The trial judge filed his findings of fact, which are fully sustained by the evidence in the record, and which findings are as follows:

"(1) I find that the plaintiff sold to defendant certain personal property and land fully described in plaintiff's petition, and that the consideration was the check for \$866.66 sued on, and the assumption by the defendant of two-thirds of the \$1,600 vendor's lien notes held by Robinson Bros.

"(2) I find that defendant, Springman, knew of the vendor's lien notes held by Robinson, and bought the land subject to such vendor's lien, and that he agreed to pay the part of said notes which Woodworth and Hawkins were bound to pay (that is, two-thirds of such notes) as part of the purchase price that he was to pay for the land, and that he stopped the payment of the check sued on.

"(3) I find that when Springman first raised objection to the trade, which was after the deed was made to him, that the plaintiffs offered to give back the check if he would deed them back the property, and that Springman refused to do this, and that at this time he had suffered no loss, nor had he paid anything on the purchase price. After stopping the payment of the check, Springman contracted to sell the two-thirds interest in said property for \$2,000 to A. K. Fretz.

"(4) I find that Springman went into possession of the property and refused to give it up to Hawkins and Woodworth, and has ever since been in possession of all of the property. He has used up much of the personal property, and refuses to pay the check for which this suit is brought.

"(5) I find that the property a two-thirds interest in which was sold to Springman by Hawkins and Woodworth was worth at the time of that sale the sum of \$3,000 or more.

"(6) I find that suit was brought by Robinson Bros. and their lien was foreclosed and the land sold, and that Robinson Bros. became the purchasers thereat.

"(7) I find that defendant stopped payment of the check, forcing protest, and refused either to cancel the trade or pay the consideration, and that the costs of protest was \$6.10."

By his first and second assignments of error appellant attacks the trial judge's first and second findings of fact, the ground of his contention being that the preponderance of the evidence shows that appellant did not know of the existence of the outstanding vendor's lien notes, and that he did not assume or agree to pay two-thirds of the amount of same.

This court will not reverse a judgment merely because it may appear from the record that the evidence preponderates in favor of the losing party or against the find-

signment of error which only complains that the preponderance of the evidence is against a finding of a trial court, upon which judgment was rendered, is not sufficient to require consideration. *Railway v. Lee*, 52 Tex. Civ. App. 23, 74 S. W. 349; *Railway v. Rowell* (Tex. Civ. App.) 45 S. W. 763; *Railway v. Holland*, 27 Tex. Civ. App. 397, 66 S. W. 68. The assignments will not be considered.

Appellant's third assignment is as follows: "The court erred in its conclusion of law as follows: 'I find that defendant is bound to plaintiffs for the amount of check, with 6 per cent. interest from its date, and costs of protest. I find that plaintiffs are entitled to their judgment for said amount and foreclosure of their attachment lien, and judgment is entered to that effect'—because the uncontradicted evidence shows that plaintiffs executed and delivered to defendant a warranty deed to the land described in plaintiffs' petition, in which the consideration was recited, the sum of \$866.66, and that this deed was written upon a blank in which a vendor's lien was provided for, but that the vendor's lien clause was stricken out of said deed, showing clear intention on the part of both vendors and vendee that no lien existed, and that the recited consideration was the full consideration, and it was not competent to contradict said deed by parol testimony." The evidence shows that the deed recited the payment of \$866.66 as the consideration for the land, and that no express vendor's lien was retained; that in payment of said sum appellant gave his check on Robinson Bros., and that through his own initiative the check was not paid on presentment, nor was said sum of money otherwise paid to appellees; that in drawing the deed a blank form of deed was used in which was a clause providing for the retention of an express vendor's lien, but that this clause was stricken out before the deed was executed. It is well-established law that the grantor of land who has delivered possession to the grantee retains an equitable lien upon the land for the unpaid purchase money, although he has taken no distinct agreement or separate security for it, and even though the deed recites that the consideration has been fully paid (*Marshall v. Marshall* [Tex. Civ. App.] 42 S. W. 354), and it rests upon the vendee, in a suit brought by his vendor to enforce such a lien, to show that the equitable lien with which the land stands charged has been waived. This, we think, was not established in the case under consideration by the mere fact that the clause in the form used, providing for the retention of the lien, was eliminated in drawing the deed. The further contention that parol evidence of the consideration other than that recited in the deed was not admissible is without merit. As said in *Johnson v. Elmen*, 24 Tex. Civ. App. 45,

long-recognized principle of law that parol evidence is admissible to show the real consideration for a deed, and in an action * * * between the original parties to the instrument the recital in the deed of the amount of the consideration is not conclusive, nor is it necessary that allegations of fraud, accident, or mistake should be made to account for the failure to express the full consideration in the instrument. This is a common-law rule, and is well established as is the general rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument. 2 Whart. on Ev. 1044; Greenl. on Ev. §§ 284a, 285; Hitz v. Bank, 111 U. S. 725, 4 Sup. Ct. 613, 28 L. Ed. 577; McLean v. Ellis, 79 Tex. 398, 15 S. W. 394; Allison v. Pilkins, 11 Tex. Civ. App. 655, 33 S. W. 293; Taylor v. Merrill, 64 Tex. 494; Womack v. Womble, 7 Tex. Civ. App. 273, 27 S. W. 154; Garrett v. Robinson (Tex. Civ. App.) 43 S. W. 288; Lanier v. Foust, 81 Tex. 186, 16 S. W. 994."

There being no reversible error presented, the judgment of the district court is affirmed.

Affirmed.

BRANDON v. TEXARKANA & FT. SMITH RY. CO.

(Court of Civil Appeals of Texas. Nov. 19, 1908.)

1. MASTER AND SERVANT (§ 286*)—ACTIONS—QUESTIONS FOR JURY.

In an action against a master to recover for a servant's injuries, plaintiff alleged negligence of the master in requiring him to go under a locomotive boiler and remove a plug therefrom for the purpose of washing the boiler, knowing that it required a skilled person to do such work and knowing plaintiff to be unskilled, and that plaintiff did not know it required a skilled person to safely do the work, and that plaintiff was unacquainted with the construction of the boiler or how to safely remove the plug, and that plaintiff was not aware of the danger to unskilled persons in attempting to remove the plug. Evidence was given that plaintiff was employed as a common laborer to load cinders on cars, and that while he had worked a number of years around railroad offices and shops he had never except once been called upon to wash a locomotive boiler, and that he knew nothing about such work; that, when he was injured, he was told to go into a pit underneath a locomotive and remove a plug from the locomotive, and wash the boiler; that he knew nothing of the dangers of such employment or how to avoid them; that, while endeavoring to perform the work, he was injured by boiling water from the locomotive. *Held*, that the evidence raised an issue which should have been submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1044-1049; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 225*)—ASSUMPTION OF RISK.

A servant assumes a risk ordinarily and usually incident to his service, but, if the service he is directed to perform is one not

does not assume the risk of dangers inherent thereto of which he was ignorant, and which are not patent to persons of ordinary intelligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 655-658; Dec. Dig. § 225.*]

3. MASTER AND SERVANT (§ 156*)—WARNING SERVANT.

A master, in the absence of circumstances suggesting ignorance on the part of a servant, may assume that the servant appreciates risks ordinarily incident to the employment, and the master need not warn the servant about risks of that nature, nor instruct him how to avoid them, but he must warn the servant of dangers incident to a service not within the scope of his employment, and which are not patent to persons of ordinary intelligence, and instruct how to avoid them, and he is not excused from warning and instructing concerning those dangers by the fact that the danger is incident to such service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 312; Dec. Dig. § 156.*]

Appeal from District Court, Bowie County; P. A. Turner, Judge.

Action by Sterling Brandon against the Texarkana & Ft. Smith Railway Company. From a judgment entered on a directed verdict, plaintiff appeals. Reversed and remanded.

The action was for damages for personal injuries alleged by appellant, the plaintiff below, to have been suffered by him as the result of negligence on the part of appellee. The trial court peremptorily instructed the jury to find in favor of appellee; and from a judgment entered in accordance with a verdict so finding, this appeal is prosecuted.

In his petition appellant alleged that about August 5, 1906, he was employed by appellee as a common laborer to load cinders on cars under the direction of appellee's foreman, one Gilroy; that on the date mentioned he was required by Gilroy as such foreman to engage in washing boilers and locomotives placed over a pit in appellee's roundhouse used for the purpose, and in performing such service to go into said pit under a boiler so placed, and there remove a plug from the bottom of the boiler; that, in obedience to the directions given him to do so, he went into said pit under said boiler and removed said plug; and that, when he did so, hot water and steam were discharged from the boiler, whereby he was scalded. He further alleged that to so remove said plug was, as was known to appellee, but unknown to him, dangerous work; that to safely remove the plug required the service of a person skilled in such work, and acquainted with the construction of the boiler; that he was not skilled in such labor, and had no knowledge of the way in which the boiler was constructed, and that defendant knew how said boiler was constructed and that an unskilled person could not safely remove the plug, and knew that appellant was unskilled in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the boiler was constructed. He further alleged that the engine and boiler he was directed to wash was defective, in that it had no blow-off cock by means of which the hot water and steam could be released and discharged from the boiler without going into the pit and under same. He then alleged, as the specific acts and omissions constituting negligence on appellant's part, the following:

"First. In failing to have said engine equipped with a blow-off cock, so that steam and not water might have been released and discharged from said boiler without entering said pit, and going under said boiler and removing said plug with a wrench.

"Second. In requiring and directing plaintiff to go under said boiler and remove said plug, defendant knowing the danger incident thereto, and knowing of plaintiff's want of knowledge of such danger, and in failing to advise plaintiff of the danger, and failing to advise plaintiff of the increased danger by reason of the absence of a blow-off cock, and in failing to direct him how to safely do such work.

"Third. In requiring plaintiff to go under said boiler and remove said plug, knowing that it required a skilled person to safely do so, and knowing plaintiff to be unskilled, and knowing that the plaintiff did not know it required a skilled person to safely do the work, and knowing that the plaintiff was unacquainted with the construction of said boiler, and knowing plaintiff's want of knowledge of how to safely remove said plug, and knowing that the plaintiff was not aware of the danger incident to unskilled persons attempting to remove said plug."

From the evidence it appeared that in August, 1906, when appellant was hurt, appellee had between the rails of its track inside its roundhouse in Texarkana a pit about 3 feet deep, 2½ feet wide, and 60 feet long used in washing boilers of locomotive engines. One Gilroy, as appellee's master mechanic, was in charge of the roundhouse, and employed and discharged men performing service there. Several months before appellant was hurt Gilroy employed him to shovel cinders outside the roundhouse. A few weeks before he was hurt, appellant was transferred from this work to work inside the roundhouse, where, he testified, he cleaned up the office, kept up with the material used to repair cars, raked fire out of the fire pans of engines, etc. Up to the time he was hurt he had never, he testified, washed out but one boiler, and the steam and hot water had been removed from it, and cold water was then running through it. He had worked for 16 years for a railroad at its depot in Little Rock as assistant mail transfer clerk, had worked for a lumber company around its planer and mill, and had worked for appellee as a track or section hand on its line of railroad, but, he testified, had no

worked at a roundhouse, and did not know "anything about roundhouse work at all." On the morning he was injured he was directed by Gilroy to wash, or assist one Dell Hudson in washing, a boiler to an engine placed over the pit. As to the circumstances attending the injury suffered by him, appellant testified as follows: "We was short of men that day. * * * Mr. Gilroy told me I had to wash the boilers that morning. I had washed one boiler before that. I never did wash more than one. I did not know anything about boiler washing. I had washed one before that, that they had let the water out and had the cold water running through. * * * Mr. Gilroy told me that morning to go out there and wash that boiler. And I went out there, and couldn't find anywhere to let the water out of it, and I went back and told him about it, and he told me to take a wrench and loose the plug on the side; and I couldn't do that, couldn't get none of those plugs loose on the side. They was all gummed up so tight. He told me to go down in the pit and see if I could get one loose, * * * to take the wrench and a hammer and go down in the pit and beat on it, and see if I could knock the rust off, so I could turn it. * * * He did not tell me anything, after I told him there wasn't any place, no blow-off pipe, to let the water out, just told me to go down in the pit and see if I could loose the plug down there, and let it out. I did that. I went down in the pit and loosed the plug, and about the time that * * * I made one turn on it, and Dell (Hudson) was up there on the bank, looking down on me, and he hollered at me, and by that time the water and the pressure of the hot water and steam scalded this arm and this side and both legs as I crawled out of the pit. I did not know it was dangerous to go down in that pit and unloose that plug. They had blowed off the steam on the engine that morning. * * * I didn't know how long it took the water to cool. I thought it was about cool. As to how it came out when I unloosed the plug, why, it just blowed out. The mud blew all in my face so I couldn't see." On his cross-examination appellant testified that he went to work at about 7 o'clock on the morning he suffered the injury, and had not been working longer than about 30 minutes when he heard the engine blowing off steam; that it was between 9 and 10 o'clock on that morning when he was injured; that he didn't know when he went in the pit to remove the plug whether the water in the boiler was then hot or not, but knew it was hot when the steam was blowing off two or three hours before that time; that Gilroy didn't tell him the way to let the water out was to loosen the plug while in the pit, and then get out of the pit and remove it, but that Dell Hudson did tell him that was the way to do it to keep from getting wet, and that that was the way he

in the pit to loosen the plug, and then get out of the pit and unscrew it until it came out. From the testimony of the witnesses Linam and Gilroy it appeared that the plug was tapering in shape, and made to fill a hole $2\frac{1}{2}$ inches across. To keep the boiler from leaking it was necessary to screw in the plug very tight, and the plug, it seems, was shaped to taper, so that the further it was screwed in the tighter it would get. The force of the steam came on the plugs. "Sometimes when they are in tight," testified Gilroy, "they are hard to get out. After you get it started, why you can screw it out with your fingers." As to the shape of the plug appellant testified: "As to the small end of the plug, or the end where it starts, starting in very loose, and not being as large as the back or shoulder part. I never noticed about that." There was testimony that boiler washing was a trade or business distinct from common labor like that appellant testified he was employed to do, and that in doing it there was danger of getting burned or scalded. Gilroy testified that he knew that the water in the boiler was hot at the time appellant was engaged in removing the plug.

Thos. N. Graham and Hart, Mahaffey & Thomas, for appellant. Glass, Estes & King, for appellee.

WILLSON, C. J. (after stating the facts as above). On the allegations of negligence made in the third paragraph of the specifications set out in the above statement, we think the evidence raised an issue which should have been submitted to the jury. As the law is, appellant, of course, should be held to have assumed the risks ordinarily and usually incident to the service he contracted to perform for appellee. The latter had a right, in the absence of circumstances suggesting ignorance thereof on the part of appellant, to assume he understood and appreciated those risks, and should not be held to have owed him the duty to warn him about same nor to instruct him how to avoid them. But, if the service Gilroy directed him to perform and which he was engaged in performing at the time he was injured was a service not embraced within the scope of his contract with appellee, appellant should not be held to have assumed dangers incident thereto of which he was ignorant and which were not patent to persons of ordinary intelligence, and appellee should not be held to have been excused from the duty of warning him of their existence and instructing him how to avoid them. The reason generally assigned as a basis for the doctrine of risk assumed on the part of the employé, that by seeking the employment he holds himself out as qualified by the necessary experience and knowledge to perform its duties, does not exist where he is required by the master to

ne contracted to perform. And the risks of such added service cannot be said to have been contemplated by the servant at the time he sought the employment covered by his contract, and his compensation cannot be said to have been fixed with reference to them. As to such added service the employé should be held to have assumed only such risks incident thereto as were known to him at the time or as should be said to have been obvious to a person of ordinary intelligence. As to other risks, the employer should be held to owe him the duty to warn and instruct him. 1 Labatt's Master & Servant, §§ 240, 460, 270; Railway Co. v. Newman, 27 Tex. Civ. App. 77, 64 S. W. 790; Railway Co. v. Wrenn, 2 Tex. Civ. App. 628, 50 S. W. 210; Oil Co. v. White (Tex. Civ. App.) 54 S. W. 432; Railway Co. v. Utley, 27 Tex. Civ. App. 472, 66 S. W. 311; Railway Co. v. Renz, 24 Tex. Civ. App. 335, 59 S. W. 280. "So far," says Mr. Labatt, "as the essential fact of an increase of danger is concerned, it is obvious that this situation may be brought about by the transfer of the servant to a new environment, or by the imposition of new duties in the old environment, no less than by a change in the inherent quality or in the arrangement of the instrumentalities themselves, or of the materials handled. It follows, therefore, that when the servant is thus required to work amidst new surroundings or to undertake new duties, the master becomes at once chargeable with the obligation of giving him instructions in any case where there is a real augmentation of the risk, owing to the fact that the servant has not sufficient experience or intelligence to enable him to safeguard himself." Master & Servant, § 240. In such a case the master has not the right to assume that the servant understands and appreciates the danger incident to the added service. 1 Labatt's Master & Servant, § 460. It would seem, therefore, that if washing or assisting in washing the boiler was not a service embraced within the terms of appellant's employment, and if the dangers incident to the work were not obvious and were not known to appellant, it was appellee's duty to warn him of the dangers to be encountered in doing the work, and to instruct him how to avoid those dangers. And it would follow, if there was evidence tending to establish such a state of the case, and an absence of a warning to appellant, that the peremptory instruction complained of should not have been given. Viewing the record, as we think it should be viewed, from the standpoint most favorable to appellant, and without intending in the least to intimate the weight which should have been given to it by the jury, we think it must be said that there was such evidence. The witnesses Linam and Hudson testified that boiler washing was a trade or calling in itself. Appellant testified that he was employed to work as a common laborer around the roundhouse, and not as a

1 Foreclosure of his mortgage, which was accordingly done, and judgment entered for plaintiff thereon, from which this appeal prosecuted.

The appellant urges by his first assignment at the court below erred in the trial of a cause in excluding all the evidence offered by him tending to prove each and all the allegations of his cross-bill, and in remptorily instructing the jury to find a verdict against him thereon. It will therefore be seen that the question raised is whether or not the fact of appellant's having given a mortgage which authorized the plaintiff to take possession of the engine with the usual power of selling same in default of payment of his debt would preclude defendant from recovering damages for the seizure of the same by sequestration upon showing that the grounds stated to obtain the writ were untrue, and, further, that the same was maliciously sued out, by reason of which defendant suffered damages. This question has been heretofore determined adversely to appellant's contention. In the case of *Wedig v. San Antonio Brewing Ass'n et al.*, 25 Tex. Civ. App. 158, 60 S. W. 567, Justice Collard, in delivering the opinion of the court, said among other things: "It will be seen by the terms of the mortgages that the brewing company, defendant, had the right to take possession of the property, and sell it to pay the debt secured thereby, or any part of the debt. The petition shows that the debt had not been paid in full, and the right to take the property into possession cannot be questioned. The exercise of that right and securing it by process of the court could not be ground for damages"—citing *Harling v. Creech*, 88 Tex. 300, 31 S. W. 357. The *Wedig Case* was one in which, as in this, the plaintiff had executed a mortgage for the security of a debt, and the defendant, the debt being past due, had sued out a writ of sequestration and taken possession of the property thereunder, and the suit was brought by the plaintiff to recover damages for the alleged illegal suing out of said writ, and depriving him of possession of said property by reason thereof; the court saying, further, in said opinion that the defendant is only charged with doing an act which the contract declared it could do, and it is difficult to see how it would render itself liable for doing it. In the case of *Singer Manuf. Co. v. Rios*, 96 Tex. 174, 71 S. W. 215, 60 L. R. A. 143, 97 Am. St. Rep. 901, on certified question from this court to the Supreme Court, it was held that the provision in a chattel mortgage that the mortgagee may enter the mortgagor's premises and take possession of property on default of payment is valid and constitutes a defense against an action for trespass in so taking

even though without the consent of the mortgagor; and Judge Gaines in reviewing the case of *Harling v. Creech*, supra, held that that case announced a correct doctrine. We therefore think that there was no error on the part of the trial judge in excluding said testimony so offered by defendant, and in directing a verdict in behalf of plaintiff, as he did, and therefore overrule this assignment.

Appellee urges an affirmance of the judgment of the court below with damages, and insists that the record discloses a manifest purpose on the part of appellant to delay the enforcement of the judgment of the court below by resorting to an appeal and the suspension of the execution of said judgment without any reasonable cause for complaint against the same. Nothing is shown in support of this contention except that the appeal bond and transcript were filed by appellant, respectively, on the last days that the same could lawfully have been filed, and that no briefs were filed in the court below and none were filed in the appellate court at the time of the filing of the transcript. Appellant before the submission of this cause, however, had duly prepared and filed his brief herein, and no postponement of the cause was occasioned by his failure to file said brief. The law having given the appellant a definite time within which to file his appeal bond and transcript, and the same having been filed within that time notwithstanding the fact that each of these acts was done on the very last day on which he had the right to do them, still we do not believe that these facts alone would constitute such delay on his part as would justify the belief that the appeal was taken merely for delay; and, so believing, we decline to sustain appellee's contention and overrule the same.

Believing no error has been shown in the action of the trial court, its judgment is affirmed.

LOUISIANA & T. LUMBER CO. v. DUPUY et al.†

(Court of Civil Appeals of Texas. Oct. 24, 1908.
Rehearing Denied Dec. 3, 1908.)

1. BOUNDARIES (§ 46*)—LOCATION BY PARTIES.

Where the exact location of a boundary line is uncertain, and it is located by an agreement of the abutting owner, knowledge on the part of a person who subsequently purchases a part of the property that the agreed line is not the true line will not defeat his right to hold to said line if he purchases on the faith of such agreement.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 222, 250; Dec. Dig. § 46.*]

2. BOUNDARIES (§ 41*) — ESTABLISHMENT — TRIAL.

In an action by a purchaser of property to try title to land lying between a boundary line previously fixed by former owners and the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Application for writ of error dismissed by Supreme Court for want of jurisdiction.

versy, believing it belonged to such survey, in good faith, paying value therefor, and acted on the agreement fixing the location of said line, not knowing of any mistake, if there was mistake, then the owners of the other survey would be estopped to deny that the boundary line was not properly located. There was no evidence in the case tending to show that defendant at the time of its purchase had any notice of any mistake in the location of the agreed line. *Held*, that the instruction did not mislead the jury into the belief that, unless defendant was shown to have purchased without knowledge of any such mistake, it could not find that plaintiffs were estopped to dispute the agreed line.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 41.*]

3. BOUNDARIES (§ 46*)—ESTABLISHMENT—LOCATION BY PARTIES.

Where an uncertain boundary between two surveys is fixed by agreement of the owners, and defendant purchased the land on one side of the agreed line believing that the same belonged to the survey owned by his vendor, and in good faith paid value therefor, and acted on the agreement locating the line, not knowing that there was any mistake, the owners of the other survey would be estopped to deny that the boundary line fixed by agreement was not properly located.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 222, 250; Dec. Dig. § 46.*]

4. BOUNDARIES (§ 46*) — ESTABLISHMENT — AGREEMENTS.

After an uncertain boundary line had been fixed by agreement of the abutting owners, one of them sold to defendant, and an action was subsequently brought by a purchaser of the property on the opposite side of the line to try title to the strip of land between the line as fixed by agreement and the original line. *Held*, that an instruction to find for defendant if the boundary line was fixed by agreement as alleged, regardless whether the purchaser of the property on the other side of the line at the time of his purchase knew of the agreement fixing such line, was properly refused.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 222, 250; Dec. Dig. § 46.*]

5. BOUNDARIES (§ 33*)—ESTABLISHMENT—EVIDENCE.

After the location of an indefinite line separating two surveys had been fixed by agreement by the adjoining owners, defendant purchased property in one survey, believing that the line so fixed was the proper line. Plaintiffs, who were the successors in interest of the purchaser of the other survey, brought an action to try title to the strip between the agreed line and the original line. Defendant claimed that plaintiffs were estopped to dispute the line as located by the agreement. *Held*, that the burden was upon defendant to show that at the time plaintiffs' predecessor purchased the property he had knowledge of the agreement.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 151; Dec. Dig. § 33.*]

6. BOUNDARIES (§ 41*) — ESTABLISHMENT — TRIAL—INSTRUCTIONS.

An indefinite line between two surveys was fixed by agreement of the owners and defendant purchased the interest of one owner, believing that the line so fixed was the proper line. Subsequently plaintiffs' predecessor in interest purchased the land in the other survey, and plaintiffs brought an action to try title to the land between the original line and the line as agreed on. *Held*, that instructions ignoring plaintiffs'

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 41.*]

7. TRIAL (§ 255*)—INSTRUCTIONS—REQUEST—NECESSITY—BURDEN OF PROOF.

The failure of the trial court to charge that the burden of proof was on plaintiff is not reversible error, in the absence of a request by defendant to so charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-631; Dec. Dig. § 255.*]

8. VENDOR AND PURCHASER (§ 242*)—BONA FIDE PURCHASERS—BURDEN OF PROOF.

The burden is on the party asserting equitable title against a legal title to show that when the legal title was acquired, the purchaser had notice of the equity sought to be asserted.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. § 242.*]

Appeal from District Court, Houston County; Benjamin H. Gardner, Judge.

Action by Mrs. Wiley Dupuy and others against the Louisiana & Texas Lumber Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Nunn & Nunn, for appellants. Aldrich & Crook, for appellees.

PLEASANTS, C. J. This is a suit by the appellees, the widow and heirs at law of M. C. Dupuy, deceased, to recover 9.7 acres of land alleged to be a part of the Allen Latham survey, in Houston county. The suit is brought in the form of an action of trespass to try title, but the only issues raised by the evidence are those of boundary and estoppel.

Plaintiffs were entitled to recover the land sued for if it was a part of the Latham survey, unless they were estopped from such recovery by facts pleaded by defendant. Defendant claimed the land is a part of the S. Hudson survey, which is the older of the two surveys, and the line of which is called for in the field notes of the Latham as one of its boundary lines. It is further alleged in defendant's answer: "That there was uncertainty and confusion as to the true location of said boundary line, and that on account of the confusion of the calls in the patent of the said S. Hudson survey, and the uncertainty as to its true boundary lines heretofore, to wit, on or about _____ day of _____, 1900, and just before the defendant Louisiana & Texas Lumber Company purchased the land in this suit, and with the view of making said purchase from the then owners of the said S. Hudson survey, a part of the Allen Latham survey, it became necessary that the dividing lines between these two surveys should be established as agreed upon by the parties concerned as a condition on which the said Louisiana & Texas Lumber Company would purchase the same and to this end and to this purpose B. F.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index

for defendant to prevail in its equitable claim growing out of the estoppel alleged to have arisen from the agreement as to the boundary line, the burden was upon it to show that at the time M. C. Dupuy purchased he had knowledge of such agreement. *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; *Baldwin v. Root*, 90 Tex. 552, 40 S. W. 3; *Fordtran v. Perry* (Tex. Civ. App.) 60 S. W. 1000.

The assignments from No. 4 to No. 7, inclusive, complain of the refusal of the court to give special charges requested by the defendant. All of these charges ignore appellees' right to recover, regardless of the agreement as to the location of the boundary line, provided it was not shown that M. C. Dupuy at the time he purchased had knowledge of such agreement, and for that reason were properly refused. There is no reversible error in the failure of the court to charge that the burden of proof in this case was upon plaintiffs. If such a charge was proper in this case, the failure of the court to give it would not, in the absence of a request therefor, constitute reversible error.

The eighth assignment complains of the verdict on the ground that it is not supported by the evidence, in that the undisputed evidence shows that the boundary line between the Hudson and Latham surveys had been fixed by agreement between the owners of said surveys, and, as so fixed, the land in controversy was a part of the Hudson survey, and that M. C. Dupuy knew of this agreement at the time he purchased. The statement under this assignment does not support it, in that it does not show that M. C. Dupuy had notice of the agreement as to the location of the boundary line at the time he purchased. The statement is that there was no evidence that Dupuy did not have notice of the agreement at the time he purchased. As before stated, this was not sufficient to defeat Dupuy's title. No rule is more fully settled by the decisions of this state than that which requires a party asserting an equitable against a legal title to show that at the time the legal title was acquired the purchaser thereof had notice of the equity sought to be asserted against it. The cases cited by appellant *Linnartz v. McCulloch* (Tex. Civ. App.) 27 S. W. 279, *Bremer v. Case*, 60 Tex. 153, and *Rogers v. Petrus*, 80 Tex. 427, 15 S. W. 1093, are all cases in which a junior title was asserted against a senior; and the holding in such cases that it devolved upon the purchaser of the junior title, in order to establish his claim, to show that he purchased without knowledge of the senior title, is not only not in conflict with the rule above stated, but is in harmony therewith. In all of these cases the holder of the senior title held the superior legal title, and

purchased without notice of the senior recorded deed.

We are of the opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

SWOPE v. LIBERTY COUNTY BANK et al.
(Court of Civil Appeals of Texas. Nov. 11, 1908. Rehearing Denied Dec. 2, 1908.)

1. EVIDENCE (§ 411*)—PAROL EVIDENCE—VARYING CONTRACTS—INCOMPLETE CONTRACTS.

Parol evidence is generally inadmissible to vary or contradict the terms of a written instrument, but if the contract, as expressed in the writing, is incomplete, parol evidence is admissible between the parties to show the entire agreement; but, where a part of the contract is expressed in writing, with the intention that it shall be complete as to that part, the general rule is applicable to that part of the contract.

[Ed. Note.—For other cases, see *Evidence*. Cent. Dig. §§ 1874-1899; Dec. Dig. § 411*.]

2. EVIDENCE (§ 397*)—PAROL EVIDENCE—AFFECTING WRITINGS—PRESUMPTION AS TO COMPLETENESS.

If an element of a transaction is mentioned or covered by a writing, it is assumed that the writing was meant to embrace the whole intention of the parties on that element, so that parol evidence is inadmissible to vary it; but, if a particular element is not mentioned, it is assumed that the writing was not intended to embrace that part of the transaction.

[Ed. Note.—For other cases, see *Evidence*. Cent. Dig. §§ 1756-1765; Dec. Dig. § 397*.]

3. EVIDENCE (§ 411*)—PAROL EVIDENCE—AFFECTING WRITINGS—VARYING CONTRACTS—COMPLETE CONTRACTS.

An applicant for an insurance policy gave his note for the first premium when the policy was issued, and as a part of the contract secured a statement reciting the payment of the note, and the agent's receipt therefor, and the receipt provided that it should not be valid unless the applicant was promptly examined by the company's medical examiner, the payment to be returned if the policy was refused on examination. The applicant refused to take the examination, and in an action to recover the amount of the note, sought to show that the note and agreement were executed under a verbal agreement with the company's agent that the applicant might investigate the policy office, and, if satisfactory, would accept it, and that the company refused the issue of the policy offered by the agent. *Held*, that, the contract being complete on its face, and covering the entire transaction, the parol evidence offered to vary it was inadmissible.

[Ed. Note.—For other cases, see *Evidence*. Cent. Dig. §§ 1874-1899; Dec. Dig. § 411*.]

Appeal from Liberty County Court; I. S. Simmons, Judge.

Action by the Liberty County Bank against T. C. Swope and Robert E. Bowen, in which each of defendants filed a cross-action against the other. From a judgment for plaintiff against both defendants and in favor of defendant Bowen on his cross-action and against the defendant Swope on his cross-action.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

the affirmed, and judgments in the cross-motions reversed, and judgment directed for plaintiff on his cross-action.

Evans & Pickett, for appellant. J. F. Key and Marshall & Marshall, for appellee.

HILL, J. The Liberty County Bank sued Robert E. Bowen, as the maker, and T. C. Swope, as the indorser, on a negotiable promissory note made by the former to the latter, December 17, 1906, for \$329.40, payable January 1, 1907, with interest from maturity at the rate of 8 per cent. per annum, and for 10 per cent. additional if not paid at maturity, and collected by an attorney or by proceedings. Plaintiff's petition is in ordinary form, alleging that the note, at maturity, was transferred by the payee to the bank for a valuable consideration. Bowen answered by a general denial and, admitting the execution of the note to Swope, the answer contains a cross-bill against him, in which it is alleged: That the note was deliverable to take effect as an obligation only in accordance with a verbal agreement and contract, made between him and Swope, to whom the note was executed. That the circumstances under which it was made and the agreement were, substantially, that the note was intended to be used as the first premium due on an insurance policy, if Bowen had decided to take out a policy in the Mutual Life Insurance Company, which Swope was then representing as its agent; that at the time it was signed it was agreed between him and Swope that he should examine and investigate a proposition of insurance offered him by Swope in said company, upon investigation, he (Bowen) decided to accept the insurance, he would make application therefor by taking and submitting to the insurance company an examination of his physical condition, and, in the event he should do so and be accepted by the company, the note would become of full legal effect. That it was further agreed that Swope should hold the note on the condition, and not negotiate the same (unexecuted) should be advised and notified (Bowen) that the proposition of insurance offered had been accepted and an application taken; and that Swope expressed and stipulated with him to hold the note on the conditions and for the purpose stated. That within a reasonable time after the investigation of Swope's proposition regarding to taking out the insurance, Bowen learned it was impossible of performing the insurance company, and that it was impossible to issue a policy granting and carrying out Swope's flattering offers. Whereupon Bowen immediately notified Swope that he would not accept such proposition, nor take the examination, and requested him to return the note. He then learned that Swope, with-

out transferring the note to the bank, had transferred the note to the bank, that his action in transferring and selling the note was wrongful, and, in violation of said contract, was effected by Swope for the purpose of defrauding him, and that he is informed and believes that plaintiff purchased the note in the usual course of trade for a valuable consideration, without notice of his equities, and is an innocent holder thereof. That by reason of the premises the note was only conditionally delivered to take effect, and that he (Bowen) had the right under said agreement to reject the note and thereby prevent it from becoming an obligation, and that, in his exercise of such right, the note became void and of no effect as between him and Swope. The answer concluded with a prayer that, in the event plaintiff should recover against him, he have judgment over against Swope for the amount recovered and for costs, etc. The defendant Swope answered Bowen's cross-bill by general and special exceptions, a general denial, and pleaded specially: That the note sued on was executed on the day it bears date for the sum of money therein stated, and was thereafter, before maturity, for value assigned by him to plaintiff. That when executed, he was agent of the State Mutual Life Insurance Company, and that through him, as such agent, Bowen made application to the company for a life insurance policy in the sum of \$10,000, which application was in writing and signed by him. That at the time, and as a part of the same transaction, Bowen executed the note in payment of the first premium due on the policy, and, in addition thereto, and as a part of the same contract, a further written agreement in writing was made between him, as agent for the insurance company, and Bowen, which is substantially as follows: "Statement to be Signed by Applicant upon Payment of Premium, or Any Part Thereof. Dated at Devers, Texas. Dec. 15, 06. I hereby declare that I have paid to T. C. Swope \$329.40, and that I hold his receipt for same, corresponding in number hereto, on the form used by the Mutual Life Insurance Company, on application for insurance, and that I agree to the terms of said receipt. No. 44931. [Signature of Applicant] Robert E. Bowen." And that the said receipt mentioned was at the same time signed by this defendant as agent of said company, and delivered to the said defendant, Bowen, the same being in writing and constituting a part of said agreement and contract, and is in substance as follows, to wit: "Received from Robert E. Bowen, at Devers, state of Texas, this 15 day of December, 1906, the sum of three hundred & twenty nine & 40/100 dollars, the sum declared by applicant in his application to have been paid, on the following conditions and agreements: First. That if a policy be issued on the application for insurance made by the above, this day, to the State Mutual Life Insurance Company, correspond-

company shall accept this receipt towards payment of the first premium on the said policy. Second. That this receipt will not be valid if issued for any sum in excess of the sum declared by applicant in such application to have been paid; it will not be valid if erasures or additions have been made in the printed form; and it will not be valid unless the person to whom it is issued is promptly examined by an examiner of the State Mutual Life Insurance Company. Third. That if a policy be not issued on said application within sixty days from this date (and only in that event) said sum will be returned on surrender of this receipt to the company. Fourth. That the liability of the company under this receipt shall not exceed the sum declared by the applicant in his application to have been paid, and that this receipt is non-negotiable, and cannot be assigned or transferred. No. 44931. [Agent must sign here] 'Tom C. Swope, Agent.' That according to the terms of said contract, Bowen was to promptly submit himself to an examination to a physician acting as examiner for the company, and if the examination proved satisfactory to the company, the policy applied for would be issued to him in accordance with the terms of said contract; but that Bowen, after entering into said contract, delayed and postponed and finally refused to have himself examined, although Swope repeatedly requested him to be, in order that the company could determine whether it would accept his application, rendering it impossible for defendant Swope, as agent of the company, to comply with and carry out the terms of the written contract, which he would have performed had Bowen complied with his agreement in regard to having himself examined, as was incumbent on him before the policy could be issued. This answer concluded with a prayer that, in the event plaintiff recovered against defendant Swope by reason of his indorsement of the note, he have judgment over against his codefendant for such sum as should be adjudged against him (Swope) in plaintiff's favor, for costs, etc.

Bowen replied to this answer of Swope, by a general demurrer and general denial. The case was tried before a jury, and resulted in a judgment in favor of plaintiff against both defendants, and in favor of defendant Bowen on his cross-action over against Swope for the amount adjudged in favor of the bank against the former as maker of the note sued on. From this judgment in favor of Bowen against him, Swope has appealed.

The undisputed evidence shows that the note sued on, the application for insurance, and the receipt described in the answer of Swope, were all executed at the same time and place, were parts of the same transaction between Swope, as agent of the insurance company on the one hand, and Bowen on the other, in regard to the contemplated

written instruments, and that the three documents, taken as a whole, expressed the written agreement between the parties in regard to the contemplated insurance for which the note was given in payment of the first premium.

The contention of appellant under his first and second assignments of error is that these writings, when taken together, constitute a complete and entire contract, plain and unambiguous, the terms of which cannot be varied or contradicted by a contemporaneous parol agreement between the parties and that therefore the court erred in admitting the testimony offered by the appellee to prove the allegations in his cross-bill as to the verbal agreement made between the parties at the time the note was executed. Such testimony having been admitted over the objection of appellant embodied in the assignments, we can see no escape of the appellee Bowen from this contention. Unquestionably, the three instruments referred to are parts of the same transaction, and, as between the appellant and Bowen, are to be viewed as an entirety, just as though they were all written together on the same piece of paper for the purpose of expressing the terms of the agreement between them. It is a general rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. If, however, all the terms of a contract, such as would make it complete, are not expressed in the writing, parol evidence is admissible between the parties for the purpose of showing the entire agreement between them. But where a part of a transaction has been embodied in a single writing, with the intention that it shall express the agreement as to such part of it, the rule against disputing the terms of the document is applicable to so much of the transaction as is so embodied. If the particular element in the transaction upon which parol evidence is offered is mentioned, corrected, or dealt with in the writing, then presumably the writing was meant to represent all the transaction on that element. If it is not, then probably the writing was not intended to embody that element of the transaction. Wigmore on Ev. § 2430. Applying this test to the writings, taken as a single instrument, it is apparent that it was intended to evidence the facts that application had been made by Bowen to the insurance company, represented by Swope as its agent, for an insurance policy on his life; that the applicant was to stand a medical examination satisfactory to the company before the policy would be issued; that the note sued upon was executed for the first premium due; that it was taken and considered as so much money to be appropriated by Swope to the payment of the premium in the event of Bowen's standing the satisfactory examination within the time designated, with the understanding that it

less he alleges and proves that he has sustained some special injury thereby which is different in kind and degree from that which results to the public at large. 2 Cooley on Torts, pp. 1292-1294; Jones on Easements, par. 543. In this suit the special injuries relied upon consist in the permanent injury to the freehold—the depreciation in the market value of the realty. This is the only injury alleged or proven. It therefore follows that unless the condition and proximity of the excavation not only interfere with the legitimate travel upon the avenue to such an extent as to interrupt its free use, but the conditions by which this is produced are permanent and not subject to be remedied, then there was no evidence which could have been made the basis for a recovery of the damages sought. It is only when the injury is permanent, or the nuisance complained of is from its nature permanent, that the damages are to be measured by the depreciation in the market value of the realty affected. *Rosenthal v. Railway Co.*, 79 Tex. 328, 15 S. W. 268; *Sanders v. Miller* (recently decided by this court) 113 S. W. 996; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 59 N. W. 925, 43 Am. St. Rep. 711. In the case last above cited the court said: "The inquiry should have been as to whether or not the defendants had caused a permanent and irremediable injury to plaintiff's property. If so, he was entitled to compensation in this action for all injury, present or prospective. If, on the other hand, the injury was temporary in its character, and capable of being avoided in the future without permanent injury to the plaintiff's freehold, the case was one of a continuing nuisance, and damages should have been restricted to the commencement of the action."

In those cases where the depreciation in the market value of the realty is made the basis of measuring the damages, a recovery is permitted for prospective, as well as present, injuries. This is justified solely upon the theory that, so far, at least, as the complaint is concerned, the conditions which have caused the injury are lasting and irremediable. Applying that rule of law to the facts here involved, it will be seen that it is not enough to warrant a recovery in this case that it be shown that Britton avenue is menaced by a dangerous nuisance, but it must further appear that this situation is necessarily or in all probability permanent. Here we must distinguish between the cut or excavation as a fixture, and the danger arising from its proximity to the highway in an unguarded condition. While the railway company had the right to make the excavation in the manner it did, because it was

guilty of negligence, not necessarily in making the excavation, but in not restoring the highway to a safe condition by sufficiently guarding travelers against the precipice. It will not be contended that the maintenance of this excavation in an unguarded condition was essential to the proper and legitimate use of its property by the railway company. If the highway bordering thereon is rendered unsafe for travel, we see no reason why the company at the instance of the proper parties, those receiving special injury, may not be compelled to restore it to a safe condition. The facts in evidence in this case, if found sufficient to show an interference with travel on Britton avenue, present a situation which can be remedied, or a nuisance that may be abated. *Sanders v. Miller* (recently decided by this court) 113 S. W. 996, and cases cited. For those reasons no damages are recoverable for prospective injuries, such as are necessarily implied when the depreciation in the market value of the realty is made the basis; and in this case, no other special injuries having been alleged or proven, there was no issue upon which a jury would have been authorized to pass.

We need no better illustration of an injustice made possible by erroneously adopting the depreciation of the realty as a measure of damages in this class of cases than is here presented. If the precipice caused by the railway excavation is a menace to travel upon Britton avenue so grave as to practically amount to an obstruction of that highway, the undisputed facts show that this condition may be remedied, either by the appellants, or other interested parties, constructing a fence or a sufficient guard along the south line of the avenue, between it and the excavation, or by compelling the railway company to erect and maintain a sufficient guard. This might be done as well after appellants had obtained a judgment for permanent injury to their realty as before. They would not be compelled to remain idle and permit the obstruction to continue merely because they had recovered such a judgment for future damages. Thus we would have damages awarded for injuries that never accrue.

There is no evidence going to show that travel on Britton avenue had ceased or had been lessened by the presence of the excavation. One of the appellants' witnesses testified that it was impassable by reason of the ditch or drain caused by some of the property owners concentrating the flow of water across the avenue toward the cut.

We do not think there is any good reason for changing our former holding, and the motion for rehearing is therefore overruled.

in contemplation of her approaching death, as would give the said Peter W. Peterson a portion thereof greater than he would have received by her voluntary disposition. To this end the said Peter W. Peterson, who is masterful and overbearing in character, and his said accomplices, excluded from access to his said mother all of her other children, who were then within such a distance as to have enabled them to have visited her, and withheld from all of them information as to her true condition up to her death, and admitted none to see her except those who were indifferent, or those who were conspiring with him for the said purpose; that said Peter W. Peterson falsely insinuated to his mother that she had been cheated and defrauded in the sale of her interest in certain Texas lands to five of her children, and awed and intimidated her with threats of placing her under guardianship as incompetent, and deprived her of the advice and consolation of her other children, which she greatly needed, and, while thus subdued and under his exclusive influence, persuaded her that unless some special provision was made for him he, under the laws of Texas, would be cut off from an equal share with the other children of the paternal and maternal inheritance, whom he falsely represented as intending such course. Moreover, the said Christine Peterson had long been partly deaf, and was illiterate, and had lost her memory, and all of her faculties were so impaired as to render her incapable of the ordinary means of communication with others in respect of business matters on October 16, 1902. If the said Peter W. Peterson on said date obtained any apparent consent to or acquiescence in any form of transfer to himself of said instruments, it was such as resulted from her physical and mental impairment, as aforesaid, and from said fraud and from undue influence, as above alleged, and not from the true consent of said Christine Peterson, and that only such persons were present at the time thereof as were so conspiring, as aforesaid, with said Peter W. Peterson. That the two notes in controversy constitute about four-elevenths of all the property of the said Christine Peterson which she owned on and prior to October 16, 1902, and at the time of her death. That the said Christine Peterson had five children besides the said Peter W. Peterson and this defendant, and that her affection for all of them was such as to render it her true will that all of her children should share equally in her estate after her death. That there was no valuable consideration for the transfer of the said notes to Peter W. Peterson, and that the said Peter W. Peterson is a man about 10 times the wealth of his said mother, while she had several children who had no property or wealth whatever. That, if there

said notes, the same was made with the purpose of obtaining to said Peter W. Peterson the benefits of the chances of litigating the claim of the said Peter W. Peterson herein set up as belonging to plaintiff, without affording this court the means of adjusting all the equities between the parties in respect of other undue advantages obtained by said Peter W. Peterson in the disposition of his mother's estate by acts done or apparently done on the 16th day of October, 1902, and defendant says that this court ought not to entertain plaintiff's suit unless the said Peter W. Peterson will come in and subject himself to the jurisdiction of this court in order that the equities may be adjusted in respect of the subject-matter and other property of the estate of the said Christine Peterson. The defendant says he holds the notes sued for, for the benefit of himself and the other children of the said Christine Peterson, deceased, who each own a one-seventh undivided interest therein which interest he is ready and willing to pay over to each of the said children out of the proceeds to be collected on the said notes, or the defendant is ready and willing to surrender the said notes to any proper representative of the estate of the said Christine Peterson who will show a better right thereto than defendant has." Christine Maurer and her husband, E. H. Maurer, Tillie A. Waterman and husband, W. H. Waterman, Mary Swanson and her husband, Gus Swanson, Ella D. Pivito and her husband, M. E. Pivito, and Frank H. Peterson intervened as parties defendant, and for their answer adopted the allegations contained in the answer of Charles J. Peterson.

The case was tried before a jury, which rendered a verdict in favor of defendants, upon which judgment for them was duly entered. The plaintiff in error's motion for new trial having been overruled, he perfected this appeal.

The evidence was uncontradicted that Peter W. Peterson and all the defendants except E. H. Maurer, W. H. Waterman, Gus Swanson, and M. E. Pivito were the children and heirs at law of Christine Peterson; that the said Christine Peterson prior to her death, which occurred on October 19, 1902, had lived in the home of her son Peter W. Peterson for a considerable length of time; that for some time before her death she suffered with, and died from the effects of, cancer, and that from the ravages of the disease great physical weakness resulted; that three days before her death she assigned the notes and mortgages sued for to Peter W. Peterson, and that he thereafter assigned the same to the plaintiff in error. The evidence was not sufficient to raise the issue of unsoundness of Mrs. Peterson's mind at the time she executed the assignments, unless the statement

1901, that his mother was "a little feeble-minded," and the testimony of a physician who had never seen or attended Mrs. Peterson who, in answer to a hypothetical question, stated that the judgment of a woman of the age and condition of Mrs. Peterson at the time she executed the assignments would be very much impaired and very easily influenced, and, if she was weak-minded so early as the first part of the year 1901, her case would be diagnosed as a case of senile insanity, was sufficient to raise that issue. On the question of undue influence exercised by Peter over his mother to induce her to execute the assignments, the testimony offered by defendant, if admissible, was sufficient to raise that issue.

By his first assignment of error the appellant complains of the action of the court in giving the following special charge requested by the defendants: "If you believe from a preponderance of the evidence that on the 6th day of October, 1902, Christine Peterson's mind was affected as the result of disease and age, or disease alone, so as to render it difficult for her to exert her will freely and assert her true intentions against the wishes of those to whose influence she was subjected, then you are instructed that the burden of proof is on the plaintiff to show by a preponderance of the evidence that the advantage obtained by Peter W. Peterson over her other children in procuring the assignments in question was fairly obtained and without undue influence." The burden of proof was upon the plaintiff to make out his case as alleged, and upon his making proof of the existence of the notes and mortgages, and the execution and delivery of the assignments pleaded by him, the burden was discharged. If, then, the defendants desired to avoid the force and effect of the assignments as alleged and proved by plaintiff, it was incumbent upon them to allege and prove such facts as would defeat plaintiff's right of recovery; and this they attempted to do by charging and offering proof to show that the assignments were void because Christine Peterson's mind at the time she signed them was so impaired as to render her incapable of contracting, and that the assignments were obtained by Peter W. Peterson by fraud and duress and undue influence exercised by him over her. This is in accord with the familiar principle that the burden rests upon the party who has the affirmative of the issue. While the weight of the evidence may have shifted from side to side according to the nature and strength of the proof offered in support or denial of the defense pleaded, the burden still rested upon them to prove the facts alleged by them upon which they sought to defeat plaintiff's cause of action. *Clark v. Hillis*, 67 Tex. 148, 1 S. W. 356; *Howell v. Hanrick*, 83 Tex. 94, 29 S. W. 762, 30 S. W. 856, 31 S. W.

794.

By the fourth paragraph of the charge the court instructed the jury as follows: "Now, bearing in mind the foregoing definition of undue influence, if you believe from a preponderance of the evidence before you that Peter W. Peterson secluded his said mother in his home, excluded from her presence her children, who were in such distance as to have visited her, and denied her an opportunity to consult them about the disposition of her property, and while thus secluded, and while she was so mentally and physically impaired, or either, as alleged in defendants' answer, if you believe from a preponderance of the evidence that she was so impaired, awed, intimidated, or coerced, as alleged in defendants' answer, and by undue influence, as that term has been hereinbefore defined, procured from her the assignments or transfers of the mortgage and notes described in plaintiff's petition, and but for such undue influence, if you believe from the evidence that such influence existed and was exerted to procure said assignments or transfers, the same would not have been made, you will find for the defendant and interveners, and so say by your verdict. Or if you believe from a preponderance of the evidence before you that the said Peter W. Peterson secluded his said mother, as alleged in defendant's answer, and excluded her other children in the vicinity from her presence, and while thus secluded falsely insinuated to his said mother that she had been cheated and defrauded of her interest in certain Texas lands by five of her children, or awed and intimidated her by threats of placing her under guardianship as incompetent, or deceitfully persuaded her that unless some special provision was made for him, under the laws of Texas, he would be cut off from an equal share with the other children in the paternal and maternal inheritance, and falsely represented to her that his brothers and sisters were intending said course, and that his said mother was coerced by said threats, or relied upon said representations or insinuations, or any of them, and by reason of the aforesaid means, or any of them, was induced to execute said transfers or assignments of said notes and mortgages, and but for said means or some of them would not have so executed said assignments or transfers, you will find for the defendant and interveners, and so say by your verdict." In this charge it seems that all facts and circumstances that go to sustain appellees' cases are marshaled in consecutive form, and present the facts upon which they relied at such length and in such manner, and in such graphic array and persuasive form as to give too much emphasis to the particular circumstances referred to. In giving the charge we think the court was in error, and the fourth and fifth assignments

court. The plaintiffs in error have filed a motion for rehearing, and on reconsideration of that question a majority of this court have reached the conclusion that our holding was error, and that the motion for rehearing should be granted. This view of the majority is based upon the conclusion now reached that the authorities cited in the original opinion do not sustain the holding there made, and that the case of *Whitcomb v. Smithson*, 175 U. S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303, is directly in point, and supports their present conclusion that the case was not removable to the federal court. The writer, however, is of the opinion that the former holding was correct, and therefore dissents from the majority on this proposition. Our former holding rendered it unnecessary to pass upon the merits of the case, but the present holding of a majority of this court requires the consideration of the whole controversy, which we proceed to do. Some of the parties have been eliminated from the suit, and the only parties now are M. E. Huber and daughter, Georgia, plaintiffs in error, and the railway company, defendant in error. The plaintiffs in error allege negligence on the part of defendant in killing Huber, in that: (1) In operating its engine at a high and dangerous rate of speed upon a public street; (2) in operating its engine at a greater rate of speed than permitted by an ordinance of the city; (3) in operating its engine without keeping a lookout for the safety of persons using the street; (4) in not ringing the bell; (5) in not ringing the bell as required by an ordinance of the city of Dallas; (6) that the track was located in dangerous proximity to a building, constituting a snare and a trap to people using the street at the place of accident; (7) that defendant failed to furnish a flagman at that place; (8) that defendant discovered the peril of deceased, and failed to use the means at hand to prevent the accident. The defendant pleaded the general denial and contributory negligence, in that Huber came to his death by his own carelessness, negligence, and want of care "(1) in using no pains to observe the approaching engine, which could have easily been observed had he exercised care for his own safety; (2) by trying either to pass immediately in front of the engine, and in dangerous proximity thereto, or by his attempting to board the engine when it was passing a position he occupied on the sidewalk; (3) by allowing himself to become in an intoxicated and helpless condition, and while in such condition attempting to either cross immediately in front of or to board a moving train." A trial resulted in a judgment for the railway company, and the plaintiffs prosecute this appeal.

Plaintiffs in their second assignment of error complain of the following portion of

the evidence before you that the said Lawrence Huber's death was the direct and proximate result of the defendant's negligence and that his death was not contributed to by negligence on his part, you will find for plaintiffs; but, if you find that the said Lawrence Huber was guilty of negligence that directly and proximately contributed to his death, you will find for the defendant, although you may find that the defendant was also guilty of negligence that contributed to his death." The contention is that "said charge required the jury, before finding a verdict for plaintiffs, to find too many prerequisite facts in that: (1) Defendant was not in the exercise of ordinary care for plaintiff's safety; (2) that the failure of the defendant to exercise ordinary care for plaintiff's safety was the proximate cause of the accident; (3) that the deceased was not guilty of negligence proximately contributing to his death; (4) the burden of proof is placed upon plaintiffs, by the manner of the framing of that paragraph in the charge, to show that the deceased was not guilty of contributory negligence, whereas, the law only required plaintiffs to show, by the burden of proof, that defendant did not exercise ordinary care for the safety of the deceased, and that its failure to exercise ordinary care for the safety of the deceased in crossing the track of defendant was the proximate cause of the death of the deceased, because if the failure of said defendant to exercise ordinary care for the safety of the deceased proximately resulted in the accident, then the negligence of the deceased could not have been the proximate cause of the death of the deceased. Therefore the court erred in requiring the jury to find four issues in favor of plaintiff by a preponderance of the evidence, before authorizing the jury to find a verdict for plaintiffs, when only two issues were required to be found by the jury to entitle the jury to find a verdict for the plaintiffs." We think some of the objections to the charge of the court complained of are well taken. Before a recovery could be had by plaintiffs, it was necessary for the evidence to show that death resulted from the negligence of defendant; and, as contributory negligence was pleaded, and evidence introduced sufficient to raise that issue, it was also necessary for the jury to believe that deceased was not guilty of contributory negligence in order to warrant them in finding a verdict for plaintiffs. While this is true, the charge is so framed as to place the burden of proof on plaintiffs to show that deceased was in the exercise of due care at the time of the accident, and not guilty of contributory negligence. It is the settled law of this state that the burden of proof is on defendant to establish plaintiff's contributory negligence. To this rule, however, there are two excep-

was never issued to him, but issued to Anderson Washington instead, and that said policy was to be an eight-year policy payable in eight premiums of \$62.70 annually, but instead the policy issued provides for twenty payments of \$62.70 each." "Wherefore," the citation further recites, "defendant Anderson Warbington says that the defendant Kansas City Life Insurance Company and W. B. Lawrence have failed to comply with the contract, and he prays that, if the plaintiff J. T. Harris recover judgment against him for the amount of the notes, then that he have judgment over and against the said Kansas City Life Insurance Company and W. B. Lawrence for the amount of said judgment." The specific reason assigned by appellant why the citation was not sufficient to support the judgment is that the judgment was for \$149.35 and 10 per cent. interest from July 6, 1907, its date, whereas the citation states the demand to be for \$137 and 10 per cent. interest from March 1, 1907. It may be that in computing interest accrued, or otherwise, an error was made, and that the judgment was rendered for a greater sum than it should have been for. If it was, appellant's remedy was by an appeal or certiorari to have had the error corrected. As against a merely erroneous judgment relief by injunction cannot be had, if a remedy by appeal or certiorari was available. *Fitzhugh v. Orton*, 12 Tex. 4; *Anderson v. Oldham*, 82 Tex. 231, 18 S. W. 557. It has been held, even as against a void judgment, that relief by injunction should not be granted if an appeal or certiorari lies. *Railway Co. v. Ware*, 74 Tex. 47, 11 S. W. 918; *Reast v. Hughes* (Tex. Civ. App.) 33 S. W. 1003; 1 High on Injunctions, §§ 173, 277, et seq. And see *Bond v. Pacheco*, 30 Cal. 534; *Ziel v. Dukes*, 12 Cal. 479. The reason alleged by appellant for not appearing and defending against the recovery complained of, and for not resorting to the remedy by appeal or certiorari, we think is entirely insufficient. If it chose to rely upon Harris' assurance that, because he was asking no judgment against it, it need not appear and defend the suit, in face of the fact that it was advised by the citation that appellee was seeking a judgment against it, in the event Harris recovered against him, it ought not to be heard now to complain that it was misled. On the facts alleged, if appellant was misled, it cannot be said to have been misled as the result of an accident or a mistake, or any fault on appellee's part, but it must have been as the result of its own inexcusable neglect to acquaint itself with the contents of the citation served upon it.

The judgment is affirmed.

1908. Rehearing Denied Dec. 9, 1908.)

1. APPEAL AND ERROR (§ 931*)—REVIEW—PRESUMPTIONS.

On appeal from a judgment for plaintiff in an action on a health policy providing for indemnity only for illness beginning after 60 days after the policy issued, it must be presumed that the court found that the sickness sued on began after that period, where there was evidence to that effect.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3764; Dec. Dig. § 331.*]

2. INSURANCE (§ 648*)—HEALTH INSURANCE—EVIDENCE—PHYSICIAN'S REPORT.

In an action on a health policy, preliminary reports furnished insurer by a physician are not admissible to show the nature of the disease which confined insured.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 648.*]

3. INSURANCE (§ 559*)—PROOFS—SUFFICIENCY—WAIVER.

By refusing to pay benefits payable in cases of confining sickness because the fact proof showed that assured had not been confined for the required period, insurer waives any objection to the sufficiency of the proofs conforming to the requirements of the policy, but did not admit the truth of the statements in the proofs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1391; Dec. Dig. § 539.*]

4. INSURANCE (§ 451*)—HEALTH POLICY—CONSTRUCTION—CONSISTENCY OF CLAUSES.

A health policy specified an indemnity for confining illness, and a subsequent clause provided for one-fifth of the specified benefits for disability from paralysis and other specified diseases. *Held*, that the clauses were both effective and not repugnant; the latter being in the nature of an exception or qualification of the former.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 451.*]

5. INSURANCE (§ 646*)—HEALTH POLICIES—ACTION ON—BURDEN OF PROOF.

In an action on a health policy specifying an indemnity for confining illness, but providing in a subsequent clause for one-fifth of the amount for a disability from specified diseases, the burden was on insurer to show that insured's illness was one embraced by the latter clause.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1664; Dec. Dig. § 646.*]

6. INSURANCE (§ 645*)—HEALTH POLICIES—EXCEPTIONS—NECESSITY FOR PLEADING.

In an action on a health policy specifying an indemnity for confining illness, excepting disabilities resulting from paralysis, etc., in which case one-fifth of the amount is payable, insurer cannot show that it was paralysis which confined insured without pleading that fact.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1634, 1638; Dec. Dig. § 645.*]

Appeal from District Court, Galveston County; Geo. E. Mann, Judge.

Action by Elizabeth Hayes against the General Accident Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. F. Kelly, for appellant. Wm. B. Lockhart, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

125 Mo. 30, 51 S. W. 382 (30 Am. St. Rep. 427), as follows: "If such instrument contain in it first a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something that would otherwise be included in it, a party relying on the general clause in pleading may set out that clause only without noticing the separate and distinct clause which operates as an exception, but, if the exception be incorporated in the general clause, then the party relying on it must in pleading state it together with the exception." It follows from this that it devolved on the defendant to allege and prove that the illness was one of those enumerated in the latter clause. This was not done. The defenses alleged were: (1) A false warranty that the insured was in sound physical condition and had no physical infirmity or defect. There was evidence that the statement was true. (2) That the disease which confined the assured was contracted before the policy was issued. This there was evidence to negative. (3) That the proofs of illness furnished the company did not notify it of illness by which the assured was necessarily and continuously confined to the house and therein regularly attended by a physician; but, on the contrary, the illness was according to the proofs furnished defendant a non-confining illness and one which the policy provides should be compensated for at the rate of \$7 per month. It appears that the preliminary proof named "heart disease" and the final proof stated "heart disease and paralysis." The sufficiency of the proofs as being such as the policy contemplated was waived by defendant in passing on the final proof, not finding fault with the same, but directing a settlement upon the basis of a nonconfining sickness, claiming that the proof indicated that this was the case. There was no evidence to show that neither heart disease nor paralysis was a nonconfining illness in support of this plea, and this is a matter not the subject of judicial cognizance. In none of the pleas is any mention of the clause "h" or of "paralysis." The question, as before stated, is whether or not defendant was entitled to the benefit of testimony that the disease was paralysis, not having pleaded it. On this subject the decisions have not been uniform. The cases of Insurance Co. v. Troy Ass'n, 77 Tex. 225, 13 S. W. 980, and Insurance Co. v. Boren, 83 Tex. 97, 18 S. W. 484, would sustain the right; but the principle of these opinions is against the weight of authority and has not been adhered to. See Insurance Co. v. Rivers, 9 Tex. Civ. App. 177, 28 S. W. 452; Insurance Co. v. Watt (Tex. Civ. App.) 39 S. W. 200 (writ of error denied); Casualty Company v. Jennings (Tex.

The petition was based upon the general clause in the policy as for a confining disease, and the proof sustained this. The judgment, so far as the plaintiff's pleading and the proof were concerned, is sustainable. The only just objection we perceive to the judgment is that the court ignored the fact that the disease was paralysis, but under the authorities we are constrained to hold that it was correctly ignored.

Affirmed.

SAUNDERS v. ALVIDO & LASERRE et al
(Court of Civil Appeals of Texas. Nov. 19, 1908.)

1. INTOXICATING LIQUORS (§ 297*)—CIVIL DAMAGE LAWS—PERSONS ENTITLED TO SUIT—"PERSON AGGRIEVED."

Under Sayles' Ann. Civ. St. 1897, art. 3390, authorizing suit on a liquor dealer's bond by the person aggrieved by its breach, an action for the unlawful sale of liquor to a minor may be brought by the sister of the minor where the mother of such minor died when he was very young, and the minor was left by the mother with the request to the sister that she take care of and raise him, and gave the possession and custody of the minor to the sister, the father being a drunkard and without a home, and disqualified to care for and raise the minor, and the sister assumed the care and support of the minor and in all respects cared for him as his mother; she being a person aggrieved within the meaning of the statute.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 432-434; Dec. Dig. § 297.*]

For other definitions, see Words and Phrases, vol. 1, pp. 273-278; vol. 8, pp. 7569, 7570.]

2. PARENT AND CHILD (§ 15*)—PERSONS IN LOCO PARENTIS.

The rights and duties of one standing in loco parentis are the same as those of the parent, and any cause of action accruing to a parent by reason of such relationship will under similar circumstances, accrue to one standing in loco parentis.

[Ed. Note.—For other cases, see Parent and Child, Dec. Dig. § 15.*]

3. INTOXICATING LIQUORS (§ 306*)—CIVIL DAMAGE LAWS—PLEADING.

In an action on a liquor dealer's bond to recover for the unlawful sale of liquor to a minor, plaintiff alleged that she was the sister of the minor; that the mother died when he was very young; that at the time of her death the father of the minor was alive, but a drunkard without a home, and incapable of taking care of and raising the said minor; that the mother just preceding her death gave to the plaintiff the custody of the minor, and requested her to take him and adopt him into plaintiff's family, and to rear, manage, and control him until he reached his majority; that she took said minor and cared for him, and assumed all the responsibilities and duties of a parent toward him, and provided for him such educational advantages as was within her power, and has had at all times since taking him into her care the management and control of his actions. Held, that the petition showed both a moral and legal obligation on the plaintiff to maintain, control,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

fact that he has acquired the habit of drinking strong and intoxicating drinks, such habit having been largely acquired in defendant's place of business; and having squandered his earnings, as well as moneys given and furnished him by plaintiff in the place run and operated by defendants as herein alleged, the said minor has thereby and by reason thereof entailed upon plaintiff great additional burdens and expense, anxiety, worry, and annoyance."

The statute under which this suit is brought has been often construed by our courts, and the meaning of the term "person aggrieved," as used in said statute to designate those upon whom the right of action is conferred, has been declared to be any person whose legal rights have been invaded by the breach of the bond provided for in the statute. In the case of *Peavy v. Goss*, 90 Tex. 80, 37 S. W. 317, it is held by our Supreme Court that the parent or person standing in loco parentis has the right to maintain an action under this statute for the unlawful sale of liquor to a minor. It is true that in the case cited the plaintiff was the parent of the minor, and it was unnecessary in the decision of the question presented to hold that one standing in loco parentis would have the same right as the parent, but, under the construction given the statute that the right to sue was conferred upon any person whose legal rights were invaded by the alleged breach of the bond, it necessarily follows that a person standing in loco parentis would have the same right as a parent to maintain a suit of this character. The rights and duties of one standing in loco parentis seem to have been uniformly held by the courts to be the same as those of the parent, and any cause of action accruing to a parent by reason of such relationship would under similar circumstances accrue to one standing in loco parentis. *Schrimbs v. Settegast*, 38 Tex. 302; *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 304; *Whitaker v. Warren*, 60 N. H. 20, 49 Am. Rep. 302; 17 Am. & Eng. Ency. of Law (1st Ed.) 342. The allegations of the petition before set out show that the plaintiff has stood in the place of both father and mother to the orphaned minor, Orion Hill, since the death of his parents; that she has maintained, nurtured, and provided for him as her own child since his infancy, and they have at all times stood to each other in the relation of parent and child. Under these facts, it is the duty of plaintiff to look after the moral training of said minor, and she has the legal right to keep him away from temptation. This legal right of plaintiff was invaded if, as alleged in the petition, appellees sold liquor to said minor in violation of law, and such invasion

aggrieved."

We do not think this holding is in conflict with the decision in the case of *Choate v. Vilha et al.*, 40 Tex. Civ. App. 588, 89 S. W. 1082. In that case the court in effect finds that the allegations of the petition do not show that the plaintiff was in loco parentis to the minor to whom the liquor was alleged to have been unlawfully sold. The court says: "The petition does not allege that the plaintiff has adopted the minor, or that he has in any wise obligated himself for the minor's support, maintenance, or education. In fact, for aught that appears in the petition, all that plaintiff has done for the minor may have been done for an adequate consideration furnished by the minor or someone else; or the custody, control, and maintenance of the minor, which he alleges he has had for four years, may have been voluntary on his part, and does not necessarily confer upon him the legal right to control the actions of the minor." It is, we think, perfectly clear that this conclusion cannot be reached from the allegations of the petition in this case. We think the allegations of the petition above set out show both a moral and legal obligation on the part of plaintiff to maintain, control, and care for the minor just as his parents would be required to do if they were living, and from this obligation the reciprocal right to maintain an action for injury to said minor arises.

From the language in the next to the concluding paragraph in the opinion in the case last cited the court seems to clearly recognize that the right of action in cases of this character is not restricted to the natural parent and the legal guardian or person who has legally adopted the minor, but inures to one who "by contract or otherwise has the legal right to control his actions."

It follows from these conclusions that the judgment of the court below should be reversed and the cause remanded; and it has been so ordered.

TEXAS & G. RY. CO. v. PATE (Court of Civil Appeals of Texas, Nov. 12, 1908.)

1. PLEADING (§ 204*)—GENERAL DEMURRER—PETITION ALLEGING CAUSE OF ACTION IN ALTERNATIVE.

If a petition consist of a general allegation of facts relied on, followed by a specific allegation elaborating the same matter, it would be demurrable if the specific allegations be insufficient, under the rule that, if general and specific allegations as to the same matter are combined, the general will be controlled by the specific allegations, but where a petition states such facts affirmatively, and without qualification, as if proven would establish absolute liability of a railroad under the existing

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

ough insufficiently, to state facts showing injury to the animal resulting from negligent operation of the train, the two issues being distinct and not involving the same proof, the action as a whole would not be demurrable cause of insufficiency of the second issue presented.

Ed. Note.—For other cases, see Pleading, *1st* Dig. §§ 486-490; *Dec.* Dig. § 204.*]

APPEAL AND ERROR (§ 1040*)—REVIEW—HARMLESS ERROR—ERROR CURED BY REFUSAL TO SUBMIT ISSUE.

Where the court overruled exceptions to issue presented by the petition, its subsequent refusal to submit the issue cured any error in its previous ruling.

Ed. Note.—For other cases, see Appeal and Error, *Dec.* Dig. § 1040.*]

RAILROADS (§ 447*)—ACTIONS FOR INJURIES TO ANIMALS—INSTRUCTIONS.

In an action against a railroad for killing an animal, a charge which in effect required the jury to find before plaintiff could recover, that an animal was killed by the locomotive or cars of defendant by striking the animal, and that the right of way was not fenced in at the time defendant was not objectionable as authoring recovery whether the animal was struck by the locomotive or not.

Ed. Note.—For other cases, see Railroads, *1st* Dig. § 447.*]

APPEAL AND ERROR (§ 1066*)—REVIEW—INSTRUCTIONS.

If the charge confined the finding as to the place to the place where the animal was found dead, defendant could not complain there, where it had neither alleged nor proved that it had fenced its right of way.

Ed. Note.—For other cases, see Appeal and Error, *Dec.* Dig. § 1066.*]

RAILROADS (§ 448*)—ACTIONS FOR INJURIES TO ANIMALS—EVIDENCE.

In an action against a railroad company for killing an animal, evidence held sufficient to go to the jury, though only circumstantial.

Ed. Note.—For other cases, see Railroads, *1st* Dig. § 448.*]

Appeal from Panola County Court; J. H. Long, Judge.

Action by A. D. Pate against the Texas Gulf Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Young & Stinchcomb and H. N. Nelson, for appellant. Brooke & Woolworth, for appellee.

LEVY, J. By his pleading the appellee claimed that his certain mule of the value of \$150 was struck and killed by the locomotive of the appellant company. The case was properly before the county court on appeal. In accordance with the verdict of a jury, judgment was rendered in favor of the appellee.

By its first assignment of error the appellant complains of the overruling of the general demurrer to the pleading of the appellee. The allegations in the pleading could properly be construed as being the intendment to make, first, a general allegation of the facts alleged on, and then following it with a special allegation elaborating the same matter,

demurrable as being within the rule that if general and specific allegations as to the same matter are combined the general will be referred to, construed, and controlled by the specific, and will be insufficient if the specific allegations are insufficient. But the intendment of the pleading would not, in our opinion, justify such construction. The effect of the allegations by proper interpretation is to seek a recovery against the appellant company for the value of the mule killed, either in statutory liability, or negligence in the operation of the locomotive, as the evidence might develop the facts to be. The averments, as will be seen, firstly, stated such facts, if proven, as would establish absolute liability under the statute, and were plead affirmatively and without qualification; and, secondly, endeavored, though insufficiently, to state such a state of facts as would show injury to the mule resulting from negligent operation of the train. The first state of facts averred for recovery is not legally dependent upon nor constituted in negligent operation of the train, but regardless of such negligence. The issues that would be thus presented would be distinct issues, and not involved in the same matter of proof. If it were proven in the case that the mule was killed by the cars of appellant and the line of railway was not fenced in, then appellee would be authorized to recover the value of the mule. If, however, the mule was killed by the cars of appellant and the evidence were to show that the line of railway was fenced, then, before recovery would be authorized to the appellee, there must be the further proof of negligent operation of the cars causing the injury. It follows that the liability of appellant in the case might be decreed upon either state of facts as proven, if either ground be sufficiently stated in the pleading. The first ground, being affirmatively and positively pleaded, would not fall under the demurrer to the second ground, because of the fact that the second ground was not sufficiently pleaded. It is suggestive to quote the language employed in the opinion in the case of *Floyd v. Patterson*, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787: "We also think that our system of pleading permits a plaintiff, who is doubtful about the particular facts which he can establish, to plead in the alternative, without rendering his pleading demurrable for inconsistency or multifariousness." In the case of *Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1000, the court, in passing upon an assignment involving a ruling upon a general demurrer, uses this language: "Courts sit to try causes upon positive averments, and not to hear and determine issues presented by allegations which affirmatively show that the pleader is in doubt as to the truth of the matter alleged. An exception exists

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The second assignment is to overruling exceptions to the pleading. The exceptions were directed to the "second" ground set out in the petition and we think it was subject to the exceptions made. But the court refused to instruct the jury upon this "second" ground as a liability to appellant and submitted only the state of facts pleaded in the first averment. If the right result on the exceptions was reached when the court refused to instruct the jury, it substantially met the previous erroneous ruling of the court in respect thereto, and operated to remove any injury to the appellant on which a reversal could be predicated.

By the third assignment it is contended that the charge, as complained of, authorized a recovery irrespective of whether the mule was struck by the locomotive or not. The charge, construed as a whole, requires the jury to find, before they could return a verdict for appellee, that the mule was "killed by the locomotive or cars of defendant company by striking said mule," and, further, that the right of way was not fenced in at the time by the appellant company. The charge might be subject to the criticism that it confined the finding as to the fencing to be "at the place where the mule was found dead." But in the absence of any contention on the part of appellant made by pleading and proof that it had fenced in its right of way, an objection to the charge in this latter respect could not avail.

The fourth and last assignment of error urged is to the refusal to give a peremptory instruction to find for the appellant. While the evidence offered to support and sustain a finding by the jury that appellant's locomotive struck and fatally injured the mule rested in circumstantial evidence, it was reasonably sufficient and cogent enough to require the trial court to pass the issue to the jury for a decision. The court did not err. The case was ordered affirmed.

SANDERS v. MILLER.

(Court of Civil Appeals of Texas. Nov. 19, 1908.)

1. NUISANCE (§ 4*)—ACTIONABLE NUISANCE.

It is not enough to give plaintiff a cause of action for damages that his premises are depreciated in value as unsightly or undesirable by defendant digging near them, on his own premises, a large open excavation for surface water.

[Ed. Note.—For other cases, see Nuisance, Dec. Dig. § 4.*]

2. NUISANCE (§ 4*)—EXCAVATION FOR SURFACE WATER.

The mere construction of a large excavation for surface water on defendant's premises

sect pests having been produced.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 80; Dec. Dig. § 4.*]

3. NUISANCE (§ 50*)—ABATABLE NUISANCE—DAMAGES.

Even if an excavation for surface water on defendant's premises near plaintiff's residence is a nuisance as liable to produce unhealthy conditions, it is an abatable nuisance, the pool not being for a public use, so that plaintiff cannot recover, as for a permanent injury, the depreciation in the market value of his property, but only any damages to date.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 126; Dec. Dig. § 50.*]

Appeal from District Court, Bowle County; Hon. P. A. Turner, Judge.

Action by G. G. Miller against W. W. Sanders. Judgment for plaintiff. Defendant appeals. Reversed and rendered.

Smelser & Vaughan and M. L. Harkey, for appellant. Hart, Mahaffey & Thomas, for appellee.

HODGES, J. The appellee filed this suit in the court below, seeking to recover the sum of \$1,000 which he claimed as damages resulting from the depreciation in the value of his homestead by reason of the digging of a pool near it by the appellant. It appears from the testimony that the appellant, Sanders, owned a lot consisting of about six or eight acres on the opposite side of a street, in the town of De Kalb, from a lot owned by the appellee and upon which the latter resided. Some time during the month of September, 1907, Sanders dug a pool upon his premises, making it about 30 feet by 60 or 70 feet, and the depth is variously estimated at from 3 to 6 feet. According to measurements, the pool is within 42 feet of the residence of the appellee, but wholly upon the land of the appellant. The case was tried before a jury, and a verdict rendered in favor of the appellee, assessing his damages at \$250, and judgment entered accordingly. In his charge to the jury the court instructed that the measure of damages, if any, would be the difference between the value of the appellee's property before the construction of the pool and immediately afterwards. There are various assignments of error in the record, complaining both of the judgment of the court and of the charge presented on the measure of damages.

The testimony shows that suit was instituted after the pool was completed, but before any water had collected in it. It also shows that at the time of the trial there had been some water collected in the pool, but it had disappeared either by evaporation or absorption, and the pool was then nothing more than a dry tank. In the lot, a short distance from the pool, was the barn of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thus explains an actionable nuisance: "Anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights." In *Burditt v. Swenson*, 17 Tex. 489, 67 Am. Dec. 665, our Supreme Court discusses the definition of nuisance, and adopts the following: "To constitute a nuisance it is not necessary that the annoyance should be of a character to endanger health. It is sufficient if it occasions what is offensive to the senses and which renders the enjoyment of life and property uncomfortable. Even that which does but cause a well-founded apprehension of danger may be a nuisance." As an illustration of what may be termed "sufficient to cause a well-founded apprehension of danger," the court refers to the case of *Cheatham v. Shearon*, 1 Swan (Tenn.) 213, 55 Am. Dec. 734, where it was held that a powder house located in a city, and containing stored therein large quantities of gunpowder, constituted a nuisance. In *Joyce on Nuisances* it is said: "The unauthorized or unreasonable use of, or the neglect of properly and reasonable using, one's own property, to the detriment, hurt, annoyance, discomfort, injury, or damage of another in his property or legal rights, or of the public, is a nuisance. A use made by one of his own property which works an irreparable injury to another's property, or which deprives his neighbor of the reasonable and comfortable enjoyment and use of his property, or which violates the unwritten but accepted law of decency, or which endangers or renders insecure the life and health of his neighbor, is a nuisance." *Joyce on Law of Nuisances*, § 11. Again, in section 19, the same author says: "It is difficult to define just what degree of injurious annoyance must be reached in order to warrant the court in determining what circumstances constitute a nuisance. A mere tendency to injury is not sufficient. There must be something actually appreciable which of itself arrests the attention, that rests not merely in theory, but strikes the common sense of the ordinary citizen. The determination, however, of the question rests in sound judgment, and depends upon common sense in each case. So in a New Jersey case the court said: 'But the question remains: What degree of discomfort is necessary to constitute a nuisance? It is clear that everything that renders the air a little less pure, or is to any extent disagreeable, is not necessarily a nuisance. The word "uncomfortable" is not precise; in fact, no precise definition can be given. Each case must be judged by itself. If property cannot be enjoyed unless the health is endangered thereby, a nuisance exists.'" The authority referred to to sustain the proposition announced in the last sentence is *Campbell v. Seaman*, a New York case, found in 63 N. Y. 568, 20 Am. Rep. 567. That was an ac-

property by reason of offensive gases and smoke emanating from a burning brick kiln. It appears to be a well-considered case, and a large number of authorities are reviewed by the court in reaching a conclusion. In discussing the use which one person may make of his property regardless of its effect upon the rights of his neighbor the court said: "But every person is bound to make a reasonable use of his property, so as to occasion no unnecessary damage or annoyance to his neighbor. If he makes an unreasonable, unwarrantable, or unlawful use, so as to produce material annoyance, inconvenience, discomfort, or hurt to his neighbor, he will be guilty of a nuisance to his neighbor, and the law will hold him responsible for the consequent damage. As to what is a reasonable use of one's own property cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable, and a nuisance. To constitute a nuisance the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient." Admitting the location by Sanders of the pool in such close proximity to Miller's lot has operated to cause a depreciation in the value of the premises, that fact alone is not sufficient to give a cause of action for damages. It is not every injury to the property of another that creates actionable liability. Before such injury becomes the basis of a cause of action, there must be a substantial invasion of, or interference with, the legal rights of the owner. There must be something more than merely making the premises unsightly or undesirable. *Dunn v. City of Austin*, 77 Tex. 139, 11 S. W. 1125; *H. & W. T. Ry. Co. v. Reasonover*, 36 Tex. Civ. App. 274, 81 S. W. 329; *Van De Vere v. Kansas City*, 107 Mo. 83, 17 S. W. 695, 28 Am. St. Rep. 396; *Trulock v. Merte*, 72 Iowa, 510, 34 N. W. 307; *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490; *Monk v. Packard*, 71 Me. 309, 36 Am. Rep. 315; *McCann v. Strang*, 97 Wis. 551, 72 N. W. 1117; *Lewis on Eminent Domain*, § 236; 2 *Cooley on Torts*, p. 1249; 4 *Sutherland on Damage*, § 1037. In the case first above cited the court says: "Nor will the court interfere when the thing complained of is not in existence, but may be called into existence by threatened acts of the defendant in the exercise in his lawful domination over his property, and it is uncertain, dependent upon circumstances in the future whether it will or not operate injuriously."

The question presented in this case, then, is: Was the mere construction of the pool the creation of a nuisance? That it is not a nuisance per se we think admits of no con-

sance. A pool or stagnant water produced by a railway embankment might be regarded as a permanent nuisance, while one created by excavations made by a private person for private use would not be so considered. If the nuisance here complained of is an abatable one, the plaintiff below would be entitled to recover only such actual damages as he had sustained up to the time of the trial, and not the depreciation in the market value of his property. *Rosenthal v. Railway Co.*, supra; 4 *Waits on Actions and Defenses*, p. 776. The appellee not having alleged any damages except the depreciation in the value of his realty, the judgment in his favor cannot be permitted to stand if we conclude that the pool if a nuisance is an abatable one. An abatable nuisance may be regarded as one which is practically susceptible of being suppressed, or extinguished, or rendered harmless, and whose continued existence is not authorized under the law. It does not necessarily mean that, in order to abate a nuisance, the structure or thing which has caused the injurious results should be destroyed. It may be rendered harmless without resorting to such extremes. *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378. In the case of a nuisance caused by stagnant water whose chief evil consists in affording a breeding place for mosquitoes, the occasional application of some known substance which would effectually prevent such results might be all that would be required to abate the nuisance. Or the pool itself might be drained or refilled. The evidence shows that this can be done in this instance with only a few days labor. We have no hesitancy in holding that in the case before us if the pool should develop into a nuisance it is one which may be abated, and therefore the measure of damages submitted by the court was not the proper one. We are also of the opinion that the appellee, not having alleged or proven any actual injuries resulting from the presence of the pool, has not shown any actionable damages which would authorize a judgment in his favor. It is immaterial, in so far as it affects the right to abate a nuisance, that some affirmative action is required on the part of the wrongdoer to accomplish that end. If he has erected a structure, or made an excavation, which has become a nuisance, he may be compelled to remove the one or fill up the other or do some affirmative act which will destroy the unlawful character which the structure or excavation may have assumed. *State v. Goodnight*, 70 Tex. 686, 11 S. W. 119; *G. H. & S. A. Ry. Co. v. Tait*, 63 Tex. 223; *Seguin v. Ireland*, 58 Tex. 183; *Williams v. Davidson*, 43 Tex. 1; *Revell v. People*, 177 Ill. 468, 52 N. E. 1052, 43 L. R. A. 790, 69 Am. St. Rep. 257, and notes; *Nicholson v. Getchell*, 96 Cal. 394, 31 Pac. 265; *Van Bergen v. Van*

1 High on Injunctions, § 804 and note 43; *Jaggard on Torts*, p. 802.

We think, for the reasons stated, that the judgment of the trial court was erroneous, and that the case should be reversed and a judgment here rendered in favor of the appellant. The case is accordingly reversed and rendered.

GULF, O. & S. F. RY. CO. v. MEENTZEN BROS.

(Court of Civil Appeals of Texas. Nov. 25, 1908.)

1. RAILROADS (§ 482*)—FIRES—PRESUMPTION—BURDEN OF PROOF.

Proof that sparks from an engine ignited property along a railroad track establishes a prima facie case of negligence and to defeat a recovery for the loss sustained, the railroad company must show that the engine was provided with the best approved apparatus for arresting sparks, and was properly operated.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1735; Dec. Dig. § 482.*]

2. RAILROADS (§ 482*)—FIRES—EVIDENCE.

That sparks from an engine ignited property along a railroad track may be shown by circumstances such as the passage of a train, sparks issuing from the engine, the ignition in a short time of the property, and its destruction.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1730; Dec. Dig. § 482.*]

3. RAILROADS (§ 480*)—FIRES—PRESUMPTION—EVIDENCE.

To raise a presumption of negligence of a railroad company causing the destruction of property by fire set by its engine, there must be affirmative proof that the fire was caused by sparks from the engine.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1713; Dec. Dig. § 480.*]

4. RAILROADS (§ 482*)—FIRES—NEGLIGENCE—EVIDENCE.

In an action against a railroad company for loss of property by fire alleged to have been set by sparks from an engine, evidence held insufficient to authorize a recovery, in view of the fact that the meager circumstances showing that the fire was set by sparks were overcome by evidence showing freedom from negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1731; Dec. Dig. § 482.*]

5. RAILROADS (§ 482*)—FIRES—ACTION—ISSUES.

Where, in an action against a railroad company for loss of property by fire set by sparks from an engine, the evidence showed that the fire began outside of the railroad right of way, whether combustible matter was left on the right of way was not in issue.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 482.*]

6. RAILROADS (§ 457*)—FIRES—OBLIGATION OF EMPLOYEES TO ASSIST IN ARRESTING FIRE.

Employees of a railroad company need not assist in arresting a fire on land adjacent to the railroad right of way unless the company had set the fire.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 457.*]

Appeal from District Court, Jefferson County; L. B. Hightower, Judge.

Action by Meentzen Bros. against the Gulf,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

All the witnesses swore that they had never known a spark from an oil-burning engine to reach the ground.

It is the law in Texas in cases of this character that, when sparks from an engine ignite property along the track, a presumption of negligence arises, and the injured party is authorized to recover for the resulting damages, unless the presumption of negligence is removed by the railroad company. In other words, proof of ignition of the property by sparks from a locomotive makes a prima facie case of negligence which must be rebutted by the railway company. In the case of *Railway v. Levine*, 87 Tex. 437, 29 S. W. 466, the Supreme Court states that, when proof is made of property being destroyed by fire started by sparks from an engine, the injured party should recover, "unless the railroad company shall prove that its engine was provided with the best approved apparatus for arresting sparks and preventing their escape, and properly operated." The basis upon which the foregoing proposition rests, however, is proof that the fire was caused by sparks from an engine. In cases of fires along railway tracks, it is seldom that the sparks are seen to fall upon the grass or other combustible material, and naturally circumstantial evidence must usually be depended upon to make out a case. Usually those circumstances are the passage of a train, smoke, or sparks, or both issuing from the engine, the ignition in a short time of the property and its destruction. In this case, however, the whole evidence is to the effect that an engine passed; no smoke or sparks shown to have been emitted; nothing but a high wind; the grass on fire a few minutes after the engine passed; the spread of the fire, and destruction of property.

It is said by the Supreme Court in *Railway v. Timmermann*, 61 Tex. 660: "The general rule may be fairly stated to be under the present state of the authorities that where the property is destroyed by fire along or near the railroad track, if it be affirmatively shown as a matter of fact that the fire did actually occur from sparks of fire emitted from the locomotive engine, then the burden, after such affirmative proof is made, rests on the railroad company to show that there was in fact no negligence on its part in causing the fire." In order to raise a presumption of negligence, there must be affirmative proof of the burning by the railroad company. There was no attempt to show that no one passed near the field just before or at the time of the fire, although it appears that there was a public road along the railroad very near the point at which the fire originated. One of the appellees swore that the public road was right where

ing. It does not appear that the engine was going up hill or laboring at the time so as to cause the emission of sparks. No evidence was adduced showing other fires had occurred in the vicinity, or, for that matter, anywhere along the line. Nothing appears but the bare facts that a train passed, and shortly afterwards the grass was on fire. There is authority, however, to the effect that the finding of fire near the track in a short time after a train passed is sufficient to throw the burden upon the railway company of showing that its engine did not start the fire, or, if it did, the company was not guilty of negligence. *Railway v. Coombs*, 76 Ark. 132, 88 S. W. 595; *Railway v. Dawson*, 77 Ark. 434, 92 S. W. 27; *Railway v. De Busk*, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. Rep. 221. This case of meager circumstances was met by uncontroverted evidence that sparks from oil-burning locomotives never ignited grass, that they never reached the ground in a live or burning state, and that it was utterly impossible for grass to be ignited by sparks from an oil-burning locomotive at a distance of fifty feet from the track. In addition, it was shown that the engine was being properly operated and was equipped with all the latest approved appliances used on oil-burning engines, and that such engines were much safer than coal-burning engines with the most approved spark arresters. The fire was shown to have begun outside of the right of way on appellees' land, and there could be no issue as to whether or not combustible matter was left on the right of way of appellant. The attacks on the charge of the court cannot be sustained.

The employees of appellant, even though they heard the cries for help made by appellees, and knew of the existence of the fire, were under no obligation which bound appellant to assist in arresting the fire, unless it appeared that appellant's engine had set fire to the property. *Railway v. Platzer*, 73 Tex. 117, 11 S. W. 160, 3 L. R. A. 639, 15 Am. St. Rep. 771. The evidence clearly showed that most of the damage occurred before the sectionmen passed and the fire was then at least 500 feet from the railroad.

Because the great preponderance of the evidence is against the verdict of the jury, the judgment is reversed, and the cause remanded.

FAIN et al. v. NELMS et al.

(Court of Civil Appeals of Texas. Nov. 4, 1908. On Rehearing, Nov. 26, 1908.)

1. IMPROVEMENTS (§ 4*)—RIGHTS TO COMPENSATION—PURCHASER IN GOOD FAITH.

The owner of land having authorized D. to make sales of it, or prospective purchasers hav-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Survey located [such a distance] from Elkhart—fifty dollars.” Dick testified that as a rule the land company did not give local agencies, but that he secured their agency in this county and sold about 3,000 acres for them, and that it was the practice of the company to draw its own deeds, which are delivered at a certain bank in Austin, and the money due thereon is remitted there and that the company have the land surveyed and field notes made before the deeds are signed. On October 10, 1902, Dick and O'Connor wrote Nelms: “The agent for the land you bought here has returned, but the superintendent of the company is expected every day. The deed cannot be made until he returns. We will advise you as soon as the president arrives.” Dick with the surveyor, Young, went to the land, and, in company with Nelms, the land was surveyed out for Nelms by Young, but the line given Nelms for his land extended over on the Frost track 12.01 acres. This is the land in question. Nelms, believing this to be a part of what he was to get by his purchase, and relying upon said survey, went upon the 12.01 acres and made improvements upon it, and lived upon it until this suit was brought. There was a conflict in the evidence as to when Nelms went into possession of it, but there was ample testimony showing he did so very soon after the survey and more than 12 months before this action was brought. There was also testimony that the trade made with Dick was carried out, and he received a deed for the International & Great Northern land from parties to whom the New York & Texas Land Company had conveyed it substantially in accordance with the terms upon which he and Dick had agreed, and evidently in pursuance of such agreement. The company, it seems, made a conveyance of the land by field notes including the 12.01 acres to W. F. Woodward in August, 1903, and on November 7, 1903, Woodward conveyed to John Hood, who had in June, 1903, by agreement with Nelms of that date, conveyed the land to Nelms. This suit was brought in April, 1904.

We are of opinion that the several propositions (except the last one mentioned above) cannot be sustained. The owner of the International & Great Northern survey had authorized Dick to make sales, and, at least, parties desiring to purchase its lands had reason to believe that he was so authorized. Either one of these views of the evidence was sufficient to constitute one dealing with Dick a purchaser in good faith. The receipt given by him evidenced the transaction, and was under the circumstances a writing sufficient to warrant Nelms in entertaining the belief that he had secured the land; i. e., the International & Great Northern survey. By a survey made by a surveyor who, the testimony showed, was competent and of

of that survey. That he relied upon this land being a part of his purchase, and in such belief and reliance, so induced, moved upon it, improved it, and lived upon it with his family, is supported by testimony; also that he moved upon it more than 12 months prior to the filing of the suit. This was sufficient, as far as good faith was concerned, to support his plea, unless he should be confined in his plea to land that was in fact within the International & Great Northern survey, and was incapable under a writing calling for the International & Great Northern survey to become an improver in good faith of land situated in another survey. In *Butts v. Caffall*, 24 S. W. 380, this court held: “If he [the defendant] was not negligent in ascertaining the correct boundary of the property claimed and exercised due diligence, such as a reasonably prudent and careful man would under like circumstances, to ascertain the location of his premises, and after the use of such care and diligence was mistaken as to its location, and if, while laboring under such mistake, he constructed his improvements on appellant's land, honestly believing it to be his own, he should be allowed to recover their value”—citing several cases. See, also, *Gilley v. Williams* (Tex. Civ. App.) 43 S. W. 1094. For the above reasons the several propositions cannot be sustained.

But the last of the above propositions (the third) appears to be well taken. There was no testimony that is pointed out to us by appellee, and none that we have found, which goes to show the value of the land as it was improved. There was evidence of what the land would be worth without improvements, but none as to its value as improved. It is true the value of the improvements was testified to, but it was held in *McCown v. McCafferty*, 14 Tex. Civ. App. 77, 36 S. W. 517, that this was not sufficient. This seems to be right. The jury could not be expected, from evidence of the value of the improvements alone, to arrive at how much the value of the land was enhanced by the improvements. Failure to introduce this proof was fatal to a submission of the plea, and the court should, for this reason, have given the peremptory instruction asked. And it is the duty of this court not to remand the cause merely for the purpose of giving defendants opportunity to supply the proof, which ought to have been made at the trial; but to render the proper judgment under the evidence as it stood. We see no indication in the record that the failure to make the proof necessary to warrant the submission of the plea was due to any action of the court. For the propriety of this action we refer to *Eldson v. Reeder* (Tex. Sup.) 105 S. W. 1113; *Baggett v. Sheppard* (Tex. Civ. App.) 110 S. W. 952; *Henne & Meyer v. Moultrie*, 97 Tex. 216, 77 S. W. 607.

the woods and cut all the timber out of the way of the house, and hewed my sills out of timber that was there. I also cut out some sleepers. I cut out the studding from small pines there on the land." No evidence was introduced as to the value of the timber and material used in making the improvements. The above is from appellants' statement under the third proposition. The assignment complains of the refusal of a charge to the effect that Nelms could not be allowed the value of said timber in estimating his improvements, and that, unless he had proved the value of the improvements, exclusive of the value of any timber taken from the premises, to find for plaintiffs. The cutting of timber on the land was damage to the land or waste which under the terms of the statute relating to improvements is authorized to be found separately, and under the charge the jury found it separately. The assignment could not be sustained.

The letters complained of by the fifth, sixth, and seventh assignments were admissible upon the issue of defendant's good faith.

The first assignment of error complains of defendant's being allowed to open and conclude the argument. As under the agreement the issues were reduced to the one of improvements in good faith, and the burden of proof at the trial was upon the defendants, the action of the court was in accordance with Sayles' Ann. Civ. St. 1897, art. 1299.

The fourth assignment of error which complains of the argument of counsel it is deemed unnecessary to discuss in view of the reversal; likewise the eighth, which complains of excess in the verdict.

For the error indicated in the discussion of the second assignment, the judgment with reference to improvements is reversed and set aside, and judgment absolute in favor of plaintiffs for the land rendered by this court.

Reversed and rendered.

On Rehearing.

Upon further consideration, we have come to the conclusion that the judgment against defendant on his plea of improvements should not have been rendered by this court. We adhere to the ruling that, without some proof relative to the value of the land as enhanced by the improvements, the jury were apparently unable to determine such value. Proof of the value of the land and proof of the value or cost of the improvements alone are not enough to enable the jury to fix the enhanced value of the land by reason of the improvements. The land may or may not be enhanced to the extent of the value of the improvements. It may be that the market value of the land is not enhanced any by the improvements upon it. Circumstances or other testimony should be shown that would

The question that concerns us, however, is whether defendant's failure to introduce some evidence relative to that subject entitles him to have the plea of improvements adjudged against him, when the matter was submitted to the jury, and they have found that in good faith he has improvements of value upon the land. The verdict was in favor of defendant on the substantial facts entitling defendant to his improvements; the only defect being in the proof upon the subject of the extent of the allowance to which he was entitled. The statute (article 1027) reads: "When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except where it is necessary that some matter of fact be ascertained, or the damage to be assessed, or the matter to be decreed, is uncertain, in either of which cases the cause shall be remanded for a new trial in the court below." Now, it appears to us that a judgment rendered against defendant on the entire plea would be contrary to what the jury have found upon ample pleading and evidence to sustain it, viz., that defendant has in good faith and in proper time made valuable improvements upon the land, it is fairly evident that defendant is entitled upon that finding to an allowance in some sum in respect to those improvements. The question is only what sum. That sum cannot properly be determined upon the record, although the court and jury undertook to determine it. We think that, under the circumstances, our duty is to carry into effect the verdict which entitled the defendant to his improvements, and which is a verdict for defendant on the substantial elements of his plea, and being unable to say that the proper sum was the sum found, or that it can be ascertained from the record, we conclude that the cause should be remanded to have the fact properly ascertained.

There being no dispute as to title, and the sole issue in this case being the plea of improvements, a proper disposition of the case here is to reverse the judgment and remand the cause.

Motion granted and judgment reversed and cause remanded.

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KISSINGER et al. v. HAY et al.

(Court of Civil Appeals of Texas. Nov. 14, 1908.
Rehearing Dismissed Dec. 5, 1908.)

1. LICENSES (§ 6*)—ORDINANCES—VALIDITY— AUTHORITY OF MUNICIPALITY.

An ordinance imposing a license fee on hackmen, and prohibiting the use of certain streets for hack stands between designated hours, prohibits the standing of such vehicles on the designated streets, but does not render owners of vehicles liable to prosecution for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

regulate stands for the vehicles, and to prevent the incumbering of streets.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 6.*]

2. LICENSES (§ 7*)—ORDINANCES—VALIDITY—AUTHORITY OF MUNICIPALITY.

An ordinance, prohibiting the use of streets by hackmen for the purpose of a public stand without obtaining a permit therefor and paying a license fee, reserving to municipal authorities the right to grant licenses to such persons as they deem proper, is not void on the ground that it gives the municipal authorities the discretion to say who shall and who shall not have permits.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 7.*]

3. MUNICIPAL CORPORATIONS (§ 121*)—ORDINANCES—VALIDITY—PERSON ENTITLED TO QUESTION.

One who has not been refused a permit under an ordinance, prohibiting the use by hackmen of the streets for a public stand without first obtaining a permit and paying a license fee, cannot urge the invalidity of the ordinance, because discretion is conferred on municipal authorities to say who shall and who shall not have permits.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 121.*]

4. MUNICIPAL CORPORATIONS (§ 121*)—ORDINANCES—VALIDITY—AUTHORITY OF MUNICIPALITY.

A person whose permit, granted under a municipal ordinance prohibiting the use by hackmen of streets for a public stand without obtaining a permit therefor and paying a license fee, has not been revoked cannot urge the invalidity of the ordinance because discretion is given to municipal authorities to revoke a permit for a violation of the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 121.*]

5. LICENSES (§ 7*)—ORDINANCES—VALIDITY—REASONABLENESS OF FEE.

An ordinance imposing an annual license fee on hackmen of \$2.50 for each vehicle drawn by one horse, and \$5 for each vehicle drawn by two horses, and for each motor vehicle, does not impose an unreasonable license tax.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 15; Dec. Dig. § 7.*]

6. LICENSES (§ 7*)—ORDINANCES—VALIDITY—DOUBLE TAXATION.

An ordinance imposing an annual license tax, on hackmen of from \$2.50 to \$5 for each vehicle is not invalid as double taxation.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 14; Dec. Dig. § 7.*]

7. INJUNCTION (§ 105*)—ENFORCEMENT OF MUNICIPAL ORDINANCES—CRIMINAL PROSECUTION—ADEQUACY OF REMEDIES.

Ordinarily an injunction will not lie to restrain a criminal prosecution; there being an adequate remedy at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. § 105.*]

8. INJUNCTION (§ 105*)—ENFORCEMENT OF MUNICIPAL ORDINANCES—CRIMINAL PROSECUTION—ADEQUACY OF REMEDIES.

Injunction will not lie to enjoin the enforcement of an ordinance imposing a license fee on hackmen and regulating the use of streets

Appeal from District Court, Dallas County; J. C. Roberts, Judge.

Action by N. Kissinger and others against S. J. Hay and others. From a judgment of dismissal, plaintiffs appeal. Affirmed.

M. M. Parks, J. M. Overstreet, and Ross M. Scott, for appellants. J. J. Collins and J. C. Robertson, for appellees.

RAINEY, C. J. This is an injunction suit brought by appellants to enjoin the board of commissioners of the city of Dallas from the enforcement of an ordinance of said city regulating the standing of move wagons, express wagons, hacks, and other vehicles let for hire upon the streets of said city, and providing a license fee therefor. A temporary injunction was granted. Defendant answered by exceptions, and moved to dissolve, upon a hearing of which the exceptions were sustained, the injunction dissolved, and plaintiffs' cause dismissed, from which this appeal is prosecuted.

Plaintiffs' petition alleged, in substance, that they were threatened to be prosecuted for a violation of the ordinance, and that they would be greatly harrassed, annoyed, and oppressed, and that a multiplicity of prosecutions would follow, at great cost and expense to the appellants; that said ordinance is unconstitutional, unreasonable, and oppressive, and void, because it gives to the board of commissioners the discretion to say who shall and who shall not have a permit under the same, and because it is therefore discriminatory and partial; that the limits contained in the ordinance, and the fines and penalties attached for disobedience of it, are unreasonable, and that the enforcement of the ordinance would amount to the practical confiscation of appellants' property; that said ordinance practically excluded appellants from doing business in the city; that the license fee imposed by the said ordinance upon the appellants was, in effect, double taxation. Section 7, subd. 4, of the charter of Dallas (Sp. Act Leg. 1907, p. 584, c. 71, art. 2), gives to the city the power "to lay out, establish, open, alter, widen, lower, raise, extend, grade, narrow, care for, pave, supervise, maintain and improve streets, alleys, sidewalks, squares, parks, public places and bridges, and to vacate and close the same, and to require the removal from the streets and sidewalks of all obstructions, * * * signs, fruit stands, show cases, and encroachments of every character upon said streets and sidewalks." Section 43, of art. 14, among other powers confers the following: "To license, tax, and regulate draymen, hackmen, omnibus drivers, baggage wagon drivers, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ter county, Ark., its subcontractors Piggot & Prebble employed appellant to work on said railroad. His labor consisted in grading and leveling the roadbed. He received time checks for his individual labor to the amount of \$66.70. He also bought time checks from other laborers to the amount of \$106.03. On the 1st day of July, 1903, he recovered judgment before a justice of the peace in Baxter county against Piggot & Prebble for both amounts, and no part of said judgment has been paid. The object of this action on the part of appellant is to enforce a lien on the railroad of appellee for the payment of said sum of \$66.70 and accrued interest. The chancellor found in favor of appellee, and a judgment was rendered in its favor for costs. The case is here regularly on appeal.

W. S. Chastain, for appellant. T. M. Mehaffy, J. E. Williams, and Horton & South, for appellee.

HART, J. (after stating the facts as above). The chancellor evidently proceeded upon the theory that Piggot & Prebble, the subcontractors, were necessary parties to the action, and that is the question presented to us for determination. In the case of *St. Louis, Iron Mountain & Sou. R. Co. v. Love*, 74 Ark. 528, 86 S. W. 395, the court in construing sections 6661 and 6663 of Kirby's Digest, under which this action is brought, said: "It is clear that, where a contractor or subcontractor is the primary debtor, the suit should be against him to establish the liability and not against the railroad company primarily. They may both be joined in the suit, the contractor so that the debt may be established against him, and the railroad company so that the lien therefor may be adjudged against its property; but it does not follow that a personal judgment must be rendered against the contractor before a lien can be declared against the railroad company." See, also, *S. B. Luttrell & Co. v. Knoxville, L. & J. R. Co.*, 105 S. W. (Tenn.) 565, and cases cited. In *Jones on Liens*, par. 1303, the rule is stated as follows: "A subcontractor who holds an open, unsettled, or disputed account against the principal contractor should obtain an adjudication of this before seeking to establish a lien against the owner, or at the same time that he seeks to do so. He should either obtain a judgment against the contractor before bringing an action to enforce the lien, or he should make the contractor a party to that action. The burden of ascertaining whether there is any defense to the action ought not to be put upon the owner of the property. He is not presumed to have any knowledge upon the subject. Further than this, if the contractor establishes his lien against the property, and the owner is com-

with an adjudicated claim, and not with a mere open account."

In the present case the railroad company, which is the owner of the property, sought to be reached by the lien, has been furnished with an adjudicated claim. The account between appellant and the subcontractors became res adjudicata by the judgment of the justice of the peace from which no appeal was taken, and that is all that could have been accomplished by making the subcontractors parties to this action. Since the object in making the subcontractors parties to this suit was to fix the liability of appellant against them, and since that had already been established by a judgment of a court of competent jurisdiction, we are of the opinion that the chancellor erred in not enforcing a lien against the railroad of appellee in favor of appellant for the amount sued for; the undisputed evidence showing that it has not been paid.

The decree is therefore reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

GREER et al. v. COOK.

(Supreme Court of Arkansas. Nov. 16, 1908.)

1. INJUNCTION (§ 33*)—SUBJECTS OF RELIEF—SUITS—EVASION OF EXEMPTION LAWS.

When debtor and creditor reside in the same state, the creditor's attempt to evade the exemption laws of that state by suing in a foreign jurisdiction may be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 70; Dec. Dig. § 33.*]

2. VENUE (§ 26*)—RESIDENCE OF PARTIES.

That an attorney to whom part of a claim was assigned for his services in collecting the claim was a resident did not prevent suit in another state, where the original creditor resided.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 40; Dec. Dig. § 26.*]

3. ABATEMENT AND REVIVAL (§ 13*)—PENDENCY—RIGHT TO BRING NEW SUIT.

That suit on a claim was pending within the state did not prevent a new action thereon in another state.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 92; Dec. Dig. § 13.*]

4. INJUNCTION (§ 33*)—VEXATIOUS SUITS—RIGHT TO ENJOIN.

That a creditor sued a resident in a foreign jurisdiction solely to vex and oppress him does not authorize injunction against such suit; the remedy, if any, being at law for malicious abuse of process.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 70; Dec. Dig. § 33.*]

Appeal from Pulaski Chancery Court; Frank H. Dodge, Special Judge.

Action by W. H. Cook against W. L. Greer and another. From a judgment for plaintiff, defendants appeal. Reversed, with directions to dismiss.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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appended.

MCCULLOCH, J. Cook is a railroad locomotive engineer and resides in Pulaski county, Ark., and one Shilling, acting through his agent and attorney, Greer, sued him before a justice of the peace of Pulaski county, for a debt of \$51.32 alleged to be due on open account for goods sold. Judgment was rendered in favor of Shilling for the alleged debt and cost, and afterwards a writ of garnishment was issued on the judgment and served on Cook's employer, the St. Louis, Iron Mountain & Southern Railway Company to seize his wages. He appealed from the judgment of the justice of the peace to the circuit court, and superseded the judgment.

While the case was pending in the circuit court, Shilling and Greer (an interest in the alleged debt having been assigned to the latter in payment for his services as collecting agent) assigned the claim to one Dart at Kansas City, Mo., for the sole purpose of having a new suit brought on the claim in Dart's name in the state of Missouri. The new suit was instituted at Kansas City, including garnishment proceedings against the railway company to seize the same wages of Cook covered by the garnishment in the Arkansas suit. Cook then instituted the present action in equity to enjoin the further prosecution of the Missouri action, alleging that it was being prosecuted in another state for the purpose of defeating his right of exemptions as a resident of the state of Arkansas. He also alleged in his complaint that he did not owe the alleged debt. The chancellor granted a perpetual injunction as prayed for, and also rendered a decree in Cook's favor for the sum of \$75 damages found to have been sustained on account of the wrongful prosecution of the Missouri action. Shilling and Dart, being nonresidents of the state, were not made parties to the suit; Greer and the railroad company being the only defendants. It seems to be well established by authority that, when a debtor and creditor are resident of the same state, an attempt of the latter to evade the exemption laws of the state of their domicile by bringing suit in another state may be enjoined by a chancery court. *Griffith v. Langsdale*, 53 Ark. 71, 13 S. W. 733, 22 Am. St. Rep. 182; *Note to Rader v. Stubblefield*, 10 Am. & Eng. Ann. Cas. p. 26. And the same doctrine is often extended so as to prevent other evasions of the laws of the state of the domicile of the parties. But this court in the case above cited expressly limited the application of the rule to suits between parties residing in the same state, and refused to enjoin a resident of another state from suing in that state a citizen of this state, even though the effect of it was to prevent the latter from getting the benefit of his exemptions.

suit sought to be enjoined, nor does the proof show definitely where they reside, but it does show that Shilling, the original creditor, is not a resident of the state of Arkansas. He may have been a resident of the state of Missouri for aught the record discloses. It was the duty of appellee to allege and prove facts sufficient to entitle him to the relief sought, and, having failed to do so, the relief must be denied. It is true that Greer, to whom an interest in the debt alleged to be due from appellee had been assigned as compensation for his services in collecting it, resided in this state, but, as his co-creditor resided in another state, they had the right to bring another action there to collect the debt.

The fact that an action was first instituted and was pending here, when the new action was commenced in Missouri, does not alter the case. Whether or not the bringing of a new action in a foreign jurisdiction operates as an abatement of the action here we need not decide. The result turns upon the right of the creditor to bring his action in another state without being open to the charge of having fraudulently evaded the laws of this state, and, if he had the right, in the first instance, to sue in another state, the fact that he had already instituted suit here does not cut off that right. The fact that the creditor instituted the suit in a foreign jurisdiction for the sole purpose of vexation and oppression does not authorize the interposition of a court of equity by injunction. The remedy, if any, is at law for the malicious abuse of process. *Baxley v. Laster*, 82 Ark. 236, 101 S. W. 755, 10 L. R. A. (N. S.) 983, 118 Am. St. Rep. 64. The case of *Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 545, which is relied on by appellee to sustain the decree, has no application, for there the court of equity in this state had assumed jurisdiction of all the parties and the subject-matter of the litigation on other well-established grounds of equity jurisdiction, and, as an incident to the proper adjudication of the matters involved, enjoined one of the parties from prosecuting a suit in Tennessee involving the same issues. The injunction was granted at the instance of cross-complainants and this court approved it on the ground that, inasmuch as all of the necessary parties were not before the Tennessee court, complete relief could not be given them. No such state of facts exists in the present case. Here the jurisdiction of the chancery court was invoked for the sole purpose of granting an injunction to stop the prosecution of an action at law in a foreign jurisdiction.

We are clearly of the opinion that no grounds are shown for equitable interference, and the decree is therefore reversed, with directions to dismiss the complaint.

2. Defendant asked, and the court refused to give, an instruction telling the jury that the state had failed to show that the statement made by the defendant was material, and that they must acquit the defendant. The evidence is undisputed that Mallory was on trial charged with the crime of arson, and the state, to sustain this charge, introduced the defendant, who swore he saw him set fire to and burn the house charged in the indictment at the time and place therein mentioned. There is the testimony of two witnesses, and some circumstances in addition thereto, that this testimony was false. There was no other testimony on the subject. Chief Justice English said: "When there is no dispute about the facts sworn to, the question whether the testimony on which perjury is assigned is material is a question of law, to be decided by the court, and not of fact, to be passed on by the jury." *Nelson v. State*, 32 Ark. 192. The court left it to the jury to say whether the testimony was material or not; and, in view of the evidence just outlined, there could be no other finding than that it was material, but it would have been within the province of the court to have told the jury that the evidence was material. Certainly there is no prejudicial error in refusing to direct a verdict because the state did not introduce testimony to prove that alleged perjured testimony was material when it went to the very gist of the case, and was shown by the undisputed evidence in the case.

Finding no error in the case, the judgment is affirmed.

MATHY v. MATHY.

(Supreme Court of Arkansas. Nov. 2, 1908.
On Rehearing, Nov. 30, 1908.)

1. DIVORCE (§ 49*)—RECONCILIATION—CONDONATION.

Where a husband and wife met and confessed their past offenses to each other, and each forgave the other and resumed the marriage relation, they thereby condoned all past causes for divorce.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 172, 174, 176, 178; Dec. Dig. § 49.*]

2. HUSBAND AND WIFE (§ 48*)—CONVEYANCE BY WIFE TO HUSBAND—EFFECT.

A conveyance by a wife to her husband passes only the equitable title; the legal title remaining in her.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 242; Dec. Dig. § 48.*]

3. DEEDS (§ 193*)—CONVEYANCE BY WIFE TO HUSBAND—INVALIDITY—PRESUMPTION—BURDEN OF PROOF.

Because of the confidential relation existing between husband and wife, a conveyance by the wife to the husband may be attended with a presumption against its validity for undue influence and will be closely scrutinized; the burden being on the husband to establish that it

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 589; Dec. Dig. § 193.*]

4. DIVORCE (§ 249*)—DISPOSITION OF PROPERTY—RESTORATION TO WIFE—LIEN.

Where a wife during her marriage conveyed property to her husband and he removed incumbrances therefrom, paid insurance, taxes, fixed charges and made permanent improvements, after divorce for her fault, the husband's equitable title should only be divested, and the property vested absolutely in the wife on her repaying the amounts so invested by him, with interest, less the net amount of rents which he received therefrom.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 706, 709; Dec. Dig. § 249.*]

Appeal from Garland Chancery Court; Alphonzo Curl, Chancellor.

Action by Della J. Mathy against Joseph Mathy, in which defendant filed a cross-bill. From a judgment denying relief to either party, defendant appeals. Reversed and remanded, with directions.

C. V. Teague, for appellant. S. W. Leslie, M. S. Cobb, and Wood & Henderson, for appellee.

HART, J. Della J. Mathy instituted an action for divorce against Joseph Mathy in the chancery court of Garland county on the 19th day of April, 1906, and the case is here on appeal.

The complaint alleges a marriage on May 3, 1885, in Chicago, Ill., a residence in Arkansas for the statutory period required for divorce, and for cause of divorce assigns cruel treatment and personal indignities. She prays for alimony, attorney's fees, and for general relief. On May 23, 1906, Joseph Mathy answered, admitting the marriage and residence in the state of Arkansas, but denies all the other material allegations of the complaint. On May 30, 1906, he filed his cross-complaint, alleging that appellee had been guilty of adultery with divers persons named in his cross-complaint. On June 9, 1906, appellee answered the cross-complaint. She denied adultery on her part, and charged appellant with adultery with various women named by her in her amended bill. Subsequently several amendments were made to the pleadings, which consisted in additional charges of adultery by each and a denial of the charges by the other. The chancellor found both parties equally at fault, and therefore rendered a decree dismissing both the complaint and the cross-complaint for want of equity. A large amount of testimony was taken on each side. On account of the vulgar details, we will refrain from making an abstract of the testimony. Besides, it would serve no useful purpose. A careful examination of the evidence leads us to conclude that, whatever may have been the sins of each against the marriage vows, about the beginning of the year 1905 they confessed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

For the reasons given, the decree must be reversed and the cause remanded, with directions to enter a decree in accordance with this opinion. The chancellor may, if he deem it necessary, give leave to either party to introduce further evidence in regard to the amounts expended by appellant and the rents received by him on the Magnolia Hotel property.

On Rehearing.

The original opinion in this case will be so amended as to allow appellant all amounts expended by him in clearing the title and removing incumbrances from the property, insurance, taxes, and fixed charges against it paid by him, and all permanent improvements, if any, made by him, with the legal rate of interest from date of payment if the same be shown in an equitable accounting to be just charges. These amounts should be credited by the net amount of rents received by him.

In all other respects the motion for rehearing is denied.

HAMITER v. BROWN.

(Supreme Court of Arkansas. Nov. 16, 1908.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT.

The Supreme Court will not interfere with a finding by the jury on conflicting testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. BILLS AND NOTES (§ 350*)—BONA FIDE PURCHASERS—PRE-EXISTING DEBT—"DUE COURSE OF BUSINESS"—"HOLDER FOR VALUE."

One who takes negotiable paper in payment of an antecedent debt before maturity and without notice, actual or otherwise, of any defect, receives it "in due course of business," and becomes, within the meaning of commercial law, "a holder for value."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 924-936; Dec. Dig. § 359.*]

For other definitions, see Words and Phrases, vol. 3, p. 2223; vol. 4, p. 3320.]

3. BILLS AND NOTES (§ 371*)—BONA FIDE PURCHASERS—DEFENSES—ACCOMMODATION PAPER.

A bona fide holder for value of accommodation paper taken in due course of business may enforce it against the makers although he knew when he received it that one of them was an accommodation surety.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 964; Dec. Dig. § 371.*]

4. APPEAL AND ERROR (§ 1033*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

A party cannot complain of instructions which are too favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.*]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Leslie T. Brown against J. H.

Dan W. Jones, for appellant. E. M. Merriam, for appellee.

McCULLOCH, J. This is an action instituted by appellee on three negotiable promissory notes executed to him by appellant as one of the joint makers with W. T. Tucker and T. H. Davis. Appellant and Davis signed the notes as joint makers, but were in fact only accommodation sureties for Tucker, which fact was known to appellee when he accepted the notes. Tucker was indebted to appellee for a sum of money collected as attorney for the latter, and appellee testified that the notes were delivered to him in satisfaction of the debt. Tucker admitted that he was indebted to appellee for money collected as the latter's attorney, but denied that the notes were delivered in satisfaction of this debt. He testified that he delivered the notes to appellee for the latter to use as collateral in borrowing money, and that he represented to appellant, when he requested him to sign as surety, that the notes were to be used only for that purpose. Appellant also testified that he signed the notes upon said representations made to him by Tucker that the same were for appellee's use as collateral in borrowing money. Appellee did not negotiate the notes, but kept them until maturity, and afterwards instituted this action on them.

There is no dispute in the evidence as to these representations being made by Tucker to appellant to induce him to sign the notes, and, as the verdict of the jury has settled in appellee's favor the conflict between his testimony and Tucker's as to the purpose for which the notes were delivered, we must treat it as settled that the notes were put into circulation by Tucker for a purpose not in accordance with his representations to appellant when he obtained the latter's signature. Appellant, then, has made out a defense, except as against a bona fide holder of the notes for value. Can appellee, who accepted the notes in payment of an antecedent indebtedness from Tucker, the principal, claim as an innocent holder for value? This court has answered that question in the affirmative. *Tabor v. Merchants' National Bank*, 43 Ark. 454, 3 S. W. 805, 3 Am. St. Rep. 241. In that case the court held that "one who takes negotiable paper in payment of an antecedent debt before maturity and without notice, actual or otherwise, of any defect thereto, receives it in due course of business, and becomes, within the meaning of commercial law, a holder for value." The fact that appellee knew when he received the notes that appellant was an accommodation surety does not affect his right to recover. *Evans v. Speer Hardware Co.*, 65 Ark. 204.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. TRIAL (§ 11*)—CAUSES FOR PARTICULAR DOCKETS—EQUITABLE DEFENSES.

Defendants' answer in an action on notes states no equitable defense, and so does not entitle them to a transfer to equity, execution of the notes being admitted, and the answer merely averring that it is impossible for defendants to state, owing to the large number of transactions between the parties, the calculations of interest on various notes, various offsets, and appropriations of collateral to various notes, just what amount is due on the notes sued on; this being a mere invitation to have an accounting to ascertain whether or not there is a defense, and nothing appearing that could not be ascertained in a court of law without an equitable accounting.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 29; Dec. Dig. § 11.*]

2. CORPORATIONS (§ 123*)—STOCK—TRANSFERS—RECORDING.

Kirby's Dig. § 849, requiring the recording of transfers of stock, does not apply to transfers for collateral security, but only to actual sales.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491; Dec. Dig. § 123.*]

3. CORPORATIONS (§ 123*)—STOCK—TRANSFER—TRANSFER ON BOOKS.

Kirby's Dig. § 853, requiring stock of a corporation to be transferred on its books as it shall provide, does not invalidate, as between the parties, a transfer of stock as collateral by delivery of the certificates, without notice to the corporation or transfer on its books.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491; Dec. Dig. § 123.*]

4. CORPORATIONS (§ 123*)—STOCK—SUCCESSIVE TRANSFERS AS COLLATERAL—DUTY TO RECORD.

Where stock was transferred as collateral, first by W. to defendant, and then by defendant to plaintiff, any neglect in not having the transfer from W. to defendant recorded was that of defendant, so that plaintiff is not liable to defendant for loss of the stock on account thereof through W.'s selling it.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 123.*]

5. CORPORATIONS (§ 123*)—CORPORATE STOCK—TRANSFER AS COLLATERAL—NEGLECT OF PLEDGEE—PLEADING.

The answer in an action on notes, alleging that W. transferred stock to defendant as collateral, and that defendant then transferred it to plaintiff as collateral, that plaintiff neglected to have the transfers recorded or transferred on the books of the corporation; that plaintiff, then and long afterwards knowing W. was insolvent, permitted him to sell and dispose of the stock; that it was plaintiff's duty to use ordinary diligence to preserve the collateral, but it failed to have the collateral recorded or transferred as required by law, or to realize on or protect it; and that but for the negligence of plaintiff, as herein stated, said stock would have been protected, appropriated, and applied on the notes—merely charges negligence, in that the stock was lost by plaintiff not having its assignment recorded and transferred on the corporation's books, and not that plaintiff turned the stock over to W. and by such surrender permitted him to sell it, which would have been a conversion.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 123.*]

Mere delay of plaintiff in enforcing collateral securities given it by defendant does not relieve defendant of liability, or make plaintiff liable for loss of the security.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 78; Dec. Dig. § 30.*]

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by the German National Bank against Joseph Loeb and another. Judgment for plaintiff. Defendants appeal. Affirmed.

On the 30th of April, 1906, the German National Bank brought suit against Joseph Loeb and Helen Loeb for a balance upon two promissory notes. On November 5, 1906, the defendants filed an answer and counterclaim. On March 15, 1907, the plaintiff filed a reply to the counterclaim, and on March 28, 1907, the defendant filed a motion to transfer to equity, which was as follows, to wit: "Defendants state that beginning in September, 1899, they borrowed money up to and including July, 1903, from the plaintiff; that from time to time during said period they executed to plaintiff about 75 notes, ranging in amount of from \$500 to \$12,000; that said notes were usually made payable from 30 to 120 days, and were discounted at the bank of said plaintiff by said defendants at the time of their execution, which notes were generally renewed from time to time during said period; that as many as 15 or 20 notes were so made and renewed during each year covering said period; that the average amount borrowed or renewed each year amounted to about \$20,000, or an aggregate of approximately \$90,000; that during said period they also indorsed notes at said bank for other parties to the amount approximately of from \$65,000 to \$75,000; that to secure said amounts, including the notes sued upon herein, and the indorsements made by them, they deposited with said bank from time to time certain collateral security, ranging in amounts from \$15,000 to \$25,000; that at all times during said period there was always a surplus of several thousand dollars in value of collateral in excess of the amount defendants were indebted to said plaintiff; that at various times during said period collateral so deposited were realized upon by said bank, and the amounts collected thereon was applied to the payment of the various notes and interest executed by defendants; that it is impossible for defendants to state, owing to the large number of transactions between the parties, the calculations of interest on the various notes, the various offsets, and appropriations of collateral to the various notes, just what amount is now due, if any, by said defendants upon the notes sued upon herein; that by reason of various loans, withdrawals, sales by the said Joseph and Helen Wolf of the 460 shares of stock in the Little Rock Building Association and the Ladies' Build-

the track out of danger until the moment he suddenly started across, when he was instantly warned and struck before he could jump aside, and where there was nothing to indicate any infirmity preventing him from seeing the approaching train.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.*]

4. RAILROADS (§ 327*)—CROSSINGS—DUTY OF PEDESTRIAN.

Generally it is negligence for one approaching a railroad crossing to fail to look and listen for approaching trains.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

5. RAILROADS (§ 350*)—CROSSINGS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether one struck by a backing train at a public crossing was guilty of contributory negligence held, under the evidence, a jury question.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1166-1189; Dec. Dig. § 350.*]

Appeal from Circuit Court, Union County; Geo. W. Hays, Judge.

Action by D. Gill Russell against the Little Rock & Monroe Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

T. M. Mehaffy and J. E. Williams, for appellant. W. E. Patterson, for appellee.

HART, J. D. Gill Russell brought this suit in the Union circuit court against the Little Rock & Monroe Railway Company to recover damages which he alleges he sustained by reason of the defendant negligently backing its train over him while he was crossing its railroad tracks at a public crossing in Huttig, Ark. The defendant answered, denying the material allegations of the complaint, and alleged contributory negligence on the part of the plaintiff.

Russell, the plaintiff, testified substantially as follows: "I am 66 years old, and live at Felsenthal, Union county, Ark. I am an attorney at law. On the 28th day of August, 1906, I was at Huttig, in said county, and, desiring to go to Farmerville, I went to the depot for the purpose of taking one of defendant's trains to that place. While at the depot, the Monroe train came in, going north. I got tired of waiting for my train, and crossed over to the east side of the main track, intending to go to a neighbor's to borrow a horse to ride to Farmerville. I walked south on a towpath along the side of the main track towards a public crossing. When I got near the crossing, I turned around to see if the track was clear. I looked north and south, and did not see anything to interfere. The south-bound train was late. I knew that the rules and regulations of the railway company prescribed that trains on schedule time had the right of way, and also that north-bound trains had the right

was standing still. I walked leisurely along to the road crossing, which was about 25 steps distant. The public crossing was about 75 or 100 yards from the depot. When I got there, without looking back, I started across the track. As soon as I stepped on the track, some one hallooed 'Look out.' I looked up, and did not have time to jump to either side. I threw up my hands as the train carried me under. There was a man on the back end of the platform, but he looked like he did not know what to do. The train was backing rapidly, and wasn't making any noise. The train crew did not give me any warning, and, if they had rung the bell or blown the whistle, I would have heard it. I had a piece of cotton in my ear, but it was placed there loosely, and did not interfere with my hearing. I did not know of the approach of the train until the boy hollowed 'Look out' after I had stepped upon the railroad track. I was walking along the east side of the track because the path on the west side is too near the rails. My injuries were severe and are permanent. The accident happened in daylight." Other testimony was adduced by the plaintiff tending to corroborate his statement. The defendant adduced evidence to establish its defense. The defendant has appealed from a verdict and judgment in favor of the plaintiff.

Counsel for appellant base reversal upon the court giving, over their objection, the following instruction: "(6) The court instructs the jury that if they could find from the testimony that plaintiff was walking on or down defendant's track when the backing train struck and injured him, but that if any of defendant's train crew operating said train saw or could have seen plaintiff's danger in time to apprise him of it, or in time to stop the train after it appeared that plaintiff was in such danger and that from all appearance would not see or hear the train in time to avoid injury, and such trainmen failed to warn plaintiff or to stop the said train, although they may further find that plaintiff was at the time a trespasser on said track, they will find for the plaintiff." This instruction was erroneous in telling the jury that, if any of appellant's train crew could have seen appellee's danger in time to apprise him of it and failed to warn him, they should find for appellee, although they might further find that he was at the time a trespasser. It has been repeatedly held by this court that the servants of a railroad company owe a trespasser no duty except to exercise ordinary care, after discovering his perilous position, not to injure him. *St. L. I. M. & Sou. R. Co. v. Raines* (Ark.) 111 S. W. 262; *St. L. I. M. & Sou. R. Co. v. Evans*

ment may on default retake the property, and thereby cancel the debt, or he may sue on the debt, and thereby affirm the sale, in which case he looks to the debtor, and not to the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1438; Dec. Dig. § 479.*]

4. SALES (§ 313*)—SELLER'S LIEN.

A seller's lien can only be created by suit, and only where the personalty is in the buyer's hands, and when it passes from the vendee the right is lost.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 878, 879; Dec. Dig. § 313.*]

5. SALES (§ 313*)—SELLER'S LIEN—WAIVER.

A seller waived the right to pursue the property and create a lien thereon by consenting to a mortgage by the buyer, also, defeating the rights of his transferee, after maturity of the note given for the purchase money, to enforce a lien.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 313.*]

6. SALES (§ 477*)—TITLE RESERVED—WAIVER.

A seller waived a reservation of title, by consenting to a mortgage by the buyer, as to the mortgagee and those claiming under him.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 477.*]

7. TRIAL (§ 333*)—VERDICT—SUFFICIENCY.

In an action on a note and on a guaranty of its payment, a general verdict for plaintiff was not insufficient for not stating the amount of recovery, where the amount was not in dispute.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 784; Dec. Dig. § 333.*]

8. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—INSTRUCTIONS.

Error in instructions, placing too great a burden of proof on plaintiff, is not available to defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4056; Dec. Dig. § 1033.*]

9. APPEAL AND ERROR (§ 1176*)—REVERSAL—NEW TRIAL UNNECESSARY.

Error in directing a verdict for defendants, after a proper verdict for plaintiff, does not require a new trial, and judgment may be ordered on the first verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4589; Dec. Dig. § 1176.*]

Battle, J., dissenting in part.

Appeal from Circuit Court, Howard County; Jas. S. Steel, Judge.

Action by E. M. Bell against W. J. Old and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

In 1902 Old was the owner of a certain printing plant, and sold a half interest in it to Turner for \$400. Turner executed the following note:

"Nashville, Arkansas, July 21, 1902. On or before November 1, 1903, I promise to pay to the order of W. J. Old the sum of four hundred dollars with interest from date until paid at the rate of ten per cent. per annum. This note is given for a part of the purchase money for the following property, one Chandler and Price jobber, one Chandler & Price

type, 200 lbs. of body type and an other fixtures in and now belonging to the Howard County Times office at Nashville, Arkansas. It being hereby expressly agreed and understood by and between the parties hereto that the title to said property shall be and remain in the said W. J. Old, until this note is fully paid, and that in case default is made in the payment of same he is hereby empowered without legal process to sell a sufficiency of said property to pay this note and interest.

"Witness our hands this 21st day of July, 1902. [Signed] H. A. Turner."

Note indorsed: "Transferred to E. M. Bell 1 yr. 5 Mo. 17 ds. 58.53. Credit by work 2-23-04 \$105.59."

Subsequently Turner mortgaged the property to J. B. Hill to secure a loan of \$375. This mortgage was made with the consent of Old, and Old delivered to Hill as additional security the Turner note. The money obtained from Hill was paid to Old. It was agreed, at the time that the Turner note was delivered to Hill, that when Turner paid Hill the mortgage debt, Hill should return the note to Old. When the mortgage became due, instead of paying it, Turner induced the Bank of Ozan to purchase it from Hill. The bank did not know that the Turner note contained a reservation of title, and consented that it be returned to Old, relying entirely upon the mortgage as its security for the note to Hill, which it then purchased. Turner defaulting in the payment of the mortgage note, the Bank of Ozan foreclosed the mortgage, and Hyatt purchased most of the property at the mortgage sale. After the Turner note had been returned to Old, Old entered into negotiations with Bell for the purchase of an undivided one-half interest in a livery stable, and, after pending for some time, a trade was made. Old delivered the Turner note to Bell in part payment of the purchase price of the stable, and, either during the negotiations, or when the sale was consummated—there is a conflict in the evidence upon that point—delivered the following guaranty to Bell:

"Know all men by these presents: That W. J. Old, of Nashville, Arkansas, to whom E. M. Bell has executed a bill of sale to me bearing even date herewith, for an undivided one-half interest in the livery property known as the 'Arkansas Stable,' situated in Nashville, Arkansas, have assigned, transferred, delivered and set over to E. M. Bell a certain promissory note for \$400 with 10 per cent. interest from November 1, 1903, executed July 21, 1902, by H. A. Turner to me, and under term of said note a vendor's lien being reserved on certain printing press, type, and so forth, as described in said note, the transfer of said note being in part consideration of the purchase money for the livery prop-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

upon which verdict judgment was rendered for the defendants, and the plaintiff has appealed.

Sain & Sain, for appellant. W. P. Feazel, for appellees.

HILL, C. J. (after stating the facts as above). This case is a sequel to *Hyatt v. Bell*, 83 Ark. 360, 103 S. W. 748. The material facts in regard to the origin of this litigation may be found therein stated, the other material facts are in the preceding statement. An important matter in this case is the sharp conflict in the evidence as to whether the guaranty was canceled by agreement after its execution. This was submitted to the jury in several instructions. It must be taken, from the verdict returned by the jury under those instructions, that they found in favor of Bell upon that issue. The instructions were erroneous wherein they submitted to the jury the question of an election of remedies growing out of the suit of Bell against Hyatt. There was no election of remedies by virtue of that suit which would preclude Bell from maintaining this suit, and the court should have so instructed the jury as a matter of law, and only left for their determination the question of fact, above indicated, as to whether the guaranty was effective, or whether it had been canceled before the trade for the half interest in the livery stable was consummated.

The principle is well established that a vendor of chattels, who has reserved title until the purchase price is paid may, upon default of payment, retake the property, and thereby cancel the debt, or he may sue to recover the debt, and thereby affirm the sale, in which case he looks to the debtor, and not to the property; in the other case he looks to the property, and not to the debtor. But that principle does not apply here. The Turner note contained a reservation of title. The guaranty erroneously describes it as retaining a vendor's lien upon the printing plant. The two rights are different. A vendor's lien on personal property can only be created by suit, and only when the property is in the hands of the vendee. When it passes out of the hands of the vendee, the right to create a vendor's lien against it is gone. When the title to personal property is reserved, the title does not pass, and the property may be retaken upon default in the payment.

When default was made on the Turner note, which was owned by Bell, the property had passed out of the hands of Turner, having been mortgaged to Hill, which mortgage was purchased from Hill by the Bank of Ozan. This mortgage was made with the consent of Old, and he thereby waived any right to pursue the property and create a

liability on the note. But, as seen, that right did not in fact exist, as the note reserved the title, and not a lien; but his action in consenting to the mortgage of it was equally a waiver of the reservation of the title, in so far as the mortgagee, and those holding under him, were concerned. This action of his in consenting to the mortgage defeated Bell from recovering the property in the suit of *Hyatt v. Bell*. The guaranty by its terms only became effective in the event that the Turner note was not paid, and Bell had "to foreclose and enforce the vendor's lien therein reserved." Therefore, in order to make the guaranty effective, Bell was required to attempt to foreclose and to enforce a vendor's lien. The only action that was open to him was to seek to recover the property in a replevin suit, in order that he might then bring suit to enforce a vendor's lien or maintain his replevin suit upon the reservation of title. Old's action, as heretofore shown, in consenting to the mortgage, defeated that suit. There was no record notice of this conduct, and no showing that Bell had actual knowledge of it when he brought that suit. It was a fact developed in that litigation. To permit him now to defeat Bell's suit on the guaranty, on account of Bell having brought this necessary suit in order to hold the guaranty, would be to enable him to profit by his own act in derogation of Bell's rights, and to which Bell was not a party. The terms of the guaranty having required him to pursue this remedy, although the remedy may be erroneously described in it, before it became effective, required Bell to pursue the only course open to him; that is, to seek to recover the property. And now that he has exhausted that remedy, then the terms of the guaranty bring into being his remedy upon it, and he should be entitled to recover upon it. The jury has settled the only open question in the case—that is, whether the guaranty was canceled or effective—and having decided the latter, then it was the duty of the court to have entered judgment upon the verdict first rendered by the jury.

It is objected that said verdict is insufficient to render judgment upon it, because the amount of recovery is not therein stated. This amount is undisputed. The face of the note and the guaranty show that the principal was \$400 with interest. There was a credit upon the note of \$105.59. There was an allegation in the complaint, which was not denied in either answer, that the plaintiff had expended for costs \$60 in his suit with Hyatt. The amount being undisputed, the court should have directed it inserted in the verdict, or rendered judgment upon the verdict as it stood for the undisputed amount.

The court committed two errors: First, in giving the instructions which he did, at the

that she looked after the household and performed such duties as are usually done by the housewife or mistress of the house. Upon the death of John O'Neill, the said Annie gave directions for the obsequies, selected a lot in the cemetery for the burial, selected a casket, and attended the funeral."

The evidence sustains this finding of facts.

And the court declared the law of the case as follows:

"Upon the facts found, the court declares as matters of law:

"I. Prior to August 27, 1904, there was an impediment to the marriage of John O'Neill and Annie Lewis, consisting of the fact that the said John had a living wife from whom he was not divorced, and could not enter into a valid contract of marriage with the said Annie Lewis.

"II. Subsequent to the rendition of the decree for divorce August 27, 1904, the said John O'Neill and Annie Lewis continued to live together, just as they had for years prior thereto; there being no evidence that their relations were changed after this date of divorce. The court holds that their continuing to live together as husband and wife, holding themselves out as such, establishing a home, and other facts detailed by the evidence, are not sufficient evidence of a contract of marriage entered into between them, either before or subsequent to August 27, 1904. Except their living together and holding themselves out as man and wife as aforesaid, no contract of marriage existed between said parties.

"III. The claimant, Annie Lewis, is not entitled to dower and homestead in the property in controversy, under the laws of the state."

Assuming, without deciding, that marriages according to the common law are valid in this state, we find that there is no evidence before us that appellant and John O'Neill contracted such marriage, or any other marriage.

In *Darling v. Dent*, 82 Ark. 76, 82, 100 S. W. 747, this court said: "While it is true that, if it be shown that the relations between Darling and Mrs. Williams were illicit in the beginning, the burden is upon those asserting a valid marriage agreement to show that such an agreement was afterwards entered into, still there is no presumption that the relationship continued to be illicit. It is a matter of proof, and not of presumption, whether the relationship continued to be illicit, or whether it was changed to a legal or moral status." In this case there was no evidence that Annie and John O'Neill entered into any present agreement to take each other for husband and wife after he was divorced from a former wife on the 27th of

then continued cohabitation after the divorce does not prove that they changed their intent, which was to live together without being married. The concomitants of their illicit relations are not sufficient, by their unasserted probative force, to prove that when they were at liberty to marry they embraced the opportunity. As Chief Justice Beasley said of such evidence, in *Collins v. Voorhees*, 47 N. J. Eq. 315, 20 Atl. 676, 14 L. R. A. 364, 24 Am. St. Rep. 412: "To treat evidence which was in all respects and to the utmost degree in accord with the original purpose as proving, *proprio vigore*, a change of such purpose, appears to be not only inadmissible according to the legal rules, but as being in logic ridiculous." *Collins v. Voorhees*, 47 N. J. Eq. 315, 20 Atl. 412, 14 L. R. A. 364, 24 Am. St. Rep. 412, and note; *Harbeck v. Harbeck*, 102 N. Y. 714, 7 N. E. 408; *Ferrall v. Boardway*, 95 N. C. 551; *Jones v. Jones*, 45 Md. 144.

Judgment affirmed.

LE GRAND v. STATE.

(Supreme Court of Arkansas. Nov. 23, 1908.)

1. CRIMINAL LAW (§ 614*)—CONTINUANCE—DISCRETION OF TRIAL COURT—ABSENT WITNESSES.

In a bigamy prosecution, where a continuance was granted at the February term to enable accused to secure witnesses in another county, and subpoenas were issued in January for such witnesses and mailed to the sheriff of such county, but no returns were made thereto, the refusal of a subsequent continuance, requested at the third day of the August term, was not an abuse of the trial court's discretion, where it was not shown that the facts to be proved by the absent witnesses could not be proved otherwise, or why such witnesses had not attended, other than the failure to make return to the subpoenas, and no reason was shown for expecting to secure the witnesses in future.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 614.*]

2. CRIMINAL LAW (§ 1134*)—APPEAL—REVIEW—QUESTIONS CONSIDERED.

In a bigamy prosecution, where accused's marriage was proved by other competent evidence, it was unnecessary to determine on appeal whether his wife's testimony was competent for that purpose.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1134.*]

3. BIGAMY (§ 9*)—EVIDENCE—PREVIOUS MARRIAGE—ADMISSIBILITY.

In a bigamy prosecution, testimony by the sister of accused's wife that they were married while visiting witness, and told her about it an hour afterward, and that accused said they were married, as did witness' sister in accused's presence, and that they lived together in that locality, was competent to prove the previous marriage.

[Ed. Note.—For other cases, see Bigamy, Cent. Dig. §§ 42, 43; Dec. Dig. § 9.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. **APPEAL AND ERROR (§ 232*)—OBJECTIONS BELOW—SUFFICIENCY.**

An objection to "the reading from the first paragraph of the answer" and the statement of the proposed proof on that point is too general to justify review, where the paragraph, though stricken out before trial, contained some matter which could properly be proved.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 232.*]

2. **EMINENT DOMAIN (§ 133*)—CONDEMNATION PROCEEDINGS—FIXTURES.**

Where plaintiff was seeking to condemn certain lots and not the improvements, a statement by the court that, if the improvements were a part of the realty as defendant contended, they must also be condemned, otherwise the improvements were not condemned and might be removed, was proper.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 358; Dec. Dig. § 133.*]

3. **FIXTURES (§ 7*)—INTENT—EVIDENCE.**

Where defendant constructed buildings for a planing mill on certain lots, and the machinery was securely fastened to the buildings and a basement constructed in which it rested, and defendant intending to use the mill as long as he lived and afterwards turn it over to his sons, the buildings and machinery constituted fixtures.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 7-13; Dec. Dig. § 7.*]

4. **EMINENT DOMAIN (§ 262*)—REVIEW—INSTRUCTIONS—PREJUDICE.**

Where, in a condemnation proceeding, the evidence was undisputed that machinery and buildings on the land condemned were a part of the realty, an instruction that, if the buildings on the land constituted a manufacturing plant with such machinery therein as was necessary to carry on the business, the jury should find for defendant the value of the land, buildings, and machinery, while inaccurate, was not prejudicial to plaintiff.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 686; Dec. Dig. § 262.*]

5. **EMINENT DOMAIN (§ 262*)—REVIEW—INSTRUCTIONS—PREJUDICE.**

In a condemnation proceeding, a statement in an instruction that to sell real estate at its market value sometimes requires effort and negotiation for some weeks and even for some months, while objectionable as abstract, was without prejudice.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 686; Dec. Dig. § 262.*]

6. **EMINENT DOMAIN (§ 87*)—PERSONAL PROPERTY—DAMAGES—EXPENSE OF REMOVAL.**

In proceedings to condemn land, damages to personal property or the expense of removing it are not proper elements of damage.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 232; Dec. Dig. § 87.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Condemnation proceedings by the Kansas City Southern Railway Company against D. A. Anderson. From a judgment awarding defendant less damages than he demanded, both parties appeal. Affirmed.

S. W. Moore and Read & McDonough, for appellant. Ira D. Oglesby, for appellee.

son. The defendant answered in several paragraphs. Only parts of it are material on this appeal. He alleged that the property was occupied and used by him as a manufacturing plant, for the manufacture of finished lumber and mill products, and as a planing mill and lumber yard, upon which was located and used in said business valuable machinery; that the property had a peculiar value as a site for such business. He alleged that the total value of his property sought to be taken was \$18,000, and that, after purchasing said land for a manufacturing site, it was essential, in order to use the same to better advantage, that he should erect necessary and suitable buildings and place therein necessary machinery, all of which was done; that the buildings were erected and machinery placed therein and attached thereto, not to be removed therefrom, but as a permanent plant, and with the intent and purpose that same should remain and become a permanent accession to the freehold. He also alleged that at the time the petition was filed he had a large stock of lumber to be manufactured into dressed and finished lumber, and that said stock could not be used or sold in its present condition without great damage and loss, and that to remove it to a new location would cost him \$900, and without being manufactured he would suffer great loss upon it. He prayed for special damages in the sum of \$800 as a fair and reasonable cost and expense of moving the same. The issues went to a jury, and under directions of the court to make special findings they returned a verdict for \$12,000, dividing it as follows: \$6,000 for the lots, \$2,800 for the machinery, and \$3,200 for the buildings on the lots. Upon this verdict the court rendered judgment for \$12,000, and the railroad company has appealed.

1. The first error assigned is in defendant's counsel reading to the jury from the first paragraph of the answer. This paragraph had been stricken out by the court prior to the trial. It contained many matters irrelevant to the issues, but contained allegations of other matters which might have been competent testimony. The record merely shows this: "Counsel for the plaintiff objected to counsel for the defendant reading from the first paragraph of the answer in this case and making a statement of the proof purposed to be introduced upon that point. Objection overruled by the court, and plaintiff excepted." If any part of the paragraph stricken out contained any matter which would be proper to prove, then this record shows no error, because it does not show what part he read from or made a statement of the proof purposed to be introduced under it. There are allegations in it which might not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to by appellee's counsel at the bar, and there may be others not prejudicial. If it had been certain other irrelevant matters in the stricken out paragraph, certainly it would have been improper for counsel to have read them or offered to have proved them. This exception fails to lay its finger on the error.

2. The defendant offered evidence as to the character of the machinery and improvements on the property tending to show that the same were intended to be permanent. This was objected to by the plaintiff and the court said: "You are seeking to condemn these two lots and not the improvements. If the improvements are a part of the realty, you condemn them; and, if they are not a part of the realty, you do not condemn them, and they may be moved off." This was a correct statement of the case, and the court then properly permitted evidence to develop whether the machinery was an irremovable fixture or personalty. It was shown that the building was built for the purpose of installing this machinery for a planing mill, and for this purpose exclusively; that good machinery was put in and securely fastened to the buildings, and a basement was constructed in which it rested; that it was built in this manner for the purpose of attaching it permanently to the soil, and that Anderson intended to continue in this business at this place as long as he lived, and afterwards to turn it over to his boys if they wanted it. There was testimony from him and his son as to the manner of construction, all tending to show that it was intended from its nature and character to be a permanent accession to the freehold. This was all the testimony upon the point, and the court gave this instruction: "If the jury find that the buildings on the land constitute a manufacturing plant with such machinery therein as is necessary to carry on the business of the plant, you will find for defendant the value of the land, buildings, and machinery." This cannot be commended as an accurate statement of the proposition, but, in view of the undisputed evidence, it cannot have been prejudicial to the appellant. Under the undisputed testimony, the machinery became a part of the realty under the tests applied in *Choate v. Kimball*, 56 Ark. 55, 19 S. W. 108, and in *Ozark v. Adams*, 73 Ark. 227, 83 S. W. 920. As said in those cases, "the intention of the permanency in the installation of the machinery is what fixes its character as an irremovable fixture"; and this intention is "inferred from the nature of the article affixed, the relation and situation of the party making the annexation, * * * the structure and mode of annexation, and the purpose or use for which the annexation has been made."

3. The court gave this instruction: "The rule by which you are to be governed in determining the value of the property taken is the highest price which it would bring

ability and the occasion to buy are willing to pay. This does not mean the price that could be realized at forced sale upon short notice, but the price that could be obtained after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property. To sell real estate at its market value sometimes requires effort and negotiation for some weeks and even for some months." This is almost literally the words used by the court in *Little Rock Junction Ry. Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51. Objection is made to the last paragraph, wherein the court stated that "to sell real estate at its market value sometimes requires offer and negotiation for some weeks, and even for some months." This was but stating a well-known fact of which the courts have long taken cognizance, because it is common knowledge. It would be better not to have these abstract statements in instructions; but the court fails to see where any prejudice could have resulted from it.

4. Other questions are presented which largely go to the admission of testimony. Some of these are not properly abstracted so that they are brought for review, and others become immaterial in view of the undisputed facts as to the machinery being realty, and others unimportant, owing to the subsequent exclusion of some of the claims of the defendant. All the appellant's exceptions have been considered, but none of the others are found of sufficient moment to require discussion.

5. Defendant introduced testimony as to the value of the stock of lumber and other personal property sought to be condemned, and as to its depreciation in value and the cost of removing the same, over the objection of the plaintiff. At the conclusion of the testimony, the court decided to exclude all of this testimony, and did so, and told the jury that the sole question for their consideration was the value of the property sought to be condemned. The defendant excepted to this, and has cross-appealed upon this issue. There are some cases which sustain the appellee's position, and they may be found reviewed in *Blincoe v. Choctaw*, etc., Ry. Co., 16 Okl. 286, 83 Pac. 903, by the Oklahoma territorial Supreme Court (8 Am. & Eng. Ann. Cas. 689); but it will be seen by reference to the editors' notes in the latter report that the majority of the courts hold that compensation cannot be recovered in such cases, either for damages resulting to personal property or for the cost of removing it from the premises. The controlling principle is thus stated by the New Hampshire court: "As the title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires it, the inconvenience and expense incident to the surrender of the possession

Hamlet v. Railroad, 62 N. H. 361. Mr. Lewis thus states the law upon this subject: "Fixtures upon the property taken must be valued and paid for as part of the real estate, and any depreciation in the value of fixtures upon the part not taken is to be taken into consideration, the same as damage to the soil itself. * * * But the damages to personal property, or the expense of removing it from the premises, cannot be considered in estimating the compensation to be paid." 2 Lewis on Eminent Domain (2d Ed.) § 483. Many consequential losses to the landowner, such as injury to business, inconvenience, expense, and losses from interruption of business, are not recoverable as damages in condemnation suits. These may be found discussed in 15 Cyc. 733 et seq. In Hot Springs R. R. Co. v. Williamson, 45 Ark. 429, the court pointed out the difference between the Constitution of this state and some others. The Constitution of this state has broadened the right of the property owner to compensation, and included damage as well as taking and appropriating; and it is not necessary under it that there should be a physical invasion or spoliation of one's land in order to give a right of recovery. But this does not reach to damages to the business of the landowner which are incident to the enforced purchase of his property. These are not subjects for assessment in condemnation proceedings under the weight of authority and the sounder reasoning on the subject. The court was right in excluding this evidence and confining the issues to the damages for the land taken, and this included the machinery which had become irremovably fixed to the freehold.

The judgment is in all things affirmed.

CARPENTER v. CARPENTER.

(Supreme Court of Arkansas. Nov. 23, 1908.)

COVENANTS (§ 102*)—BREACH—WARRANTY—RIGHTS OF COVENANTEE.

That a purchaser of land under a warranty deed was divested of title in a suit by one claiming under a prior title, after notice to the warrantor to appear and defend and after a bona fide defense, shows his right to recover for breach of the warranty.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 157-168; Dec. Dig. § 102.*]

Appeal from Circuit Court, Craighead County; Frank Smith, Judge.

Action by W. A. Carpenter against J. T. Carpenter. From a judgment for plaintiff, defendant appeals. Affirmed.

Allen Hughes and Chas. D. Frierson, for appellant. Lamb & Caraway, for appellee.

HART, J. This is a suit brought by W. A. Carpenter against J. T. Carpenter in the

the complaint alleges that on November 1, 1901, appellant conveyed to appellee the lands in controversy, and in his deed warranted and covenanted that he was the owner in fee simple of said land and had full and lawful right to convey the same; that appellant was not the owner of said land, and had no right, title, or claim thereto, but that Clove Carpenter was the rightful owner; that at the November term, 1905, of the Craighead chancery court for the Eastern district, in a case therein pending wherein Clove Carpenter was plaintiff and the appellee and others were defendants, a decree was rendered by said court, vesting the title to said lands in Clove Carpenter and divesting the title thereto out of the plaintiff. Judgment was prayed for the recovery of the purchase price of the land, \$600, and interest. The answer admitted that the appellant, on November 12, 1901, made to the appellee the deed described in the complaint, with covenants as therein alleged, and that the defendant at the time aforesaid and for a long time prior thereto was and had been the owner in fee simple of the land described in the complaint, was in possession of the same at the time said deed was made, and forthwith delivered said land to the plaintiff; denied that at the date of said conveyance Clove Carpenter was the owner of the land, or had any right, title, or interest therein; admitted that at the November term, 1905, of the Craighead chancery court for the Eastern district, in a cause therein pending wherein Clove Carpenter was plaintiff and W. A. Carpenter and Penelope Carpenter, his wife, and J. C. Hall, as trustee for the New England Security Company, were defendants, a decree was rendered in said court, decreeing the title to said lands to be in said Clove Carpenter, and not in the plaintiff. A jury was waived, and the case was heard by the court sitting as a jury, and upon consideration of the evidence the court gave judgment for the appellee.

W. A. Carpenter testified substantially as follows: "I am a brother of J. T. Carpenter and a cousin to Clove Carpenter. Clove Carpenter is a son of J. W. Carpenter. I paid J. T. Carpenter \$600 for the lands in controversy. Clove Carpenter brought suit against me for the lands, claiming to own them under a prior title. A few days after Clove Carpenter brought suit against me, I met my brother, J. T. Carpenter, and told him about the suit. He told me not to be uneasy; that Clove Carpenter could not get the land, but that, if he did, he would pay every dollar of my money back; that he had frequent conversations with his brother about the conduct of the trial; and that his brother was a witness in the case. The case was determined in favor of Clove Carpenter, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the complaint makes the agreement and plat exhibits.

"On the 30th of May, 1888, Sutcliffe delivered to Fordyce a trust deed to said land. The deed reciting it was made in pursuance of the agreement before mentioned. On July 25, 1889, Sutcliffe conveyed to R. S. Giles all his title, claim, and interest in said land, subject to the contract between Sutcliffe and Fordyce. On the 20th of February, 1889, Giles and wife conveyed to Harr a one-fourth interest in said land, subject to the contract between Sutcliffe and Fordyce. All the deeds were made exhibits to the complaint.

"That on the 9th day of June, 1888, Fordyce, as trustee, conveyed to the Southwestern Improvement Association said tract of land, subject to the terms and conditions of the contract between Sutcliffe and Fordyce. That the defendant has sold and collected for said lots over \$2,000, and has not accounted to plaintiff for his interest therein. The complaint then gives a list of the lots sold by the defendants.

"The complaint then alleges that the defendants have sold fractional parts of said ground in acreage property in violation of the agreement. It then recites the instances of the sales of the acreage property. It is further alleged that for 1 or 2 years the defendants settled with the plaintiff for his part of the land, but that for 15 or 16 years no settlement has been made, although he had a one-fourth interest in the proceeds of the sales.

"The complaint closes with a prayer that the defendants be enjoined from selling any more of the lots, that a master be appointed to state the accounts between the parties, that the remainder of the lots be sold by a commissioner, and that the trust estate be administered and the amount paid to plaintiff that was due him."

Both defendants answered.

On the 30th day of May, 1888, Richard Sutcliffe and his wife conveyed to S. W. Fordyce, trustee, the party of the second part, the N. W. $\frac{1}{4}$ of section 32, township 1 S., range 4 W., to have and to hold, "and all and singular the rights, privileges, appurtenances, immunities, and privileges thereunto belonging or in any wise appertaining, to the said party of the second part, his heirs, successors, and assigns, forever, giving and granting unto said party of the second part, his heirs, successors, and assigns, the absolute right, power, and authority to sell and dispose of the property hereinbefore conveyed as to him may seem best, without restraint or condition, and without the necessity on the part of the purchaser to see to the application of the moneys realized therefrom, except as the application thereof is regulated and controlled by said contract dated January 3, 1888, hereinbefore referred to as the consideration for this deed."

into on the 3d day of January, 1888, by Richard Sutcliffe and S. W. Fordyce. It is in part as follows:

"First. Said Fordyce is to hold said property as trustee for the benefit of said Richard Sutcliffe, his heirs and assigns, to the extent of one half of the whole interest conveyed to him, and for the benefit of said Fordyce and his associates, their heirs and assigns, to the extent of the other half interest so conveyed.

"Second. Said Fordyce is to cause the said property to be platted in convenient shape for a town, with streets and alleys, with a railroad reservation such as is suitable and proper for the convenient handling of the business of said railway at said point, and file in the proper office said plat for record, and do all the same at his own expense, and will also put in a siding and platform where the depot at such town is located as soon as said platting is done as practicable."

The various conveyances of the land specified in the complaint were executed as therein stated.

The court found that there was no equity in plaintiff's complaint, and decreed that upon the payment by defendant into the registry of the court of \$820, admitted by defendant to be due complainant, the complaint would be dismissed for want of equity; and plaintiff appealed.

A part of the land conveyed to Fordyce in trust was sold by the trustee as acreage. Appellant insists that he was without authority to sell in this manner. But we think he was authorized to do so. The deed conveying the land to him gives and grants "to him, his heirs, successors, and assigns, the absolute right, power, and authority to sell and dispose of the property conveyed as to him may seem best, without restraint or condition"; and the agreement, pursuant to which the deed was executed, provides: "Said Fordyce is to cause the said property to be platted in convenient shape for a town, with streets and alleys, with a railroad reservation such as is suitable and proper for the convenient handling of the business of said railway at said point." There is nothing in the deed or agreement prohibiting the trustee from selling by acres, if it should be to the interest of those concerned to do so.

It is next insisted that the property was sold at a sacrifice, and that for that reason the trust should be closed. Upon this subject this court, in *Williams v. Nichols*, 4 Ark. 254, 1 S. W. 243, said: "It is well settled that courts of equity have power to remove trustees for neglect or breach of duty. It is not, however, every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce courts of equity to adopt such a course; but the acts or omissions must be such as to endanger the trust property, or to show want of honesty, or a want

was not in the pleadings and to the evidence to sustain it the defendant had objected; and for that reason the judgment was reversed. *St. L. & S. F. Ry. Co. v. Vaughan*, 84 Ark. 311, 105 S. W. 573. It was held that under the undisputed facts no other cause of action appeared, and this one had been improperly introduced. It must be held that the facts adduced on behalf of the plaintiff were sufficient to make out a charge of negligence. Mr. Hutchinson says: "He must at his peril inform the shipper of the necessary delay, that the shipper may exercise his own discretion as to the propriety of making the shipment." 2 Hutchinson on Carriers, § 496. This principle was applied in *Kansas & Arkansas Valley Ry. Co. v. Ayres*, 63 Ark. 331, 38 S. W. 515. While no negligence can be predicated upon the failure to get out the cattle earlier than they were shipped, yet the facts testified to by the plaintiff show that he was assured before 7 o'clock in the evening that he could get out his cattle right away, when, in fact, no regular train was due to leave until 9:30 the next morning, and no special train could be gotten to him short of eight or nine hours. Upon this he relied, and left his cattle loaded in the cars, instead of taking them out and caring for them during the delay, as he would otherwise have done. The undisputed testimony is that cattle kept loaded in cars standing still will be materially injured by such delay. Especially would this be true on a cold and rainy night in midwinter. There was sufficient evidence to have sent this question to the jury.

2. It is insisted that the third instruction given by the court of its own motion is erroneous, in that it assumes certain facts to constitute negligence when the jury alone, under proper instructions, should determine that. But the instruction, read in the light of the plaintiff's testimony and the undisputed evidence as to the effect of such delay and the long delay necessary to get them out at the time that the assurances were given of getting them out right away, prevent this criticism of the instruction being well founded in this instance. If it be error to assume these facts were negligence per se, that error has been concurred in by the appellant, for the fourth instruction given at its instance in another way and in better form submits the same facts to the jury as a predicate for recovery by the plaintiff if the jury believed such facts to be true.

3. It is urged that the representations of the agent were not the proximate cause of the damage; and it is argued that the evidence shows that the Kansas City Southern yards would not have held more than three cars of cattle, and that the damage could not have been averted had Vaughan known that the cattle would not be carried out right

in a way that would have prevented the injury which they received, and this testimony presented a question for the jury to determine, and was properly submitted upon instructions given at the instance of the appellant.

4. The provision of the contract to the effect that notice in writing must be given of the damages is also invoked; but there was evidence tending to prove a waiver of this clause, and that question was sent to the jury under proper instructions, framed in conformity to the decision in *St. L. I. M. & S. Ry. Co. v. Jacobs*, 70 Ark. 401, 68 S. W. 248.

5. It is insisted that the verdict is excessive. The jury gave \$734, which the court required the plaintiff to remit down to \$600. The limitation of \$16 per head stipulated in the contract is not exceeded by this verdict. According to the plaintiff's testimony, 20 of the cattle were dead and the balance seriously injured and depreciated in value. The difference in value he put at \$872. The jury gave less than the testimony warranted, and the circuit court reduced that amount, for what reason is not shown. The court is unable to see wherein the verdict is excessive. It may be that the testimony was not accurate or truthful; but that was a matter to have been argued before the jury and not elsewhere.

Finding no error in the case, the judgment is affirmed.

On Rehearing.

Appellant's attorneys forcibly reargue the questions disposed of, but after a full consideration of them the court finds no reason for changing the decision or opinion. It is insisted that "the court erred in not upholding that clause in the contract which provided that the plaintiff would waive and release the defendant from any and all liability for or on account of delay in shipping the stock after delivery of the same to the defendant's agent, and from any delay in receiving this stock after tender of delivery, as set forth in the seventh instruction requested by the appellant and refused by the trial court." This contention was not specifically discussed in the opinion, because it was thought that it was necessarily disposed of in the discussion of the other issues. It was held on the former appeal of the case that the railroad company exercised reasonable diligence in furnishing facilities and in transporting the cattle to the destination after delivery to it. Had it been held otherwise, then the question on the contract would have been pertinent. After the reversal of the cause, the complaint was amended so as to allege negligence, in that the station agent induced plaintiff to deliver the cattle to the defendant on the assurance that a train would

state law, or in violation of the state's statute; and he is charged in this indictment for the selling in violation of the state law."

The circuit judge then continued with the following, which is made the subject of the second assignment of error:

"I charge you, gentlemen of the jury, that this certified copy read to you here is a copy of the record showing that a special tax stamp from the federal government has been issued to Walter Bayless, for the period from July 1, 1907, to July 1, 1908. And under the statute read in your hearing the possession of this special tax stamp makes out a prima facie case against the defendant, and without more, under this indictment, if you find this defendant has obtained this special tax stamp privilege from the federal government. Therefore, in face of the fact that he has obtained this special tax stamp, the burden is on him to show that he has not sold liquor under this license, because I charge you that under the statute this is a prima facie case against him, and it shifts the burden upon him to show that he has not violated this statute by selling liquor under this privilege obtained from the government. And I charge you that this is a competent paper to be considered by you, and a copy of such license, or of the record that he had obtained such license."

The act bearing upon the question is chapter 355, page 1079, of the Acts of 1903. Section 1 of this act reads:

"That in a prosecution for a violation of the law prohibiting the sale of intoxicating liquors within four miles of a schoolhouse, commonly known as the 'Four Mile Law,' the fact that defendant has paid the internal revenue special tax as a retail liquor dealer, or is in possession of an internal revenue tax stamp as a retail liquor dealer, shall be prima facie evidence of sales of intoxicating liquors within the meaning of the four mile law, during the time for which he has paid the internal revenue special tax, or that is covered by the internal revenue special tax stamp possessed by him: Provided, revenue license in this act shall not be construed to mean license for use of manufacturers and druggists or others in manufacturing or compounding or otherwise than for use in sales at retail under state law."

It is insisted that our statute upon the subject of admitting certified copies does not cover the case of a certificate of records from the office of the internal revenue collector of the United States.

The sections of the Code upon this subject are found in Shannon's Code, §§ 5573 to 5591, inclusive.

We shall now group such of the sections

records and minutes, criminal records, or other papers belonging to any public office, or, by authority of law, filed to be kept therein, are evidence in all cases."

"Sec. 5576. The term 'records' used in the foregoing section includes any record of any county, common law, circuit, criminal, or chancery court, and, in general, every public record required by law to be kept in any court of this state; and, also, the books of the registers, the surveyors, and the entry takers, throughout the state."

"Sec. 5580. A judicial record of a sister state, or of any of the federal courts of the United States, may be proved by a copy thereof, attested by the clerk, under his seal of office, if he have one, together with a certificate of a judge, chief justice, or presiding magistrate, that the attestation is in due form of law."

"Sec. 5583. The acts of the executive of the United States, or of this state, or any other state of the Union, or of a foreign government, are proved by the records of the state department of the respective governments, or by public documents purporting to have been printed by order of the Legislatures of those governments respectively, or by either branch thereof."

"Sec. 5584. The proceedings of the Legislature of this state, or any other state of the Union, or of the United States, or of any foreign government, are proved by the journals of those bodies respectively, or of either branch thereof, either by copies officially certified by the officer having custody of the originals, or by a copy purporting to have been printed by the order of such Legislature, or either branch thereof."

"Sec. 5588. The certificate of the head of any department or bureau of the general government is a sufficient authentication of any paper or document appertaining or belonging to his office."

None of these sections cover the case of a certificate issued by an internal revenue collector. It is perceived that some of the sections quoted refer to the federal courts, the acts of the executive of the United States, and the legislative department of the United States government, and that the last section refers to the certificate of the head of any department or bureau of the general government. None of these sections are broad enough to cover the certificate we have before us in the present case. The only section to which, by any show of reason, the matter could be referred is the last quoted; but the "collector of internal revenue for the district of Tennessee" is not the head of a department of the general government, and the section does not apply.

The sections of the Code contained in the chapter under which the above sections fall

fault cannot take any advantage of the ruling of the court in favor of the other"; and in *Mobile & B. R. Co. v. Ladd*, 92 Ala. 287, 9 South. 169, it is said: "It is never erroneous to receive irrelevant evidence to rebut evidence of a like kind offered by the other party. *Perkins v. Hayward*, 124 Ind. 449, 24 N. E. 1033, *Sherwood v. Titman*, 55 Pa. 77, and *Fuller v. Vallquette*, 70 Vt. 502, 41 Atl. 579, all agree that, if a party opens the door for the admission of incompetent evidence, he is in no plight to complain that his adversary followed through the door thus opened; and this, although no objection was made in the first instance to the admission of such evidence.

We hold, therefore, that the trial judge committed no error in the matter now complained of; and, the verdict of the jury being amply warranted by the weight of the testimony, the judgment of the court below is affirmed.

CARPENTER v. STATE.

(Supreme Court of Tennessee. Sept. 17, 1908.)

1. INTOXICATING LIQUORS (§ 173*)—OFFENSES—APPLICABILITY OF STATUTES.

Though liquor was sold within a town of not more than 2,000*population, to which the four-mile liquor law, prohibiting the sale of liquor within four miles of a school, applied, the seller could nevertheless be convicted under Acts 1899, p. 309, c. 161, prohibiting the sale of liquor without license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 193; Dec. Dig. § 173.*]

2. INTOXICATING LIQUORS (§ 111*)—OFFENSES—GENERAL AND SPECIAL LAWS.

Special laws prohibiting the sale of liquor in particular subdivisions of the state do not suspend the operation of general laws requiring a license for their sale.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 111.*]

Error to Circuit Court, Fayette County; S. J. Everett, Judge.

Sam Carpenter was convicted of selling intoxicating liquor without a license, and he brings error. Affirmed.

Chas. N. Stainback, for plaintiff in error.
Chas. T. Cates, Jr., Atty. Gen., for the State.

SHIELDS, J. The plaintiff in error, Sam Carpenter, was indicted, tried, and convicted in the circuit court of Fayette county for selling intoxicating liquors in that county without license required by law, in violation of chapter 161, p. 309, of the Acts of 1899, and has brought the case to this court for review.

The evidence sustains the charge that the plaintiff in error did, within 12 months before the finding of the indictment, without

was incorporated after chapter 221, p. 411 of the Acts of 1899, extending the statute commonly known as the "Four-Mile Law" to towns of a population of not more than 2,000, within which class it came, was enacted, and that there was a schoolhouse where a school was kept within four miles of the place where the sale was made.

The contention of the plaintiff in error is that since the four-mile law, prohibiting the sale of intoxicating liquors within four miles of a schoolhouse where a school is kept, and making such sale a misdemeanor, applied to the town of Somerville, the statutes requiring those dealing in intoxicants to pay a privilege tax, and making the sale without license to exercise such a privilege a misdemeanor, as provided in chapter 161, p. 309, of the Acts of 1899, do not apply to that territory; in other words, that one cannot be required to take out a license to do a thing, or punished for failure to take out such license, when the business proposed to be done is prohibited by law.

This contention cannot be sustained. The business of retailing liquors in any part of the state, whether it be where they can be lawfully sold or where the sale is prohibited by the four-mile law, is made a privilege and taxed, and any one engaged in this business, although in violation of the latter law, is liable for this tax. This was held at the present term of the court in the case of *Foster v. Speed*, 111 S. W. 925. The statute under which the plaintiff in error was indicted, chapter 161, p. 309, of the Acts of 1899, was enacted as a supplement to that imposing a privilege tax upon the sale of liquors, to aid in its enforcement, and also applies to any part of the state. Further, special laws applicable to particular subdivisions of the state, prohibiting the sale of intoxicants therein, do not suspend general laws requiring license of those dealing in such intoxicants, and punishing them for doing business without such license. *Commonwealth v. Barbour*, 121 Ky. 689, 89 S. W. 1130, 3 L. R. A. (N. S.) 620.

There is no error in the judgment of the trial court, and the same is affirmed, with costs.

ROSEN v. LEVY et ux.

(Supreme Court of Tennessee. Sept. 17, 1908.)

1. FRAUDULENT CONVEYANCES (§ 295*)—EVIDENCE.

Evidence held not to show that a conveyance from husband to wife was fraudulently made with the intent to hinder the collection of a claim against the husband.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 295.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment could be collected, and this was made in the absence of Esther Levy.

Complainant, as above stated, examined both of the defendants and read their depositions in his behalf. They testified that the conveyance was made the day it bears date, in compliance with their antenuptial contract, and without any intention to hinder or delay the collection of the claim of the complainant against A. M. Levy for malicious prosecution. The defendants are corroborated by their witness, J. W. Durham, Esq. These three witnesses fully disprove the charges of fraud in fact made in the bill. The charge of fraud in law is also unsupported by the record.

The conveyance, it is true, was voluntary. It recites that it was made in consideration of \$1 and love and affection. The proof shows that it was made in pursuance of an antenuptial parol contract, void as to creditors. But voluntary conveyance, free from fraud in fact, is void only where there are existing creditors. *Nelson v. Vanden*, 99 Tenn. 224, 42 S. W. 5; *Vance v. Smith*, 2 Heisk. 351; *Sanders v. Logue*, 88 Tenn. 355, 12 S. W. 722.

Then had the defendant A. M. Levy at that time, July 20, 1905, any creditors? He testifies positively and absolutely that he had none. Complainant's insistence is that he was a creditor, because the warrant, for the unlawful suing out of which he recovered his judgment in an action of malicious prosecution, was issued June 14, 1905, while the conveyance was not made until July 20, 1905. These dates are correct, but the prosecution against complainant did not terminate until August 25, 1905, and his action for damages for malicious prosecution was not brought until some time thereafter; the exact date not appearing in the record.

It is well settled that a right of action for malicious prosecution does not accrue until there has been a final determination, favorable to the defendant therein, of the suit claimed to have been malicious. *Morgan v. Duffy*, 94 Tenn. 686, 30 S. W. 735; *Swepson v. Davis*, 109 Tenn. 99, 70 S. W. 65, 59 L. R. A. 501.

Therefore, when the conveyance attacked in this case was executed and delivered, the complainant had no right of action or claim for damages recognized by law against the defendant A. M. Levy. The first step only had been taken in a proceeding which might or might not ultimately ripen into a just claim for damages for malicious prosecution, which if properly asserted, would make the complainant a creditor of the defendant.

There is no doubt but that the plaintiff in an action brought to recover damages for a tort committed against him is a creditor of the defendant, for whom the latter must provide before he can make a voluntary convey-

in such a case is asserting a specific claim, which can be definitely ascertained and adjudged in the pending action. In the cases of *Farnsworth v. Bell*, 5 Sneed, 531, and *Patrick v. Ford*, 5 Sneed, 532, plaintiffs in actions brought to recover damages for torts committed were held to be creditors, and conveyances of property fraudulent in fact, made pending the actions, were held void and set aside. In *Vance v. Smith*, 2 Heisk. 343, it was held that a plaintiff in an action of tort then pending was an existing creditor within the provisions of a deed in trust made by the defendant to secure "all of his creditors"; and in *Sanders v. Logue*, 88 Tenn. 390, 12 S. W. 723, it is said that "a voluntary conveyance pending an action of tort, whether actually intended to defeat it or not, would be void if, upon estimating amount of property retained, there was a deficiency to pay the amount claimed." This, however, is perhaps dictum, as the question did not directly arise in the case. But it has never been held by this court, or any other so far as we are informed, that a party who has no complete claim for damages upon which he can maintain suit is an existing creditor against whom a voluntary conveyance is void. The contrary is held in *Sanders v. Logue*, *supra*. It is there said:

"In the case we are now considering, whether we treat the complainant as repudiating his contract because he was fraudulently induced to make it, suing for the money as for money had and received to his use, or whether we treat the action as one in damages incurred in consequence of the fraud and deceit practiced against him, measured by the money put to interest, the result is the same. In the first aspect he would have had no action until he disregarded the trade and demanded the money; and in the second his action would have been *ex delicto*, and not upon a specific; fixed, or asserted liability, within the meaning of the rule stated in respect to voluntary conveyance. Such a claim, it is obvious, might or might not ever be asserted, and it is too uncertain and remote to be taken into consideration in estimating the debts or liabilities of a debtor for which he must provide by the retention of property. This is obvious, and we look at the state of affairs then existing, not as now developed."

In this case, the warrant charging complainant with robbery had been issued, and he had been bound over to answer to the grand jury; but no action had been taken by the party when the conveyance assailed was made. The issue was undetermined. It was possible that complainant, the defendant in said warrant, might be indicted, might be convicted, or that the prosecution might be dismissed by the grand jury ignoring the indictment or by an acquittal on a trial. It

good bit." He further said that Coleman told him not to tell the judge how long he had known him. He also told the juror that he had only one friend on the other list, and the Attorney General objected to him; that he then told the witness that he need not tell how long he had known him (plaintiff in error).

These conversations had with the three talesmen were first disclosed by them when they were examined for service on the jury. They were not taken upon the jury, and of course were not members of it when plaintiff in error's case was tried.

Subsequently, when the present proceeding was begun against Coleman, the witnesses were examined and gave testimony in the three cases as above indicated.

Before this testimony was offered, the plaintiff in error filed a sworn answer, or return, to the attachment for contempt, in which, after denying guilt in general terms, he proceeded with the following special denial:

"He denies that he in any way undertook to, or tried in any manner to, influence any one of said persons summoned as jurors from attending said court, or obeying the summons to attend, or that he tried to influence them to attend, or that he in any other way knowingly, intentionally, or willfully interfered with the process or proceedings of the court.

"He denies that he willfully, unlawfully, or corruptly conversed with, or tampered with, said parties, or either of them, as jurors, or said anything to them, or either of them, for the purpose of influencing their verdict, or that of either of them, in the trial of his case, or authorized or procured any one else to do so in his behalf.

"He denies that he discussed the facts or circumstances of his case with either of said jurors, or had another to do it for him, or that he detailed the circumstances which brought about the indictment and prosecution against him. When the fact was casually mentioned that they were jurors, or might be jurors, he expressed himself as being pleased, doing so because they knew him, and he knew them to be fair and just men, and was willing to trust his case in their hands. He was confident of his innocence, and always felt and believed that he would finally be acquitted of the charge against him, and he was acquitted, and neither of the said parties was on the jury trying his case; and to secure his acquittal he never in any wise attempted to influence any prospective jurors by corrupt inducements, or by any other means. He positively denies that he said anything to them, or any one of them, as to the character of the verdict he desired or expected, or that he had any idea that any casual remark made could or would influence the action of any juror,

like for them to be on the jury was wrong. It was an unintentional wrong. He did not know or think that it was wrong, and had no thought that it could affect in any wise any verdict that might be obtained in court, and that he did not say it with the intention that it should have that effect.

"He avers that he has the highest respect for this honorable court, and its process and proceedings, and would not intentionally, knowingly, or willfully do anything to interfere therewith."

In the court below, when the above testimony was offered, the plaintiff in error objected to the introduction of evidence on the ground that by the above-mentioned sworn answer he had purged himself of the contempt, if he had been guilty of any, and that witnesses could not be introduced to inquire into the matter. It is now assigned for reversal that the circuit judge committed error in declining to sustain this objection and in subsequently hearing the evidence above set forth.

It is stated in *Underwood's Case*, 2 *Humph.* 46, that in a case at common law the defendant will be discharged if by his answer to interrogatories filed he make such a statement as will free him from imputed contempt; but in cases in chancery the truth of defendant's statement in reply to interrogatories filed may be controverted on the other side, and the whole matter be inquired into and ascertained by the court.

The case referred to was in chancery; likewise the case of *Rutherford v. Metcalf*, 5 *Hayw.* 58, upon the same subject. However, the rule at common law is correctly stated (and see note to *Warner v. Martin*, 4 *Am. & Eng. Ann. Cas.* 183, 184); still in this state the common-law rule has fallen into desuetude, as indicated by two recent cases. *Scott & Light v. State*, 109 *Tenn.* 390, 71 *S. W.* 824; *Ricketts v. State*, 111 *Tenn.* 380, 77 *S. W.* 1076; and other Tennessee cases referred to *infra*. The question was not discussed in any of these cases, but evidence was heard in all of them.

The same question arose recently in the Supreme Court of the United States, in the case of *U. S. v. Shipp*, 203 *U. S.* 565, 27 *Sup. Ct.* 165, 51 *L. Ed.* 319.

In the case referred to defendant filed a sworn answer denying the contempt, and it was insisted that this was conclusive. Responding to this suggestion the court said:

"On this occasion we shall not go into the history of the notion. It may be that it was an intrusion or perversion of the canon law, and is suggested by propounding of interrogatories, and the very phrase 'purgation by oath' (*juramentum purgatorium*). If so, it is a fragment of a system of proof which does not prevail, in theory or as a whole; and the reason why it has not disappeared perhaps may be found in the rarity with which con-

ingdom act, the proposition would apply. But in this case it is a question of personal presence and overt acts. If the presence and the acts should be proved, there would be little room for the disavowal of the intent. And when the act alleged consists in taking part in a murder, it cannot be admitted that a general denial and affidavit should dispose of the case. The outward facts are matters known to many, and they will be ascertained by testimony in the usual way. The question was left open in *Re Savin*, 131 U. S. 287, 9 Sup. Ct. 699, 33 L. Ed. 150, with a visible leaning towards the conclusion to which we have come, and that conclusion has been adopted by state courts in decisions entitled to respect. *Huntington v. McMahon*, 48 Conn. 174, 200, 201; *State v. Matthews*, 37 N. H. 450, 455; *Bates' Case*, 55 N. H. 325, 327; *Re Snyder*, 103 N. Y. 178, 181, 8 N. E. 479; *Crow v. State*, 24 Tex. 12, 14; *State ex rel. Mason v. Harper's Ferry Bridge Co.*, 16 W. Va. 864, 873. See *Wartman v. Wartman*, Taney, 362, 370, Fed. Cas. No. 17,210; *Cartwright's Case*, 114 Mass. 230; *Ellenbecker v. District Court*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801. Whether or not Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), applies to this court, it embodies the law, so far as it goes. We see no reason for emasculating the power given by that section, and making it so nearly futile as it would be if it were construed to mean that all contemnors willing to run the slight risk of a conviction for perjury can escape." To same effect, see the following cases: *O'Flynn v. State*, 89 Miss. 850, 43 South. 82, 9 L. R. A. (N. S.) 1119, 119 Am. St. Rep. 727; *Emery v. State* (Neb.) 111 N. W. 374, 9 L. R. A. (N. S.) 1124.

Our statute upon the subject of contempts is embodied in section 5918 of Shannon's Code as follows:

"The power of the several courts of this state to issue attachments and inflict punishments for contempts of court shall not be construed to extend to any except the following cases:

"(1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice.

"(2) The willful misbehavior of any of the officers of said courts in their official transactions.

"(3) The willful disobedience, or resistance, of any officer of the said courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule decree, or command of said courts.

"(4) Abuse of, or unlawful interference with, the process or proceedings of the court.

"(5) Willfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them.

"(6) Any other act or omission declared a contempt by law."

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The statute would be rendered ineffective if one accused of contempt could cut off all inquiry by filing an affidavit denying the contempt charged, or disclaiming any improper purpose.

The case of *Brooks v. Fleming* was in chancery; but the language of the court upon the subject was not confined to the practice in that court, but was general, as follows: Referring to contempts out of the presence of the court it was said that they can only be brought to the knowledge of the court, and its action invoked, upon the testimony of others. "The charge must be made in such form as to give the party an opportunity to purge himself of the alleged contempt. Ordinarily it must be made upon oath, to which the person accused by it has the right to answer. This answer presents an issue to be inquired into by the court, and to be determined upon its facts. The inquiry is in the nature of a criminal proceeding," etc. 6 Baxt. 331-333.

In *Sinnott v. State*, 11 Lea, 281, the party proceeded against for contempt was charged with having suggested to the sheriff that he should summon certain persons on the jury. The course of practice pursued in that case is thus stated by the court: "The Attorney General filed specifications in each case. The plaintiff in error moved to quash the specifications filed, which motion was overruled by the court; and, having filed his answer to such specifications, the court proceeded to hear the case, and, having heard the testimony, adjudged the defendant guilty as charged," etc.

In *Harwell v. State*, 10 Lea, 544, the plaintiff in error was under arrest, charged with interference with the grand jury. In that case the court heard the testimony of witnesses, but refused to hear the plaintiff in error himself testify as a witness, on the following grounds, as stated in the opinion: "In answer to the warrant, and by way of purging himself of contempt, he might have filed his affidavit upon return of the warrant; but, the proceeding being in the nature of a criminal prosecution, the defendant was not competent to testify as a witness in his own behalf, and there was no error in the refusal of the court to allow him to be examined as a witness." This was before our statute was passed which gave the right to defendants in criminal prosecutions to testify in their own behalf.

The second point insisted upon is that the facts proven do not make out a case of contempt, because the parties approached were not members of the jury which tried the plaintiff in error. The argument is that the contempt in respect of tampering with jurors must fall under subsection 5 of the Code section above quoted. This is a mistaken view. The facts show a violation of subsection 4,

**LARCENY (§ 66*)—LARCENY IN THE NIGHT-
TIME—ATTEMPT TO COMMIT—PROSECUTION—
SUFFICIENCY OF EVIDENCE**

Evidence held to support a conviction of attempted larceny of money in the nighttime.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 161; Dec. Dig. § 66.*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

John Hayes was convicted of attempted larceny of money in the nighttime, and he appeals. Affirmed.

Henry M. Walsh, for appellant. Herbert S. Hadley, Atty. Gen., and F. G. Ferris, Asst. Atty. Gen., for the State.

BURGESS, J. On December 2, 1907, the defendant was convicted in the circuit court of the city of St. Louis of the crime of attempted larceny in the nighttime of money from one Solomon Mueller, and his punishment fixed at imprisonment for the term of two years in the penitentiary, under an information, duly filed by the assistant circuit attorney, charging the defendant with said offense. Defendant appeals and assigns error.

The facts are substantially as follows: On the night of October 1, 1907, between 8 and 9 o'clock, Solomon Mueller was standing at the southeast corner of Washington avenue and Broadway, in said city, witnessing the Velled Prophets' parade. He had on his person, and owned, a gold watch, chain, and charm, and \$35 in money—three \$10 bills and one \$5 bill. He was surrounded by a surging and jostling crowd, and, hearing a policeman warn the people against pickpockets, Mueller put his watch, chain, and charm in his left pants pocket, and his pocketbook, containing his money, in his right hip pocket. Soon thereafter he noticed the defendant, who was pressing hard against him, trying to throw open his coat, as if to get at his watch pocket. The defendant moved around and behind Mueller, and put his hands in the pockets containing said watch and money. James H. Smith, chief of detectives of the city of St. Louis, who was observing the actions of the defendant, reached and took hold of the defendant while his hands were yet in Mueller's pockets, and prevented him from extracting anything therefrom. By reason of the interference of the officer, the defendant failed in his attempt to steal the property of Mueller. In his testimony, Mueller described the money which he had on his person at the time as \$35 in greenbacks—three \$10 bills and a \$5 bill, United States money. Defendant offered no evidence, nor is he represented in this court.

a careful examination of them shows that they are entirely without merit. The evidence establishes defendant's guilt beyond any and all doubt; in fact, it is all one way. He had a fair and impartial trial; and, there being no merit in this appeal, the judgment is affirmed. All concur.

STATE v. FOLEY.

(Supreme Court of Missouri, Division No. 2
Nov. 24, 1908.)

**CRIMINAL LAW (§ 1094*)—APPEAL—BILL OF
EXCEPTIONS—REVIEW.**

A conviction, in the absence of a bill of exceptions, will be affirmed on appeal, where the information is sufficient and the arraignment and the trial appear to have been regular.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3204; Dec. Dig. § 1094.*]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Toney Foley was convicted of felonious assault, and he appeals. Affirmed.

Samuel Kohn, for appellant. Herbert S. Hadley, Atty. Gen., and Frank Blake, Asst. Atty. Gen., for the State.

GANTT, J. From a conviction in the circuit court of the city of St. Louis for a felonious assault upon Edwin McCleintick the defendant appealed to this court.

Motions for new trial and in arrest of judgment were filed in due time and overruled, but no bill of exceptions was filed in the case. The information is sufficient, and the arraignment and the trial appear to have been regular in all respects.

There being no error in the record proper, the judgment must be, and is, affirmed.

FOX, P. J., and BURGESS, J., concur.

STATE v. HAMILTON.

(Supreme Court of Missouri, Division No. 2
Nov. 24, 1908.)

**CRIMINAL LAW (§ 1090*)—APPEAL—RESERVA-
TION OF GROUNDS OF REVIEW—BILL OF EX-
CEPTIONS.**

In the absence of a bill of exceptions, duly signed and authenticated by the trial judge, the action of the court during the trial is not reviewable, and the case is before the appellate court simply upon the record proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2807-2822; Dec. Dig. § 1090.*]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Will Hamilton was convicted of grand larceny, and appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in his custody, on the 21st day of December, 1906, there was \$440, the property of the J. B. Buss Mills. Conrad Hart, aged about 19 years, testified that for 8 or 10 years he had been acquainted with the defendants, who were about his age. He said that in the fall of 1906 he had been out in California with the defendant Gleason, and had talked several times with Gleason on the subject of robbing the Buss Mill, where Gleason told him there was lots of easy money for them to get when they returned to St. Louis. Early in December Hart returned to St. Louis and met the defendants, but nothing further was said about the suggested robbery until the day before the attempt was made, when Gleason asked Hart to go out to the Buss Mill, and said that the money was easy to get. The next morning Gleason met Hart again and arranged for a meeting between Hart, Gleason, and defendant Carroll at a later hour that morning. Pursuant to appointment, Hart met the defendants about 10:30 a. m., each, according to arrangements, having brought with him his overcoat. None of them had any money, and the overcoats were brought for the purpose of pawning them in order to raise money with which to buy revolvers and ammunition and carry out the plan of robbery. They visited several pawnshops and pawned the overcoats of Hart and Carroll, thereby raising \$7. Gleason kept his overcoat. With the money thus obtained they visited stores, and Hart and Carroll each bought a cheap revolver and some ammunition. About noon they ate and drank together, and soon afterwards took a car on the way to the mill on North Broadway. Hart said that while on the way they talked over the plan by which the robbery would be effected, Gleason, he said, doing most of the talking. The plan was to approach the mill on foot, Hart and Gleason to enter the office and Carroll to remain outside, to which Carroll agreed, and said that he would be outside while they went in, and if there was any fighting he would come running right over. The plan contemplated was that Gleason and Hart would enter the office, pretending to be employer and employé, and ask the use of the telephone, and, on the pretext of sending Hart for a fixture, they were to ask to have a \$2 bill changed, and thereby secure access to the money in the mill safe. About three blocks from the mill they left the car, and took a drink in a saloon, where they were seen by witness Joseph Conway. From the saloon they walked to the mill, Hart and Gleason walking on the east side of Broadway, on which side was the mill, and Carroll, according to plan, following on the west side of that street. Gleason was wearing his overcoat, and had with him for a weapon a billy, which was a short piece of leather with

O'Neill were sitting in the office when Hart and Gleason entered. Gleason asked the privilege of using the telephone, which was in the office, and, being permitted to do so, he called up a plumbers' supply company and talked about a fixture, or piece of fitting, for which he was going to send, and, as he hung up the telephone, he turned to Hart and asked whether Hart had money for the car fare. Hart replied that he had not, whereupon Gleason asked Hoxey if he could change a \$2 bill. Hoxey, saying that he could do so, stepped to the safe, which was a small safe about three feet high sitting on the floor of the office, opened the safe and took from it the said money, of which he was in charge as manager or agent for said J. B. Buss Mills, and was stepping over, making change with the money on top of the safe, when defendant Gleason struck him on the head with the billy. The blow blinded or stunned Hoxey for a moment, but he instantly turned and grappled with Gleason. Just as he did so, Hart, who, for the moment, had covered O'Neill with his revolver, pointed the revolver at Hoxey and fired a shot which hit Hoxey in the breast and inflicted a wound. Defendant Gleason, becoming released from Hoxey, ran out of the office, leaving his hat there, which had fallen from his head during the struggle. The \$2 bill, which Gleason had requested Hoxey to change, also remained in the office. Out upon the street, Hart and Gleason met the defendant Carroll waiting, who, according to Hart, inquired if they got any money. All three ran rapidly away. As they ran, Gleason handed his overcoat, marked with his name on the inside pocket, to Carroll. Carroll carried the overcoat along with him and placed his revolver in its pocket. After running some distance, an officer came upon them and arrested Hart, but defendants got away. Carroll, in his flight, threw away Gleason's overcoat, which, with Carroll's revolver in the pocket thereof, the officer in pursuit secured. Defendants were successful for a time in making their escape, but about one month later they were apprehended and arrested in New Orleans. The billy and Carroll's revolver were introduced in evidence. The witness, Conrad Hart, at the time of the trial, had already pleaded guilty to a separate information charging him with attempted robbery on account of his participation in this adventure.

Defendants offered no evidence. At the close of the case the court instructed the jury, and the cause was submitted to them. It is not necessary to reproduce the instructions, as counsel for appellants in their brief do not challenge the correctness of them. After due consideration of the cause the jury returned separate verdicts finding the defendants guilty, and assessing their punishment

can be no robbery in such circumstances.

Learned counsel for appellant direct our attention to the case of *State v. Davis*, 138 Mo. 107, 39 S. W. 460; *State v. Horned*, 178 Mo. 59, 76 S. W. 953; *State v. Jones*, 168 Mo. 398, 68 S. W. 506; *State v. Kelley*, 206 Mo. 685, 105 S. W. 606. An examination of those cases will demonstrate that they charged the ownership of the property in some company, either a mercantile company, or a railroad company. It was held that it was essential, if those companies were a partnership, to give the names of the partners, or, if a corporation, to so charge in the information or indictment. It is by no means ruled in those cases, and it is not even suggested, that, if some individual was in possession of the property, the ownership of it could not be laid in such person. T. P. Hoxey was in the lawful possession of this property, and it was charged that he was the owner of such property, and the proof fully sustains the allegations of ownership. There is no pretense that the testimony in this case was insufficient to support the verdicts.

We have given expression to our views upon the only propositions urged by counsel for appellants, which results in the conclusion that the judgment of the trial court should be affirmed, and it is so ordered. All concur.

STATE v. WEBBER.

(Supreme Court of Missouri, Division No. 2.
Nov. 24, 1908.)

1. HAWKERS AND PEDDLERS (§ 3*)—ACTS CONSTITUTING PEDDLING.

That one sold liniment and lemon extract by going from place to place to sell the same, and sold one bottle to one person and two to another shows that he was a peddler within Rev. St. 1899, § 8861 (Ann. St. 1906, p. 4118), defining a peddler to be one who deals in the selling of goods, wares, and merchandise, etc.

[Ed. Note.—For other cases, see *Hawkers and Peddlers*, Cent. Dig. §§ 3, 6; Dec. Dig. § 3.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5260-5267; vol. 8, p. 7750.]

2. CONSTITUTIONAL LAW (§ 208*)—HAWKERS AND PEDDLERS—LICENSES—CLASS LEGISLATION.

The Legislature can designate peddlers as a class who must obtain licenses before following their occupation.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 667; Dec. Dig. § 208.*]

3. CONSTITUTIONAL LAW (§ 48*)—STATUTES—CONSTRUCTION.

A statute must appear to contravene the Constitution beyond reasonable doubt before it will be held unconstitutional.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. § 48.*]

4. CONSTITUTIONAL LAW (§ 205*)—SPECIAL PRIVILEGES—LICENSES—"PEDDLER."

Rev. St. 1899, § 8861 (Ann. St. 1906, p. 4118), defining a peddler as one who deals in

Mo. art. 2, § 53, prohibiting laws granting special privileges, etc., nor the fourteenth amendment to the federal Constitution; but are valid police regulations.

[Ed. Note.—For other cases, see *Constitutional Law*, Dec. Dig. § 205.*]

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

J. C. Webber was convicted of peddling without a license, and he appeals. Affirmed.

Warner, Dean, McLeod & Timmonds, for appellant. H. S. Hadley, Atty. Gen., and N. T. Gentry, Asst. Atty. Gen., for the State.

GANTT, J. On the 11th day of May, 1907, the prosecuting attorney of Vernon county filed the following information, duly verified, before Henry Dalton, a justice of the peace within and for Center township in said county:

"James N. Coll, prosecuting attorney, within and for the county of Vernon and state of Missouri, on his oath of office and on his best information and belief informs the court that J. C. Webber, on or about the _____ day of May, 1907, at and in the said county of Vernon and state of Missouri, did then and there willfully and unlawfully deal in the selling of goods, wares, and merchandise as a peddler, by going about from place to place with two horses and wagon used by the said J. C. Webber for that purpose, by then and there selling divers goods, to wit: one bottle of liniment, to one Ben Finck, for the sum of one dollar, two bottles of lemon extract to Mrs. _____ Wilkerson, for the sum of fifty cents, and divers other articles to this informant unknown, to divers persons whose names are unknown, without then and there having a peddler's license, or any other legal authority therefor; contrary to the forms of the statutes in such cases made and provided, and against the peace and dignity of the state of Missouri."

A change of venue was granted to Justice Cummings and on September 20, 1907, the defendant was put on his trial on said information and found guilty, and his punishment assessed at \$25, and judgment rendered accordingly. On the same day the defendant took his appeal in due form to the circuit court of Vernon county. At the October term, 1907, of the circuit court the defendant demurred to the information on the following grounds:

First. Said information does not constitute facts sufficient to charge this defendant with the violation of any law, or the commission of any crime or offense.

Second. Sections 8861, 8862, and 8863 of the Revised Statutes of Missouri of 1899 (Ann. St. 1906, pp. 4118-4120), under which this prosecution was instituted, are null and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

state, providing that the General Assembly of this state shall not pass any local or special law granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity.

This demurrer was overruled, and thereupon afterwards, at the same term, the question coming on for hearing, a jury was waived, and the question was submitted to the court upon the following statement of facts:

"On the — day of May, 1907, at Vernon county, Missouri, the defendant did deal in the selling of liniment and lemon extract by going about from place to place to sell the same, and he did then and there sell one bottle of liniment to one Ben Finck, for the sum of one dollar, and two bottles of lemon extract to Mrs. Wilkerson, for the sum of fifty cents, and it is also agreed that the defendant did not have any peddler's license authorizing him so to do."

At the time of submitting the question on the said statement of facts, defendant requested the court to give the following instructions:

"No. 1. The court declares the law to be that, under the information and evidence in this case, the court should find the defendant not guilty.

"No. 2. The court declares that the peddler's statutes, under which this prosecution is being had, are null and void, because in violation of section 53, art. 4, of the Constitution of the state; and the defendant should be found not guilty.

"No. 3. The court declares the peddler's statutes, under which this prosecution is being had, are null and void because in violation of the fourteenth amendment to the Constitution of the United States; and the defendant should be found not guilty."

Which said instructions the court refused, and the defendant duly saved his exceptions to the action of the court in so ruling. Thereupon the court found the defendant guilty of peddling without a license as charged in the information, and assessed his punishment at a fine of \$15, and rendered judgment accordingly. And thereafter, on the same day, the defendant filed his motion for new trial, assigning as error the refusal of the said instructions, prayed by him, by the court. Which said motion for new trial was by the court overruled, and defendant saved his exceptions. Defendant also filed his motion in arrest, assigning as grounds thereof that the information was insufficient to charge him with any crime because the statutes, to wit, sections 8861, 8862, and 8868, Rev. St. 1899 (Ann. St. 1906, pp. 4118-4120), were null and void, because in violation of the fourteenth amendment to the Constitution of the United States. Which said motion was also overruled, and defendant stayed his exceptions. Thereafter an appeal was granted to this court in due form.

This appeal involves the constitution-

8861 defines a peddler to be "whoever shall deal in the selling of patents, patent rights, patent or other medicine, lightning rods, goods, wares or merchandise except pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products including milk, butter, eggs and cheese, by going from place to place to sell the same." It is obvious that, if the statute is constitutional, the defendant was a peddler, and, not having a license, was guilty. The act is assailed on the ground that it is class legislation and in violation of section 53 of article 4 of the Constitution of this state, which forbids special laws granting to any individual special or exclusive rights, privileges, or immunities, and also in violation of the fourteenth amendment to the Constitution of the United States. It is conceded by the learned counsel for defendant that it is perfectly competent for the Legislature to select peddlers as a class, which shall be required to obtain a license as a prerequisite to following that occupation. No doubt whatever exists on this point. It has been repeatedly so held by the courts of the several states and the federal courts. The regulation of the business of itinerant peddlers is very ancient. Baron Graham in *Attorney General v. Tongue*, 12 Price, 51, said: "The object of the Legislature in passing the act upon which this information is founded was to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in towns and other places, and paying rent and taxes there for local privileges, from the mischiefs of being undersold by itinerant persons, to their injury, and, on the other hand, to guard the public from the impositions practiced by such persons in the course of their dealings, who, having no known residence, carry on a trade by means of vending goods conveyed from place to place by horse or cart." *Graffy v. Rushville*, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128; *City of South Bend v. Martin*, 142 Ind. 31, 41 N. E. 315, 29 L. R. A. 581; 21 Amer. & Eng. Ency. Law (2d Ed.) 791.

But it is insisted that section 8861 has arbitrarily divided this natural class, and requires one of such classes to take out a license, and at the same time grants the other the "right, privilege or immunity" to peddle without a license. That is to say, the Legislature cannot exempt those who deal in selling pianos, organs, books, charts, maps, eggs, butter, and cheese from taking out a license, and by the same statute require those who peddle other merchandise, as in this case "extracts and liniments," to obtain a license; that this is class legislation. It is the settled doctrine of this court that before an act of the Legislature will be held unconstitutional it must appear beyond reasonable doubt that it is in contravention of the Constitution. This assault

revenue measure, but is a police regulation. It is regulation of persons following a certain character of business, and not a tax upon property. In *Seymour v. State*, 51 Ala. 52, the peddler's act of that state was resisted on the ground that the exemption of manufacturers and makers to peddle their products was void because an unlawful discrimination between the same general class; but the Supreme Court of that state held that the state had the right to make such exemption without infringing upon the Constitution; that the privileges and immunities were the same; that every peddler who paid any license at all, paid the same. In *Hays v. Commonwealth*, 107 Ky. 655, 55 S. W. 425, a like contention was made, and it was urged that, because certain articles were allowed to be peddled without a license, the act violated the fourteenth amendment to the federal Constitution, but the Court of Appeals rejected that contention, saying: "It is true certain articles of property are allowed to be sold by itinerant persons without a license, and they can be sold by any and every person, either as an itinerant or otherwise. Therefore there is no discrimination. Moreover, all citizens, if they elect to peddle the prohibited goods, must have a license to do so, otherwise they are subjected to punishment. Hence there is absolutely no discrimination between citizens, each and every one standing on an exact equality under the peddler's law. If the fact that a man may sell stoneware without a license renders the whole peddler's law unconstitutional, it necessarily follows that the statute requiring a license to sell alcoholic liquors is in violation of the same provision of the Constitution, because the citizen may sell various other articles, both liquid and solid, without any license; and the right of both the state and federal government to require license of vendors of alcoholic liquors has always been sustained by the courts of last resort, both federal and state, so far as we are advised." So in *People v. De Blaay*, 137 Mich. 402, 100 N. W. 598, an act of the Legislature of that state prohibited peddling without a license, but made an exception in favor of wholesale merchants selling by sample and manufacturers, farmers, mechanics, and nurserymen selling their own products; and this exception or exemption was challenged on the ground that it constituted class legislation. But the Supreme Court of that state ruled that this could not be called class legislation in such a sense as to deny any citizen an equal protection of the law. Under this provision all persons in the same class were treated alike under like circumstances and conditions. Similar provisions have been sustained by that court in *People v. Sawyer*, 106 Mich. 428, 64 N. W. 333. A like ruling was made in *People v. Smith*, 147

tention, which is that because the ordinance in turn excepts persons selling vegetables, fish, meat, or farm products, and bakers who deliver bread and pastry to customers, from this provision, which is therefore invalid, is ruled against him by *People v. Sawyer*, 106 Mich. 428, 64 N. W. 333, and *People v. Baker*, 115 Mich. 199, 73 N. W. 115. In *State v. Montgomery*, 92 Me. 433, 43 Atl. 16, it was said by the court: "It is contended that the exception which permits one to peddle without a license the products of his own labor or the labor of his family, any patent of his own invention or in which he has become interested by being a member of any firm, or stockholder in any corporation which has purchased the patent, is a discrimination in favor of some against others. We do not think so. If one can peddle freely the products of his own labor, so may all. The products may be unlike, but the freedom to prosecute one's own business and to peddle his own products is free alike to all. So of the other exceptions. While it may happen that various producers may peddle each the product of his own labor without license, but not of the labor of another, still we think this fairly answers the requirements of uniformity. The Legislature is the sole judge of the extent to which the business of peddling should be regulated, and its conclusions are final, so long as the burdens imposed do not bear unevenly upon citizens." In *State v. Stevenson*, 109 N. C. 730, 14 S. E. 385, 26 Am. St. Rep. 595, a license tax upon merchants was upheld, although it exempted purchasers of farm products from the producer. The court, after observing that the law puts all merchants dealing in farm products purchased of the producer in one class and all other merchants in another class and treats all in each class alike, goes on to say: "There is no discrimination in either class. The power to select particular trades or occupations and subject them to a license tax cannot be denied to the Legislature, nor the power to tax such trades according to different rules, provided the rule in regard to each business is uniform." In *Levy v. State*, 161 Ind. 251, 68 N. E. 172, the constitutionality of an act of that state prohibiting the transaction of business by any transient merchant without a license was held not to deny the transient merchant the equal protection of the laws in violation of the amendment of the United States Constitution. The Supreme Court of that state in an exhaustive opinion considered all the objections to the constitutionality of the act, and held that it granted no special privilege and immunities, but applied to all transient merchants and was a natural and reasonable classification, and held that the occupation of a transient merchant closely resembles that of hawkers and peddlers, and sustain-

as that's concerned, some time during the day. Mr. Robertson: No, they didn't; a mule had to get out of the way of electricity. The Court: Answer the question."

At the bottom of page 47 of the abstract, witness Hurt, in answer to a question about the motorman operating the fender on the car, said: "Yes, there's a fender; he pulls a lever and drops; it's another kind of fender; I don't think they use them, though; they were trying several kinds at the time I quit, and I believe they adopted this one I speak of, the one you run up against the fender; the lower fender or life fender drops on to the rail."

Defendant's counsel objects to the offer of the fender ordinance in evidence, and says: "This ordinance is entitled 'Fenders to be provided, approved of'; the petition charges that we complied with that ordinance, therefore the ordinance is wholly immaterial."

After a very careful consideration of all of this evidence, we are unable to see how it could be inferred therefrom that the car in question was owned or was being operated by the respondent at the time it struck and killed appellants' son. All of that evidence would apply equally as well to the Suburban Railway Company or to any other company operating a street car system in the city of St. Louis. The street car tracks on Broadway and the cars which were being operated thereon at the time of the injury might have belonged to any of the latter companies; at least, there is nothing in the evidence which shows anything to the contrary, except the mere fact that counsel for respondent conducted the trial of the cause. If that fact alone constituted sufficient evidence from which the inference of ownership might be drawn, then in no case where a defendant appears in a cause by counsel could such a failure of proof ever be successfully raised, because the inevitable answer would be, why are you defending the cause if you and your car did not cause the injury? Yet the books are full of cases which hold that "the evidence should support the allegations as to ownership and operation of the train and road at the time of the injury, and should show the defendant, and not another company, to be liable." 17 Ency. of Plead. & Prac., p. 598. "In an action for damages, where it does not appear from the pleadings and evidence that the car by which plaintiff was injured was in use by defendant, and where it is not shown that the car was running on defendant's railway, and where the connection between defendant and those in charge of the car is not shown, plaintiff cannot recover." *Edmunds v. Railway*, 3 Mo. App. 603. The same rule has been an-

v. Railroad, 104 Mo. App. 588, 78 S. W. 273; *Walsh v. Railroad*, 102 Mo. 592, 14 S. W. 873, 15 S. W. 757; *O'Keefe v. Railroad*, 124 Mo. App. 619, 101 S. W. 1144.

It must follow from these observations that the action of the trial court in sustaining the demurrer to appellants' evidence was proper, and that the judgment of the circuit court should be affirmed.

It is so ordered. All concur.

STATE v. SMITH.

(Supreme Court of Missouri, Division No. 2
Nov. 24, 1903.)

1. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—ISSUES.

Where accused showed that he killed decedent in defense of his person against decedent's illegal assaults, and the court charged on the law of self-defense and manslaughter in the fourth degree, a charge submitting the issue of the rights of the parties in certain premises when the homicide occurred which was the cause of the difficulty was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. § 814.*]

2. CRIMINAL LAW (§ 1156*)—NEW TRIAL—CONFLICTING EVIDENCE—FINDINGS—REVIEW.

Where, on a motion for a new trial for incompetency of a juror, two witnesses testified that the juror had, prior to his qualification as a juror, expressed the opinion that accused ought to be convicted, and the juror as a witness positively denied the statements, the overruling of the motion will not be disturbed, in the absence of any abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3067; Dec. Dig. § 1156.*]

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

J. B. Smith was convicted of murder in the second degree, and he appeals. **Affirmed.**
See 207 Mo. 24, 105 S. W. 598.

James Orchard, S. A. Cunningham, J. B. Searcy, and L. M. Searcy, for appellant. Herbert S. Hadley, Atty. Gen., and F. G. Ferris, Asst. Atty. Gen., for the State.

GANTT, C. J. This is a prosecution commenced on the 24th day of September, 1905, by the prosecuting attorney of Shannon county, before a justice of the peace, charging the defendant with having feloniously, willfully, deliberately, premeditatedly, and with malice aforethought shot and killed John W. Blackburn at said county on the 24th day of September, 1905. A warrant issued, and the defendant was duly arrested. The preliminary trial was set for October 2, 1905, and on that day the defendant waived examination and was admitted to bail in the sum of \$5,000 to appear at the regular March term, 1906, of the circuit court of said county. The case

parties to the road were not the issue before the jury, for they shed no light upon the solution of the question as to what actually occurred at the immediate time of the killing." So we say in this case, under the defendant's own evidence, there is no room for the application of the doctrine that he shot and killed the deceased in the defense of his property rights. According to his testimony, he shot and killed the deceased in the exercise of a right of self-defense, the defense of his own person against the illegal assault on the part of the deceased. His testimony tended to prove this defense, and the court gave him a full and ample instruction on the right of self-defense. His evidence tended to show that the deceased without legal provocation had stooped and picked up a rock, and either threw it at him or was in the act of throwing it at him when he shot and killed him. The court, in view of this testimony, not only instructed on the law of self-defense, but instructed for manslaughter in the fourth degree, and an instruction such as requested by the defendant in this case would have been an invitation to the jury to have considered a matter entirely foreign to the real issue before them. Counsel have called our attention, to the cases of *State v. Kennade*, 121 Mo. 405, 28 S. W. 347, and *State v. Polard*, 139 Mo. 220, 40 S. W. 949. Those cases announce the familiar doctrine that the owner of a house and in the possession thereof has a right to protect it and himself in it against all unlawful trespassers against him. But those cases have no application to the facts of this case. This record discloses that the circuit court gave the defendant the full benefit of an instruction on the law of self-defense, and in no manner limited his right of self-defense by reason of the fact that the homicide occurred on the premises of the deceased. As was said in *State v. Hargraves*, 188 Mo., loc. cit. 350, 87 S. W. 495: "It clearly appears from the testimony (of the defendant) that the assault made by the defendant upon the deceased was in repelling or resisting an assault made by the deceased upon him. The facts in this case do not present that character of struggle where the assault is made in protection or defense of his home or premises, nor in an effort to eject a trespasser from the premises of another, in which the party would have the right to use all the necessary force to accomplish his purpose." We think the court correctly refused to give this instruction, especially as it had fully covered all the issues of law arising upon the evidence in the case. And these observations apply with equal force to the second contention of the defendant in his brief, that, in killing Blackburn under the circumstances, he was only guilty of manslaughter in the fourth degree. His own evidence, as well as

State v. Matthews, 138 Mo. 183, 23 S. W. 1085, 71 Am. St. Rep. 594, relied upon by the defendant, was wholly unlike in its facts to the case now under review.

2. It is insisted that the court erred in not granting a new trial for the reason that U. B. Summers had formed and expressed an opinion before he was qualified on the jury. In support of this ground the defendant filed the affidavit of Lucinda Burris to the effect that the juror, Summers, was at her residence on Sunday the 9th of September, 1906, and that as he started off said he was going to help hang Joe Smith. One Honeycutt testified that he had a conversation with Summers and told him the facts of the case as he understood them, and that Summers expressed the opinion that the defendant ought to be convicted. On the other hand, the juror was called as a witness and was examined fully as to both of his alleged statements, and denied positively both of the statements, and the matter was heard by the trial court, and this ground for new trial was overruled. We have often held that, where there is evidence pro and con in a case of this sort, the evidence should be such as to show a clear abuse of discretion on the part of the trial judge in order to warrant this court in interfering and setting aside a verdict. *State v. Gordon*, 191 Mo. 133, 89 S. W. 1025, 109 Am. St. Rep. 790; *State v. Howell*, 117 Mo. 342, 23 S. W. 263; *State v. Cook*, 84 Mo. 40.

Upon a review of the whole record, it appears to us that there was ample evidence to justify the verdict of the jury, and we have been unable to discover any reversible error in the record, and accordingly the judgment is affirmed.

FOX, P. J., and BURGESS, J., concur.

PHILLIPS v. ST. LOUIS UNION TRUST CO. et al.

(Supreme Court of Missouri, Division No. 1. Nov. 25, 1908.)

1. PUBLIC LANDS (§ 61*)—SWAMP LANDS—SALE—EVIDENCE.

A county treasurer's receipt not mentioning swamp land described in a certificate of sale theretofore issued by the register of swamp lands, but, on the contrary, acknowledging the receipt of the price of swamp lands sold by the county to the person to whom such certificate had been issued and two others, is insufficient to warrant a finding that the lands sold by the county to the persons named in the treasurer's receipt were the lands described in the certificate of sale.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 61.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS OF FACT—EQUITY CASES.

Notwithstanding the Supreme Court has, in an equity case, the right to review and weigh the evidence, the usual practice is to defer large-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, New Madrid County; H. C. Riley, Judge.

Bill by Amos R. Phillips against the St. Louis Union Trust Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This was a bill in equity, filed in the Circuit Court of New Madrid county by the plaintiff against the defendants, which sought to have the legal title to 280 acres of land located in that county divested from the defendants and invested in the plaintiff. There was a trial had before the court which resulted in a judgment in favor of the defendants. After an unsuccessful motion for a new trial, plaintiff appealed the cause to this court.

The bill was couched in the following language:

"Plaintiff states that codefendant Himmelberger-Harrison Land Company is a corporation organized under the laws of the state of Missouri. That the St. Louis Union Trust Company is a corporation organized under the laws of the state of Missouri. That heretofore, on May —, 1857, at the May term of the ——— court of New Madrid county, Missouri, there was legally sold the land hereinafter set out and described, and that at said sale one Augustus E. Shields purchased the following described swamp lands belonging to the county of New Madrid, Missouri, to wit, 40 acres of land, being the southeast quarter of the southwest quarter in section No. 26; also 160 acres, being the southeast quarter of section No. 26; also 80 acres, being the north half of the northeast quarter of section No. 35—township 23, range 13, being in all 280 acres, for the price and sum of \$1,729.20. That said lands being a part of the swamp lands granted to the state of Missouri by the United States by the swamp land act of Congress, approved 28th September, 1850, and that on, to wit, 23d day of May, 1857, after the purchase of said lands by said Shields, and under and by virtue of said purchase and the laws governing such sales, the register of swamp lands within and for said county, by John T. Scott, issued and delivered to said Augustus E. Shields a register certificate of purchase therefor, describing said lands then and reciting the purchase price, sale and name of purchaser, which sale and certificate of purchase was duly recorded in the register's office in the records provided for by law for that purpose, which record was a public record of said county. That after that, to wit, said Augustus E. Shields

wit, on the 14th day of August, 1860, Shapley R. Phillips paid to George W. Dawson, the treasurer of New Madrid county, Missouri, for said county, the sum of \$2,233.70, being the full amount due for the balance due on the purchase price of the above-described lands and other lands entered by Edward Coleman and Wm. D. Waldrop; and said George W. Dawson as such treasurer on said date executed and delivered to said Shapley R. Phillips his treasurer's receipt therefor, and thereby said Shapley R. Phillips became the equitable owner and had the equitable title to said lands, but the legal title remained in the county, who in equity held the same in trust for the use and benefit of said Phillips. That since said date, August 14, 1860, and till his death, said lands were taxed to Shapley Phillips, and he paid the taxes on same; cut and sold timber from same, and cut and used timber from same; and under his equitable title claimed the ownership thereof, and made such use thereof as it was fit for. That said Phillips died, and the property sued for, with other property, was set off and allotted to plaintiff in a suit in partition in the New Madrid circuit court in the year 1872, and has since then been held by plaintiff and taxed to plaintiff, and plaintiff has paid all taxes on same, and used the same for wood and timber, and for such purposes for which it was fit. And so, he says, he and his grandfather, Shapley R. Phillips, under whom he claims, have held the equitable title claiming the property in this suit since August, 1860, using the same for such purposes for which it was fit, paying taxes on same, and that these rights and claims through all these years have been undisputed and notorious, and was known to Himmelberger & Luce and others, who have since been grantees from the county and under them, and could have been known by ordinary inquiry, investigation, and observation.

"He states that he is informed that the register record of sale of lands and register record of certificate of sale of land were destroyed by fire during the period of the Civil War, between the years 1861 and 1865. He further states that about the first day of December, 1885, the county court of New Madrid county, Missouri, contracted with C. L. Luce (now dead) to dig a certain ditch or drain therein described and to be finished and completed in a limited and stated time in said contract specified, and upon its completion, according to plans and specifications, within the time named, to pay therefor a stipulated sum; but not to be paid in money, but in certain swamp lands

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Staples and Frank Mason saw the defendant standing near his house, with a shotgun in his hands, and, fearing trouble, they turned the team aside and went home another way, by passing through a fence dividing the field from Mr. Staples' land. It appears from the evidence that about 45 minutes had elapsed between the time the shots were fired and the time the defendant was first seen by the prosecuting witness and Frank Mason. On their way home, and when about half a mile distant from the defendant's home, the boys looked back and saw a man whom they supposed was the defendant standing near his house. These are all the facts of any consequence discovered by the testimony. According to his own testimony, the only reasons which the prosecuting witness had for thinking that the defendant was the person who shot at him were that the defendant had made threats, and he, the prosecuting witness, did not know anybody else in the country that would want to shoot him.

It may be conceded, as contended for the defendant, that, in order to convict the defendant of the crime charged against him, it devolved upon the state to prove that he was present at the time and place of the shooting; but this, like any other fact in the case, could be shown by facts and circumstances, if sufficient. It is not at all necessary that it be proven by direct and positive testimony. Now, at the outset it appears that there was ill feeling between the family of J. S. Staples, father of Sam Staples, and the defendant, growing out of a lawsuit; that, about two weeks before the shooting, J. S. Staples met the defendant upon the public road and told him that he would send his boys to gather the corn crop in a short time, and that the defendant replied, "I give you warning right now to stay off that place, you and your boys; if you don't, you will take the consequences." This threat made by the defendant, and the fact of the existence of animosity between him and the Staples family, taken in connection with the other facts in evidence, especially the time and place of the shooting, and the presence of the defendant, with a gun in his hand, near the place from which the shots were fired, 45 minutes after the shooting occurred, tend to show, we think, that the defendant is guilty as charged. *State v. Morney*, 196 Mo. 43, 93 S. W. 1117, cited by the defendant, was not nearly so strong a case for the state as the case in hand. In that case there was no proof of threats or ill will on the part of the defendant toward the owner of the property which was burned, nor proof that he was in the vicinity for many hours before the fire occurred. Our conclusion is that there was ample

The judgment is affirmed. All concur.

STATE v. HODGES.

(Supreme Court of Missouri, Division No. 2
Nov. 24, 1908.)

FISH (§ 9*)—OFFENSES—STATUTORY PROVISIONS—REPEAL.

Rev. St. 1899, §§ 7456, 7464 (Ann. St. 1906, pp. 3598, 3596), forbidding the placing of dynamite or other explosive in waters of the state whereby any fish may be killed, and the killing of fish by such means, are not repealed by the Walmsley game law (Laws 1905, p. 163, § 29 [Ann. St. 1906, § 7500-29]), forbidding the use of dynamite in waters of the state except by special permission of the state game and fish warden, and then only for certain purposes, and making a violation thereof a misdemeanor.

[Ed. Note.—For other cases, see *Fish*, Dec. Dig. § 9.*]

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

George G. Hodges was convicted of throwing dynamite in certain waters of the state whereby fish might have been and were killed, in violation of Rev. St. 1899, § 7456 (Ann. St. 1906, p. 3593), and he appeals. Affirmed.

See, also, 207 Mo. 517, 106 S. W. 51.

The defendant in this cause was charged in the circuit court of Shannon county with throwing dynamite in certain waters of this state, whereby the fish in said waters might have been killed, injured, or destroyed, and whereby a large quantity of fish in said waters were killed, caught, and taken from said waters, in violation of section 7456, Rev. St. 1899 (Ann. St. 1906, p. 3593). The defendant was convicted of said offense and fined in the sum of \$100, and the cause is pending in this court upon appeal from the judgment rendered in said cause. Learned counsel for appellant make no point as to the sufficiency of the testimony to warrant a conviction, nor do they complain or assign any error respecting the regularity of the proceeding, but concede in their brief that there is but one question presented for determination in this cause, and that is whether section 29 of the act of 1905 (Laws 1905, pp. 163, 164 [Ann. St. 1906, § 7500-29]) abrogated or repealed sections 7456 and 7464, Rev. St. 1899, which latter sections classify the offense as a felony and prescribe the penalty for its commission. The information in this cause, which was duly verified, omitting formal parts, thus charges the offense: "L. B. Shuck, prosecuting attorney within and for the county of Shannon, and state of Missouri, under his oath of office and upon his own knowledge, information and belief informs the court that George G. Hod-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

acter or used in such a manner whereby fish in the waters of this state might be killed or destroyed, or not. In other words, the lawmaking power sought to take away all chances of the destruction of fish by means of explosives by simply saying, "You shall not use them at all except under certain conditions, whether they were calculated to kill fish or not."

These two sections are in no way inconsistent, and both of them can be made effective and operative. As was said in the case of *State v. Taylor*, 186 Mo., loc. cit. 615, 85 S. W. 566: "It is clearly the duty of courts, in construing two sections upon the same subject defining criminal offenses, to so construe them as to bring them in harmony and make them both effective and operative, to the end that a remedy may be afforded for the evil sought to be suppressed." These two sections are easily susceptible of being made harmonious. As they now stand, if the defendant placed in the waters of this state explosives of such a nature and character whereby fish may be destroyed or injured, or used it as a means of killing and taking fish from the waters of this state, he should be proceeded against under the provisions of section 7456 for a felony. If, on the other hand, he should use an explosive not of that character whereby fish might be destroyed, and not as a means for killing and taking fish from the waters of the state, yet fails to comply with the conditions required in obtaining the permission, etc., of the game warden, then he should be proceeded against under the provisions of section 29 for a misdemeanor. In our opinion it is clear that these two sections were intended to cover separate and distinct classes of acts done by persons handling dynamite or explosives.

We have thus given expression to our views upon the only proposition confronting us in the record before us, which results in the conclusion that the judgment of the trial court should be affirmed; and it is so ordered. All concur.

STATE v. GROSSMAN.

(Supreme Court of Missouri, Division No. 2.
Nov. 24, 1908.)

1. CONSTITUTIONAL LAW (§ 208*)—"CLASS LEGISLATION"—INTOXICATING LIQUORS—PROHIBITING SALES ON SUNDAY.

Rev. St. 1899, § 3011 (Ann. St. 1906, p. 1726), prohibiting any licensed dramshop keeper from keeping open his dramshop, or selling or giving away, or otherwise disposing of intoxicating liquors, on Sunday, applies to all licensed dramshop keepers, and is a general and not unreasonable regulation of the liquor traffic, and hence

For other definitions, see Words and Phrases, vol. 2, pp. 1217, 1218; vol. 8, p. 7605.]

2. CONSTITUTIONAL LAW (§ 46*)—STATUTES—VALIDITY—RIGHT TO RAISE CONSTITUTIONAL QUESTIONS.

One charged with violating Rev. St. 1899, § 3011 (Ann. St. 1906, p. 1726), prohibiting licensed dramshop keepers from selling intoxicating liquors on Sunday, cannot raise the question of the constitutionality of section 3013, prohibiting the granting of a dramshop license to one convicted of a violation of the statutes regulating dramshops, the two sections being separate, and section 3013 not being involved in the enforcement of section 3011.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 43; Dec. Dig. § 46.*]

3. INDICTMENT AND INFORMATION (§ 125*)—STATUTORY OFFENSES—SUFFICIENCY.

Since a statute forbidding several things in the alternative creates but one offense, an information may charge one with the commission of all the acts conjunctively, but an information charging all the acts disjunctively is bad.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 125.*]

4. INDICTMENT AND INFORMATION (§ 125*)—STATUTORY OFFENSES—SUFFICIENCY.

Rev. St. 1899, § 3011 (Ann. St. 1906, p. 1726), prohibiting any licensed dramshop keeper from keeping open, or selling or giving away intoxicating liquors, on Sunday, is a regulation of the liquor traffic on Sunday, and the offense denounced may be committed by any of the methods designated by the statute, and an information charging a violation of all the acts denounced by the statute must charge them conjunctively.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 125.*]

5. CRIMINAL LAW (§ 881*)—TRIAL—VERDICT—SUFFICIENCY.

The verdict must be reasonably definite and certain and responsive to the issues.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2093; Dec. Dig. § 881.*]

6. CRIMINAL LAW (§ 971*)—VERDICT—DEFECTS—MOTION IN ARREST OF JUDGMENT.

A defect in a verdict because it is uncertain and is not responsive to the issues may be reached by motion in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2463, 2466, 2468; Dec. Dig. § 971.*]

7. CRIMINAL LAW (§ 881*)—VERDICT—SUFFICIENCY.

A verdict finding accused guilty of selling or otherwise disposing of liquor on Sunday, as charged in the information, which alleges that accused, a licensed dramshop keeper, sold, gave away, and disposed of intoxicating liquors on Sunday, is uncertain and is not responsive to the issue, because it leaves to mere conjecture as to which act accused is found guilty of committing.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 881.*]

Appeal from St. Louis Court of Criminal Correction.

Arthur Grossman was convicted of violating the Sunday law, and he appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

disposing of liquor on Sunday, as charged in the information, and assess his punishment at a fine of \$75.00. E. F. Jones, Foreman."

Section 3011, Rev. St. 1899, upon which the information and the verdict as returned by the jury is predicated, makes it an offense for any person having a license as a dramshop keeper to sell, give away, or otherwise dispose of, or suffer the same to be done on or about his premises, any intoxicating liquors, in any quantity, on the first day of the week, commonly called Sunday. Under the provisions of this section it is well settled in this state that the pleader may in one count charge all of the facts embraced in that section, providing that he connects them by the conjunctive conjunction "and." It is equally well settled that it is bad pleading to charge all of the acts embraced in the section by the use of the disjunctive conjunction "or." These adjudications are based upon the theory that a statute which forbids several things in the alternative is usually considered as creating but one offense. As is said by Mr. Bishop: "Where, for instance, a statute forbids several things in the alternative, it is usually considered as creating but one offense, and the indictment may charge the defendant with the commission of all the acts, using the conjunction 'and,' where the statute uses the disjunctive 'or,' or, on the other hand, the indictment may contain but one or two of the acts, at the election of the pleader." 1 Bishop's Criminal Prac. § 191.

In *Stephens v. Commonwealth*, 6 Metc. (Mass.) 241, the court had under consideration a statute which prescribed the punishment of "every person who shall buy, receive or aid in the concealment of any stolen goods, knowing the same to have been stolen." It was held in that case that there was but one offense mentioned by the statute, although that offense might be committed in one of three modes—by buying, receiving, or aiding in the concealment of stolen goods. So it may be said as to section 3011. Its provisions are intended as a regulation of the liquor traffic by prohibiting the pursuit of that traffic on the first day of the week, commonly called Sunday. The offense denounced by that statute may be committed by any of the methods designated in the statute, either by keeping open the dramshop on Sunday, or by selling, giving away, or otherwise disposing of intoxicating liquors, or suffering the same to be done upon or about the premises where the dramshop is located, but the doing of either one of the particular acts would of itself alone make a complete offense. On the other hand, if all of the acts denounced by section 3011 were charged in an information, and in charging the commission of such acts the disjunctive conjunction

ant charged with the commission of such acts would be unable to tell as to which one of the acts charged he would be required to meet upon the trial of the cause. It may be said as to verdicts in criminal cases that the law is well settled that they must be reasonably definite and certain and responsive to the issues presented in the cause.

In *State v. De Witt*, 186 Mo. 61, 84 S. W. 956, the authorities were all carefully reviewed by this court, and the following conclusion was announced, after a full consideration of all the authorities, speaking through Judge Gantt: "Whatever the practice may be in other states, it is the settled law of Missouri that if a verdict, which is a part of the record, is not responsive to the issue, or is so uncertain and indefinite that it will not support the judgment, this defect may be reached by a motion in arrest of judgment"—citing *Webber v. State*, 10 Mo. 4; *Davidson v. Peck*, 4 Mo. 438; *Griffin v. Samuel*, 6 Mo. 50.

The verdict in this cause, measured by the authorities cited in *State v. De Witt*, supra, is manifestly insufficient to support the judgment. If the jury had found the defendant guilty as charged in the information, or had returned a verdict finding him guilty of the commission of one of the acts charged in the information, it would have been clearly sufficient, but this verdict falls to find definitely or with certainty the defendant guilty of the commission of any acts which would constitute an offense. It finds the defendant guilty of "selling or otherwise disposing of liquor on Sunday." The verdict in that form is not a finding that he sold whisky on Sunday, or that he gave it away or otherwise disposed of it on Sunday; it is simply a verdict which says, "We find the defendant guilty of either selling on Sunday or otherwise disposing of liquor" on that day, and leaves it to a mere conjecture as to which act the defendant is found guilty of committing.

While it is with reluctance that this court feels constrained to disturb the judgment of the trial court by reason of the insufficiency of the verdict returned, yet if juries are required under the law to return their findings in a reasonably definite and certain manner which are responsive to the issues presented, and we are to longer follow the well-settled rules of law applicable to the form of verdicts, then we see no escape from the conclusion that this verdict is indefinite, uncertain, and not responsive to the issues presented, and the motion in arrest of judgment filed by the defendant in the trial court should have been sustained.

Entertaining these views, it results that the judgment of the trial court should be reversed and the cause remanded, and it is so ordered. All concur.

port that in accordance with authority conferred on said committee, it did, on the 6th day of November, 1903, employ Peter T. Barrett as its attorney and counselor at an agreed compensation of \$350, and Wm. J. Gavigan as its clerk at an agreed compensation of \$200 per month, and on February 15, 1904, employed William F. Ryan as an additional attorney at an agreed compensation of \$350 per month, and because of the expenses incurred thereby by your committee, we ask that your honorable house pass the following resolution:

"Resolved, That the committee on the 'Investigation of Taxes' be and is hereby authorized to expend the sum of \$3,615 out of the fund municipal assembly, house of delegates, to defray the expenses already incurred by your committee under said resolution."

On April 15th the said committee made its report, and the house of delegates adjourned sine die. On July 15th, at a subsequent session of the house of delegates, the following resolution was introduced:

"Whereas, the special committee of the house of delegates on tax investigation did on the 8th day of April, 1904, report to this honorable house that, in accordance with the authority conferred on said committee, it did, on the 6th day of November, 1903, employ Peter T. Barrett, an attorney, at an agreed compensation of \$350 per month and William J. Gavigan, clerk and bookkeeper, at an agreed compensation of \$200 per month, and on the 15th day of February, 1904, did employ William F. Ryan, an attorney, at an agreed compensation of \$350 per month, and because of the expense thereby incurred by it the said committee requested this honorable house to authorize it to expend the sum of \$3,615 to defray the same; and

"Whereas, this House did on said 8th day of April, 1904, authorize the expenditure of \$3,615 to defray said expenses; and

"Whereas, the said special committee on tax investigation did on the 15th day of April, 1904, report to this honorable house that immediately upon the organization of said committee, to-wit, November 6, 1903, it employed Peter T. Barrett at an agreed compensation of \$350 per month and Wm. J. Gavigan at an agreed compensation of \$200 per month, and that on the 15th day of February, 1904, it did employ William F. Ryan at an agreed compensation of \$350 per month; therefore be it

"Resolved, That the said Peter T. Barrett be allowed for his services to said committee the sum of \$1,855, and that the said William J. Gavigan be allowed for his services to said committee the sum of \$1,060, and that the said William F. Ryan be allowed for his services to said committee the sum of \$700, to be paid out of the fund heretofore appropriated to pay the expenses of the house of delegates and that the clerk of this house

\$1,855, William J. Gavigan for \$1,060 and William F. Ryan for \$700."

The respondent is the auditor of the city of St. Louis. There was oral evidence introduced which tended to show the services of the relator as clerk of said committee, and that his services were reasonably worth \$200 per month. The position of the city auditor is well stated in his return to the alternative writ of mandamus. In this return he says:

"Defendant alleges that on or about the 3d day of October, 1904, the clerk of the house of delegates drew his warrant in favor of relator for the sum of \$1,060, and that said warrant was presented to defendant as auditor of the city of St. Louis, and that the defendant on or about the 25th day of October, 1904, declined and refused, and still declines and refuses, to audit and allow the same, and declines and refuses to draw a warrant for the same to pay the same. Defendant states that the house of delegates did not possess the power or the authority under the law to authorize its said committee to make the alleged contract of employment of relator as clerk, and the said alleged contract was and is void under the provisions of section 48 of article 4 of the Constitution of the state of Missouri. This defendant states further that under section 18, art. 16 (Ann. St. 1906, p. 4892), of the charter of the city of St. Louis, no contract for services of any clerk could be entered into at a compensation exceeding the rate of \$1,800 per year—that is to say, exceeding \$150 per month—and that the alleged employment of the relator as such clerk of the said committee of the said house of delegates was without authority of law. This defendant states further that there is now no appropriation or fund, nor has there been any such appropriation or fund since the 1st of April, 1904, out of which the amount claimed by the relator could be paid, or against which this defendant as auditor of the city of St. Louis could draw or allow a warrant therefor. Defendant states further that the defendant, as auditor of the city of St. Louis, is prohibited by section 11 of article 5 (Ann. St. 1906, p. 4839) of the charter of the city of St. Louis from drawing or allowing a warrant in favor of the relator when there is no fund or appropriation against which such warrant could be drawn or allowed, or out of which it could be paid. Wherefore this defendant prays that the alternative writ be quashed, and the peremptory writ be refused, and that he be dismissed with costs."

John Faudi testified, in effect, as follows: "Am second deputy auditor of the city of St. Louis. Testified that he had with him in court the daily balance book covering all appropriations for the city. The daily balance book is an exact copy of the appropriation bill, from time to time. The different departments draw against it, and deductions

for its selection and the selection of a clerk? The position held by relator was not one held by an ordinance duly passed by the legislative branch of the city government and approved by the mayor, but only by the resolution aforesaid. Can one branch of the legislative department by mere resolution create a position and attach thereto a salary to be paid out of the city funds? Or, further, can either branch of the legislative department make a valid contract for services, without the action of the other branch and of the mayor? Or can such contract be valid without being in writing? If not, then is there such implied power in the charter and laws as would authorize the resolution, so far as relator is concerned, and the contract, if such it could be called, as indicated in the resolution? All of these are pertinent questions. Relator contends that there was power in the house of delegates to make the investigation mentioned in the resolution. This we think correct, and, as stated above, such body had the right to designate a committee for that purpose, but could either that body or its committee create a salaried position, or contract for services? To our mind there is no question that a salaried position cannot be created by resolution of one branch of the municipal legislative body. Such a proceeding is entirely out of harmony both with the spirit and letter of our law. Nor do we think it less clear that one branch of the legislative department cannot by resolution make a valid contract. The creation of salaried positions as well as the expenditure of public funds is placed in the hands of the whole legislative department, there being coupled therewith the restraining veto power of the executive department. The resolution, therefore, created no legal position for relator, nor did it constitute a valid and binding contract under which he could act.

2. We think that inasmuch as relator was not a public official, but a private citizen, before there could be a valid and binding contract between him and the city, such contract must be one duly authorized by law and duly entered into in writing by the properly constituted authorities. In other words, the relator being a mere alleged contractor for services with the city, the provisions of section 6759, Rev. St. 1899 (Ann. St. 1906, p. 3327), fully apply, as well as the provision of the city charter above quoted. If the city of St. Louis by proper ordinance had made an appropriation for this specific work, and authorized the appointment of a person to do it, then a different question might arise. Such, however, was not the case, and this matter will not be discussed. No city ordinance appears in the record, except a general appropriation ordinance, which will be discussed in a further paragraph.

for him, specially, only appears in the resolution. In our judgment, under the statute cited aforesaid, inasmuch as relator was not an officer holding an office created by ordinance, the only legal method for the authorization of his work would have been by ordinance providing for such character of work and providing for the execution of a contract as by the statute and city charter last aforesaid prescribed. The force and effect of this statute and its purposely enacted restricting influence have been fully discussed by the courts, to which discussion we can add nothing. *Woolfolk v. Randolph County*, 83 Mo. 501; *Crutchfield v. Warrensburg*, 30 Mo. App. 456; *Schell City v. Rumsey Mfg. Co.*, 39 Mo. App. 264; *Taylor v. School District*, 60 Mo. App. 372.

3. It is strenuously urged that inasmuch as there is legal authority for the house of delegates to make such investigations, then there is an implied power in that body to employ the necessary means, although it require the expenditure of the public funds of the municipality for that purpose, and although it requires a contract, either express or implied, with some person to do the work. Many cases from other states are cited, and some are forcibly in point, but an examination of those cases fail to show the constitutional and statutory inhibitions on municipal contracts, which we have, and for that reason the cases are not in point either in fact or in law. But grant it that there was an implied power authorizing the house of delegates to make a contract with relator for services to the city, yet such power to contract, whether express or implied, must be exercised in pursuance of the terms of the statute and city charter quoted, and in this case there is no such contract shown.

4. There is yet a further reason fully justifying the conduct of respondent in refusing to audit the claim of relator. For the sake of the argument, grant it to be true that the legislative department could by an appropriation ordinance, prior to or after the work was done, pay relator for his services, yet have we such an ordinance in this case? We think not. The resolution, it is true, makes a specific disposal of a certain fund theretofore appropriated by the appropriation ordinance, but this resolution cannot go beyond the scope of the ordinance. By the charter, art. 5 (Ann. St. 1906, p. 4839), it is provided: "No money shall be paid out of the treasury except on the auditor's warrant, and no warrant shall be issued on any appropriation unless there is an unexpended balance to the credit thereof sufficient to cover such warrant and money in the treasury to pay it." And by section 14 it is provided (Ann. St. 1906, p. 4839): "No money shall be expended, nor shall any improvement be ordered involving the ex-

finally settled, will this court take jurisdiction of the case at bar, the appeal having been taken long subsequent to the adjudications herein indicated? In the very recent case of *Dickey v. Holmes et al.*, 208 Mo. 684, 106 S. W. 511, the appeal was granted to this court, and it was sought to have this court retain jurisdiction by reason of a constitutional question being involved. Judge Burgess, in a very exhaustive opinion, reviewed all of the authorities applicable to the proposition now confronting us. The constitutional question raised in that case had, previous to the appeal, been finally adjudicated in numerous other cases, and this court declined to take jurisdiction of the same. It was pointed out in the discussion of the proposition that there were some cases which held that, when a constitutional question has once been decided in a case, it can be raised in a subsequent case, and when so raised in the trial court it is so far in the case as to direct the course of the appeal to the Supreme Court. Judge Burgess, in commenting upon those cases, said that: "This is not an ironclad rule to which there are no exceptions. In the very nature of things, the constitutional question involved must be a live one, not expressly foreclosed by prior decisions of this court, otherwise no such question could ever be settled, no matter how often adjudicated by this court."

In *Gabbert v. Railroad*, 171 Mo. 84, 70 S. W. 891, it was ruled that the amendment to the Constitution allowing nine jurors to return a verdict was legally adopted and was constitutional, and this court has uniformly since declined and refused to consider cases where the appeal was taken solely on the ground of the alleged unconstitutionality of that amendment, except where the appeal was taken prior to that decision, December 24, 1902.

In *Murray v. Railroad*, 176 Mo. 183, 75 S. W. 611, this court retained jurisdiction solely upon the ground that the appeal was taken prior to the decision in *Gabbert v. Railroad*, supra. The same rule was announced by this court in banc in *Tandy v. Transit Company*, 178 Mo. 240, 77 S. W. 994, and by division 1 of this court in *Portwright v. Railroad*, 183 Mo. 72, 81 S. W. 1091.

In *Lee v. Jones*, 181 Mo. 291, 79 S. W. 927, 103 Am. St. Rep. 596, there was a verdict for the plaintiff for \$1,500 upon which there was a judgment rendered, and the defendant appealed. Valliant, J., speaking for the court, said: "The appeal was taken to the St. Louis Court of Appeals, but when the attention of that court was called to the fact that only nine of the jurors concurred in the verdict, and that the constitutionality of such a verdict was challenged in the circuit court, the Court of Appeals transferred the cause to this court. At the time the appeal

by three-fourths of the jurors in a civil cause in a court of record; therefore there was a constitutional question in the case which gave this court jurisdiction, and the action of the Court of Appeals transferring the cause to this court was right. This court having jurisdiction when the appeal was taken, will retain it. But since then we have decided that under our Constitution three-fourths of the jurors in a civil suit in a court of record may render a valid verdict and therefore that is no longer a constitutional question in this state." The same conclusion was reached in *Franklin v. Railroad*, 188 Mo. 533, 87 S. W. 930, and in *Carpenter v. Hamilton*, 185 Mo. 603, 84 S. W. 863.

In *Bolling v. Railroad*, 189 Mo. 219, 88 S. W. 35, Judge Gantt, in speaking for this court, said: "Under the recent decisions of this court in banc and both divisions, had this appeal been taken to or transferred to this court after the decision in *Russell v. Croy*, 164 Mo. 69, 63 S. W. 849, and *Gabbert v. Railroad*, 171 Mo. 84, 70 S. W. 891. * * * this appeal should be remanded to the St. Louis Court of Appeals, as the sole ground upon which it is transferred to this court is that the amendment to section 28 of article 2 of the Constitution (Ann. St. 1905, p. 162), permitting nine jurors in a civil case to make a verdict, was never legally adopted, but inasmuch as the appeal, when taken fairly raised the constitutional question whether such amendments had in fact become a part of the Constitution, and was taken prior to the settlement of that question by this court in the cases above cited, we will retain the appeal as properly in this court; otherwise, we would not"—citing *Lee v. Jones*, 181 Mo. 291, 79 S. W. 927, 103 Am. St. Rep. 596; *Carpenter v. Hamilton*, 185 Mo. 603, 84 S. W. 863.

In *Dickey v. Holmes et al.*, supra, the constitutional question involved was concerning certain charter provisions of Kansas City, Mo., and, in discussing the question as to whether this court should take jurisdiction, it was said: "The case of *Barber Asphalt Co. v. Ridge*, 169 Mo. 376, 68 S. W. 1043, was decided in division No. 2, June 18, 1902, and *Paving Co. v. Munn*, 185 Mo. 552, 83 S. W. 1062, on December 24, 1904, while the appeal in the case at bar was granted on the 23d day of January, 1905; so that, before the appeal in this case was taken, division 2 of this court had twice decided the charter provision in question unconstitutional and void, and both divisions a number of times since. In view of these repeated adjudications, can there be any merit in this appeal? If there is, we fail to appreciate it. We therefore decline to take jurisdiction of this case, and order the record and papers transferred to the Kansas City Court of Appeals, to whose jurisdiction it rightfully belongs."

As applicable to the case at bar, it is man-

such duties as a good mother (an Anna Mater in name and fact) would perform for a family of boys. In the school building are eight or nine recitation rooms, a study hall, laboratory, and 15 or 20 rooms devoted to such general purposes as are necessary to the successful conduct of the school. While certain apartments of the building are set apart for the family, yet pupils and teachers have access to them, and these apartments at times are used in connection with the school, e. g., social attractions and giving the boys recreation. One of the defendant's said sons was an officer in the school, and did school work. One of said daughters was the general assistant to her mother in the home department. Another son and daughter were minors, and, when they were not elsewhere at school or in the employ of outside parties in outside pursuits, they were merely members of defendant's family, except that, as said, during vacation all the family performed duties connected with the school in renovating, refurnishing, house cleaning, etc., and, presumably, in correspondence, advertising, etc.

Resting on the foregoing facts, learned counsel insist on one side, and deny on the other, that the locus to the extent of one acre is exempt from taxation under the following constitutional and statutory provisions:

(1) Section 6, art. 10, of the Constitution (Ann. St. 1906, p. 280): " * * * Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation when the same are used exclusively for religious worship, for schools, or for purposes purely charitable * * *."

(2) Section 9119, Rev. St. 1899 (Ann. St. 1906, p. 4199): "The following subjects are exempt from taxation: * * * Sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable shall be exempted from taxation, for state, county or local purposes."

It is not contended by counsel for the state, as we see it, that the exemption does not cover private schools as distinguished from public schools, nor pay schools as distinguished from free schools, nor boarding schools as distinguished from schools having no home department, nor military schools as distinguished from those having no military features. The contention of the state hinges on the phrase, "used exclusively," found in the tax-exempting clause of the Constitution and statute; and the point for decision is nar-

propriator of a private military boarding school in Missouri reside in the school building with his family, having no avocation but running the school, and in which avocation the family participate, does such residence destroy the exemption? It is our opinion that, viewed from the philosophy of the thing and measured by cardinal standards of legal interpretation, the right answer to that question is, No. This because:

(a) It must be conceded to the state that whether a tax-exempting clause be viewed from the standpoint of the state down to the people or from the standpoint of the people up to the state, there be unbending and inviolate rules which as sure words of the law are always to be reckoned with; and these rules (from the standpoint of the state) are that an abandonment of the sovereign right to exercise the vital power of taxation can never be presumed. The intention to abandon must appear in the most clear and unequivocal terms (*Pacific R. R. Co. v. Cass County et al.*, 53 Mo., loc. cit. 27); and from the standpoint of the people they are that equality is equity in taxation; that the yoke of taxation—a forced contribution for governmental needs—should rest evenly on the necks of all citizens; that to relieve one but increases the burden of the other; that tax exemptions are in derogation of equal right—are contrary to common right—hence are not to be favored by the courts, but should be construed strictly and confined to the subjects specified, including such as are necessarily within the contemplation of the legislation under review. *Kansas City Exposition Driving Park Co. v. Kansas City*, 174 Mo. 427, 74 S. W. 979; *Fitterer v. Crawford*, 157 Mo., loc. cit. 58, 57 S. W. 532, 50 L. R. A. 191 et seq.; *City of Kansas v. Kansas City Medical College*, 111 Mo., loc. cit. 146, 20 S. W. 35. Says Scott, J., in *Wyman v. St. Louis*, 17 Mo. 335: "Equality is equity, and when one claims exemption from a burden to which all others are subject, and whose freedom will increase their load, he must clearly show himself in the situation which entitled him to the exemption claimed." And Cooley states the sum of the matter to be (1 Cooley on Taxation [3d Ed.] 357, 358): "It is also a very just rule that, when an exemption is found to exist, it shall not be enlarged by construction. On the contrary, it ought to receive a strict construction; for the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that, unless the privilege is limited to the very terms of the statute, the favor would be extended beyond what was meant." Nevertheless, conceding to the state the foregoing general propositions, yet strict construction must still be a reasonable construction, the product of right and clear thinking, or else reason is no longer the life of the law; and it has been well said by a scholar

and form aforesaid, feloniously, falsely, knowingly, willfully and corruptly committed willful and corrupt perjury, contrary to the form of the statute, and against the peace and dignity of the state.

"Nicholas B. Conrad,

"Prosecuting Attorney.

"A true bill.

"C. H. Williams,

"Foreman of the Grand Jury."

The defendant is not represented in this court by counsel, and we must look to the grounds assigned in the motion to quash as the basis of the judgment of the court in quashing the indictment. From these it appears that it was insisted by the defendant in the circuit court that, assuming the truth of all that was charged against the defendant, the matters sworn to by him before the grand jury were wholly immaterial and collateral to the question or matter under consideration by the grand jury, to wit, the illegal selling of intoxicating liquors, including beer, by Harve Smith and George Brent in said county, and therefore could not form the predicate for a charge of perjury.

It appears from the averments in the indictment that the grand jury had been duly and legally selected, impaneled, and sworn in the circuit court of Henry county at its September term, 1907, and that a certain complaint had been presented to them against Harve Smith and George Brent for illegally selling intoxicating liquors, including beer, in said county of Henry outside of the city of Clinton, and that the defendant, Ackerman, had been duly summoned as a witness before the said grand jury in regard to said complaint and had been sworn by the foreman of the grand jury, and that it was then and there material and important to know whether Ackerman had any knowledge of the transportation and hauling of beer from Clinton to Deepwater, and for whom the hauling was done, and the time and circumstances thereof. The indictment thus names and particularizes the body before whom the alleged perjury was committed, and the investigation of the guilt of persons named therein, and the materiality of the evidence in said investigation by the grand jury, and that the oath was administered to the defendant by the foreman; and the indictment then sets out the evidence which the defendant gave before the grand jury, and then proceeds to assign perjury upon this evidence. In substance it is alleged that the defendant then and there, before the said grand jury, feloniously, falsely, corruptly, knowingly, willfully, and maliciously did swear and testify that he never, at any time, hauled a wagon load of beer to Deepwater, and never unloaded any beer at Harve Smith's barn; that he never hauled

did on or about the 17th of June, 1907, a dray load of beer to Deepwater and loaded the same at Harve Smith's barn, and that he did haul beer for George Brent, and frequently made trips to Deepwater at night. It would seem that the contention of the defendant is that, because the indictment did not allege any false evidence on the part of the defendant as to the actual illegal selling of beer or other intoxicating liquors by the said Smith and Brent, therefore the fact of the knowledge of the defendant of the receipt of large quantities of beer by the said Brent and Smith, on the part of the defendant, and of his having hauled the same to Deepwater, the place of sale, in the nighttime, and delivered the same to the said Smith and Brent, was wholly immaterial, and the circuit court took this view of the law, and held that, even if the testimony of the defendant was knowingly false and corrupt, it could not constitute perjury. We think this was a mistaken view of the law. In *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116, we had occasion to investigate the sufficiency of a charge of perjury committed before a grand jury, and in the course of the opinion in that case we followed with approval the opinion of this court in *Ward v. State*, 2 Mo. 120, 22 Am. Dec. 449, where in it is said: "It is a solemn and important duty that every citizen owes to his country to give evidence in courts of justice against offenders against the peace and good order of the community." And in the *Faulkner* Case we reiterated the ruling made by this court in *State v. Terry*, 30 Mo. 368, that perjury can be committed before a grand jury in its investigation of crime, and said: "Any knowledge or information possessed by him (the defendant in the case) concerning 'the existence of such fund and the purposes for which it was to be used' was material to the inquiry the grand jury was then making. It was the natural and ordinary way in which the grand jury would ascertain the material facts upon which to base an indictment or to refuse to find one. It was their sworn duty to obtain the legal evidence to ascertain the witnesses by whom the charge could be substantiated, and to indorse their names on the indictment, not alone for the benefit of the prosecuting attorney, but for the protection of the person charged in the indictment in the preparation of his defense. This inquiry and the defendant's answer, taken in connection with the allegations of the indictment, discloses the materiality of the question and answer to the inquiry then being made." So in this case, in the investigation of the charge that Smith and Brent had been guilty of illegal sales of intoxicating liquors, including beer; that the same had been sold in said county outside of Clinton, the county seat—we

that the defendant and Albert Kapp on the 6th of April, 1907, at the city of St. Louis, feloniously committed an assault in and upon one John F. Huppert, and by force and violence to his person did rob, steal, take, and carry away one gold-filled American Waltham watch, one gold-filled watch chain, one Royal Arcanum charm, one pocketknife, one pocketbook and 35 cents in money, all of the value of \$50, from the person of the said John F. Huppert, and against his will, with the intent then and there to deprive him of the use thereof and to convert the same to their own use. The defendants were duly arraigned and pleaded not guilty, and on the 27th of May, 1908, were tried before a jury and each was found guilty, and the punishment of each assessed at imprisonment in the penitentiary for 20 years. In due time the defendants filed their motions for new trial, which were overruled, and thereupon the court reduced the punishment of the defendant King to 10 years in the penitentiary and sentenced him accordingly, and from that judgment he appeals to this court.

The testimony introduced by the state tended to show that John F. Huppert was a barber residing at 1423 Blair avenue, and working at 2219 North Broadway, in St. Louis. At about 6 o'clock on the morning of Saturday, April 6, 1907, Huppert left his home for his place of business. He was wearing at the time his gold watch and chain and charm, and carried his pocketknife, finger nail trimmer, pocketbook, and small change. At about 11:45 that night he returned home in a very bad condition; over his right eye was a deep cut as if made by a blunt instrument, his eye was swollen, his face bruised, he was bleeding profusely at the nose and mouth, and his clothes were covered with dust, dirt, and blood, and one of his pockets was torn. He was very weak from loss of blood, and was in a dazed condition, in which he remained for about 12 days, when he died. His watch and chain and the other articles named were gone, and the pocket that was torn was bloody. About 150 or 200 feet from Huppert's residence, on the route of his usual travel to and from his place of work, was an alley opening into Blair avenue. At a point in said alley, at its entrance from Blair avenue, was found, a short time after Huppert's return home that night, a pool of blood, and from this point to his home was a trail of blood. About 10 feet from the pool of blood in the alley was found a piece of his watch chain. It further appeared in evidence that at Fourteenth street and Cass avenue about one block and a half from the said alley at Blair avenue was a warehouse and wagon and coal yard, where, on the night of the said 6th day of April, 1907, a number of boys and young men, among them were

night Kapp and the defendant King left their companions at that place and were gone about 20 minutes, returning just before midnight, out of breath, excited and with their clothes mussed up. Upon being asked by Niesen, one of the said party, as to what was the matter, one of them said it was none of their business, and to the same inquiry put by another companion they replied that they had held up a man on Blair avenue and got a watch off of him, and they were going out before they got arrested. Niesen testified, "They came back and said that they had a watch and thirty cents, and they had better pull out before the cops got them," and "then they said they stuck up a fellow at Blair and Cass and got thirty cents and a watch." Niesen testified that it was his impression that it was Kapp who did this talking, and Miller, another of the party, thought that it was the defendant King that did the talking. Harris testified, "I remember Kapp coming in and he said he had held up a fellow on Blair and Cass avenue for a watch." About 12 o'clock, the defendants Kapp and King being in the act of taking their leave of the party, two officers approached, and they all ran. The officers arrested four of the associates of the defendants, and recognized and called to the defendant King as he took his flight. Up to that time, the officers had not heard of the assault upon and the robbery of Huppert. The defendant Kapp on being arrested, a few days later, said that on Saturday night after 9 o'clock, he was too drunk to know where he was or what he was doing. About 5:30 o'clock in the afternoon of Sunday, the next day, William Meyers and Charles Miller met the defendant King on the street, and Meyers asked King who held up Huppert, and he replied that he and Kapp did. The defendant King requested Meyers to meet him at 7:30 o'clock that afternoon when he would give Meyers Huppert's watch, which he then had at his home, to take to Huppert and say nothing. At the appointed hour Meyers met King and received from him Huppert's watch, which he took to Huppert's house and delivered to Huppert the next morning. King also told Meyers and Miller that the hold-up occurred on Blair avenue. Mrs. Huppert, corroborated by her daughter, testified that two men giving their names as Murphy and Miller brought her husband's watch back to him at his home on Monday morning, April 8th, and they also brought \$50 to Huppert, and had him sign a little note that he was mistaken in the man Miller, that Miller was not the man who held him up. The watch and chain were introduced in evidence. At the close of the evidence, the defendants moved the court to direct the jury to acquit them, but this motion was overruled, and the defendants offered no evidence.

STATE v. McAFEE.

(Supreme Court of Missouri, Division No. 2.
Nov. 24, 1908.)

HOMICIDE (§ 253*)—MURDER—EVIDENCE.

Evidence held to sustain a finding that the killing was premeditated, and that defendant was therefore guilty of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

Appeal from Circuit Court, Wayne County; Joseph J. Williams, Judge.

Charles McAfee was convicted of murder in second degree, and he appeals. Affirmed.

O. L. Munger and W. B. Kennedy, for appellant. Herbert S. Hadley, Atty. Gen., and F. G. Ferris, Asst. Atty. Gen., for the State.

BURGESS, J. On the 25th day of January, 1908, the prosecuting attorney of Wayne county filed an information in the circuit court of said county, charging the defendant with murder in the first degree for the killing of one J. M. Boatwright, with a loaded pistol, at said county, on the 4th day of July, 1907. He was tried upon said charge on the 19th day of February, 1908, and convicted of murder in the second degree, the verdict of the jury fixing his punishment "at ten years in the penitentiary." On the same day the defendant filed motions for a new trial and in arrest of judgment, which were overruled by the court. Thereafter, on the 22d day of February, 1908, the defendant and his counsel being present, the court, in view of the informality in the verdict respecting the punishment, changed its terms so as to read "at imprisonment in the penitentiary for the term of ten years." The court thereupon rendered its judgment and passed sentence upon the defendant, from which judgment the defendant appeals.

The testimony discloses that on July 4, 1907, there was a picnic at Mill Springs, Wayne county, Mo., which was attended by a large crowd of people. Defendant was early in town that morning, and between 9 and 10 o'clock in the forenoon he appeared at a store in Mill Springs and traded his watch for a revolver. The deceased, J. M. Boatwright, was seen on the picnic grounds that forenoon, apparently somewhat under the influence of liquor, and was making inquiries for defendant, whom he said he wanted to whip. Boatwright was a short man, weighing about 165 pounds, and the defendant was about the same weight, but taller. About 1 o'clock in the afternoon, as defendant was leaning against a lemonade stand in the pl-

men moved out of the crowd and into the open. There is some divergence in the testimony respecting the words which passed between the two men, and the epithets applied by each to the other, while at the lemonade stand and up to the time the fatal shot was fired. According to witness Elmer E. Boggs, who was within 10 feet of the parties at the time, he saw both come out of the crowd, each man with his hand on the other's shoulder, and heard Boatwright say to defendant that he would "go out of the crowd with him or any other son of a bitch." The defendant said, "Do I understand you to call me a son of a bitch?" Boatwright made no answer, but told defendant to take his hand out of his hip pocket and he would fight him fair. He then proceeded to take off his vest, and while in the act of doing so he was shot by the defendant with a pistol which he drew out of his right hip pocket. After the shot was fired Boatwright fell forward and grabbed at the pistol, and then fell on his back and died. This witness also testified that neither man appeared excited, but cool and self-possessed, and that at the time the fatal shot was fired they were two or three feet apart. Judge Creecy testified that he was within 10 or 15 feet of the men when the trouble commenced. He saw Boatwright motion to defendant, and heard him say: "Come out of the crowd, you damn son of a bitch; I can whip you." Defendant seemed angry, but not excited, and said, "Don't call me that any more." Boatwright then said, "I'll call you anything I want to." The defendant put his hand into his hip pocket, and Boatwright commenced pulling off his vest, saying, "I'll whip you any way, with your hand in there," and applied another ugly epithet to the defendant. Immediately the defendant fired, and Boatwright said, "You have killed me," whereat the defendant said, "If I ain't, G—d d—n you, I can do it." As soon as Boatwright was down, the defendant drew his pistol on him again with both hands, at which time witness Creecy stepped up to the defendant, and said, "Don't shoot him any more. You have already killed him; look at the blood on his shirt." To this defendant replied, "You stand back and keep your hands off of him or I'll put one in you." Several other witnesses for the state testified much to the same effect, the testimony differing somewhat as to the details, all agreeing, however, that Boatwright was in the act of taking off his vest when the defendant shot him. There was no evidence that deceased struck at the defendant or that he had any weapon. Dr. Owens, who was also an eye-witness to the shooting, and whose testimony was like to that of the other witnesses for the state, examined the body of the deceased.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fied that this caused the death of the deceased.

Charles McAfee, the defendant, testifying in his own behalf, said that a week before the said Fourth of July, Sarah Baker told him that Boatwright was going to kill him on sight. He had seen Boatwright twice in the morning, but avoided him, and was told that morning at the picnic, by Sarah Baker, Alice Swann, and George Mann, that Boatwright was hunting for him. He said he was standing at the lemonade stand talking with Mr. Mann, who had just told him that Boatwright was hunting him, when Boatwright approached, grabbed him by the left arm, called him a vile name, and then said: "Come out here; I am going to kill you." To this the defendant replied: "No, sir; I don't think any of the Boatwrights can do that." He testified that Boatwright held to his arm and pulled him out of the crowd, he resisting all the time, and that as Boatwright made a movement with his hand towards the right-hand pocket of his pants he (defendant) shot him. He said that he was not able to meet Boatwright in a physical encounter, and was not his equal in size or strength. He denied that the deceased was taking his vest off when he shot him, or that deceased told him to take his hand out of his pocket, or that he said he would fight him fair. In defendant's behalf, Sarah Baker testified that about a week before said day she heard Boatwright threaten defendant's life, and that about 9 o'clock on the morning of that day Boatwright told her he was hunting defendant and that he was going to kill him, which threats she communicated to defendant that morning. She stated that she witnessed the beginning of the difficulty; that, as she was on one side of the lemonade stand, and the defendant and Boatwright on the other, Boatwright went up to the defendant, grabbed him roughly by the shoulder, addressed him in insulting language, and said that he was going to kill him. Her testimony further disclosed that there was ill feeling between the defendant and Boatwright's half-brother, Ed. Boatwright, resulting from their respective attentions to a Mrs. Swann. Rufus Tindall, in defendant's behalf, testified that in the morning of that day he met Boatwright, who inquired for the defendant, saying that he was going to give him a good whipping; that about 1 o'clock he again met Boatwright, who inquired if he had seen the defendant, and that as he made the inquiry he saw the defendant, and remarked, "What I am going to do to him will be a plenty." Tindall requested him not to get up any trouble, and Boatwright, who had a knife in his hand, whittling, at the time, said, "I just want to get to stick that much of the blade in his

defendant, took him by the shoulder, and told him that he was going to give him a whipping; that he pulled the defendant along, the latter resisting, until they emerged from the crowd, when Boatwright stepped in front of defendant, and they both stopped; that defendant drew his pistol, and Boatwright seemed to be grabbing at it. Defendant fired, and Boatwright pitched forward against him. Ben Nation, witness for the defendant, testified that Boatwright took hold of defendant's shoulder, pulled him along, and said that he was going to give him a good whipping; that Boatwright was grabbing at defendant's pistol as the shot was fired, and that Boatwright's vest was on one shoulder only when he fell. Defendant introduced four witnesses who testified that Boatwright's reputation in the community was that of a quarrelsome, turbulent, and dangerous man.

While the defendant is not represented in this court, we have carefully gone through the record, and find it free from substantial error. Under the evidence, the defendant might well have been convicted of murder in the first degree. While he did not seek the quarrel with the deceased, he provided himself with a pistol in anticipation of it, and took advantage thereof to shoot the deceased, who was unarmed, and who at the time the shot was fired was in the act of taking off his vest. The deceased had not struck at the defendant, but was at the time merely preparing for a personal encounter with the defendant, whom he had threatened to whip. It is true, the deceased had applied insulting epithets to the defendant, and threatened to whip him, but there is no evidence tending to prove that the defendant was thereby aroused to a sudden heat of passion; the testimony, on the contrary, being that both men appeared to be cool and self-possessed at the time. Even after the shot was fired, and the deceased had fallen, the defendant was about to shoot again when one of the witnesses present interfered and told him to desist. Indeed, from all the evidence, it is plain that the killing was done with premeditation and deliberation, and the defendant might well count himself fortunate in escaping with so light a sentence.

The judgment is affirmed. All concur.

THOMAS v. SCOTT.

(Supreme Court of Missouri. Nov. 25, 1908.)

1. COURTS (§ 231*)—APPELLATE JURISDICTION —"CASES INVOLVING TITLE TO REAL ESTATE."

A suit to set aside a deed in the chain of title as fraudulent involves title to real estate within Const. art. 6, § 12 (Ann. St. 1906, p. 218), conferring on the Supreme Court juris-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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that if such notice was given and filed by her attorney it was without her knowledge or authority. Again, the language of the notice itself does not declare the title, except inferentially, to be in Dora Vorhauer. This plea of the defendant is not such as should be sustained, and the point is ruled against her. The question might be different, although we do not decide it, had the case been such as called for a *lis pendens*. In an alienation suit, one purely for damages, there is no place for the filing of a notice of *lis pendens*, and it would require the express direction of plaintiff to bind her.

2. Going to the merits of the case and eliminating the question of estoppel, was the decree nisi well founded? We think so. A very large portion of plaintiff's case consists of evidence tending to show improper relations between Edward Linck and Dora Vorhauer, which may be a mere circumstance tending to show a fraudulent scheme; but, to say the least, it is of doubtful probative force under the charges in the petition. The alleged fraud perpetrated upon plaintiff, in her language, is thus stated: "I signed this deed of trust. I do not remember seeing any notes at the time. My husband told me he wanted to borrow money on a second deed of trust to pay off the first deed of trust, and borrow the money from some outside party, and that is all the satisfaction he gave me. I relied upon that promise. I don't know whether or not he paid off that building association loan. I signed that deed of trust relying upon the promise he made me." All of this is flatly denied by the husband. On cross-examination she says that there were six or seven attachments against Linck's property for as many different debts, and that she knew these debts were due when she signed the deed of trust. Plaintiff's case is made solely upon this testimony as to the alleged fraudulent representation concerning this deed of trust, the alleged improper relation of Linck and Dora Vorhauer, and testimony showing that, after the personal property was attached and sold, Linck managed the business. On the other hand, it appears that Edward C. Linck sold this second mortgage which had been executed to Frank Linck to his brother Will Linck; that after the goods were attached Will Linck sold the mortgage and notes secured thereby to Archibald McKechnie, who afterwards foreclosed and brought in the property, and several years later in August, 1899, sold to Dora Vorhauer; that, with this money from McKechnie, Will Linck, aided by his brother

the property at the attachment sale; that after the sale Will Linck, Frank Linck and McKechnie, who was a friend of Will Linck, but not of Edward Linck, incorporated the Linck Wall Paper Company, and Edward Linck was hired at \$9 per week to manage the business in connection with Frank Linck; that thereafter the business was run in that name, the major interest being held by Will Linck, no interest being held by Edward Linck. McKechnie collected the rents on the real property from the Linck Paper Company and other tenants for the three years or more he owned it. After the sale to Dora Vorhauer in 1900, which sale seems to have been brought about by Will Linck, she collected the rents, and was so doing at the time of this suit. Dora Vorhauer was shown to be a woman of some property. Edward C. Linck is not shown to have had any property after the attachment and sale of the stock of merchandise. Dora Linck is not shown in any way to have had any knowledge of the alleged fraudulent statements made by Edward C. Linck to his then wife, Helen Linck. Mrs. Helen Linck waits from 1895 to 1904 to sufficiently discover fraud to bring this action, and was then no doubt chafing under the sting of seeing her former husband marry the woman who had come between them. The personal conduct of Edward C. Linck and Dora Vorhauer, prior to their marriage, is not to be commended, if, indeed, their marriage, in good morals, could be commended. Yet, when all this evidence is reviewed, it strongly tends to show that Edward C. Linck was a practical bankrupt after his stock of goods was attached, and that the subsequent transactions were legitimate and in good faith. The evidence is at least consistent upon the theory of good faith and honesty. It evidently so struck the learned chancellor below.

Complaint is urged here that McKechnie was not placed upon the witness stand by defendant. No showing is made as to whether he was dead or alive at the date of trial. We hardly think this authorizes us to reverse this judgment. It devolved upon the plaintiff to first make a case, and, with the evidence of defendants omitted, we have serious question of there being a *prima facie* case for plaintiff. However, under this record we do not have to say that no case was made by her proof. Further review of the details of the case can serve no good purpose.

Upon the whole, the judgment nisi was correct, and it will be affirmed. All concur.

transportation to the point of destination of the shipment and return, is, to the extent of a free return transportation, in violation of the fourteenth amendment of our federal Constitution and therefore void. *McCulley v. C. & Q. Ry.* (not yet officially reported) 110 W. 711. This motion for rehearing has in fact been continued from time to time to wait the decision in that case. That decision will necessitate a reversal of the judgment in this case to the extent of the item of \$3.10, but it does not affect the other items in the plaintiff's demand. The litigation commenced in a justice court in two separate suits. In the first suit there was but one count in the complaint filed in the justice's court; in the second there were three counts, one of which was for this item of \$3.10 for return transportation. Appeals in both cases were taken to the circuit court, and when here the two suits by agreement were consolidated. There was a verdict for the plaintiff on each of the four counts, in which the damages awarded in each was separately stated, and judgment accordingly, from which the defendant railroad company appealed, the appeal being to this court because it involved the question of the constitutionality of the statute above mentioned. The judgment covering the other counts are not affected by that statute.

2. The point on which appellant chiefly relies in support of its motion for a rehearing is that in the contract under which the defendant undertook to transport the plaintiff's hogs it was expressly stipulated that in case of loss or injury to the stock the plaintiff should give defendant notice thereof in writing, the notice to be served within one day after the delivery of the stock at destination, and a failure to give such notice would bar a recovery of any claim on account of such loss or injury; and that there was no such notice given in this case. The contract which defendant produced in evidence recited that, in consideration of the reduced rate at which the defendant had taken the stock for transportation, certain special terms and conditions were agreed to, among which were that the stock was not bound to be transported or delivered within any particular time; that notice of loss or injury, if any, as above mentioned, was to be given, and failure to give the same was to be a bar to a recovery; that in case of loss the damage should be limited to \$10 on a hog, etc. In the brief for appellant on which this cause was first submitted it was contended that this was a valid contract, because it was entered into by the plaintiff in consideration of the reduced rate at which the defendant received his stock for transportation. But when we looked into the contract and could find nothing to justify the assertion that there was a reduced rate, we said that the special stipulations re-

original brief, that a railroad company may for a lawful consideration contract with a shipper as claimed in this case. We considered the proposition too plain to require argument or citation of authorities. But now the learned counsel in their brief on this motion say: "We had no intention, though we confess our language might be so construed, to declare it our belief that a special or reduced rate was necessary to the validity of such stipulation. Indeed, such has never been the rule in this state." We understand the proposition of the counsel now to be that no consideration is necessary to support such a contract; in other words, the railroad company may charge the full tariff rate and yet limit its common-law liability in the manner now claimed. If there is a decision in this state going to that extent, the learned counsel have not brought it to our attention.

The railroad company in making this contract did not proceed on the theory that it had the right to charge full tariff rate and at the same time limit its liability, but, on the contrary, the contract read in evidence expressly says that the shipper has agreed to it in consideration of the reduced rate. It seems to have been a printed form and, therefore, presumably the one in common use. If the railroad company had been advised that it could limit its liability in this respect without any concession on its part, it is not likely it would furnish printed forms like this to its station agents. Railroad companies are generally well advised as to their legal rights. There can be no such thing as a contract without a consideration to support it. Our law primer told us that. If, therefore, the railroad company cannot obtain this limitation on its liability, or this particular right which it now pleads in bar of the plaintiff's claim, otherwise than by contract, then it must give something to support the contract. If it is a concession that requires the shipper's consent before it becomes binding on him, then it is not binding, even though he does consent, unless he is paid for it. If, on the other hand, it is a condition that the railroad company may impose without the shipper's consent, then the law of contract has nothing to do with it; the railroad company may simply adopt it as a regulation, and the shipper is bound to accept it. If it is to be classed under the head of a reasonable regulation which the railroad company may impose without the consent of the shipper, then the railroad company may refuse to receive the shipper's live stock for transportation on any other terms, though full tariff rate be tendered. No case has hitherto fallen under our notice in which a railroad company has claimed such a power. The right on which the defendant is here insisting is either a right it has independent of contract, or one it has obtained by con-

is or consequence only when there is a consideration to support it.

Now let us look at the cases cited by defendant's learned counsel and see if this court has ever held the contrary. We will find in these cases ample authority for the proposition that it is lawful for a railroad company to limit by contract its liability, or impose by a contract a condition requiring notice as claimed in this case, but we are now going to search for a case that sustains the proposition of the learned counsel that no consideration in the way of reduced rate is necessary to support such a contract.

The contract which defendant produced in evidence in this case recited that the price charged for the transportation was "at the rate of ——— tariff ——— per cwt." A shipping contract in exactly the same words in this respect was construed by this court in *Kellerman v. Ry. Co.*, 136 Mo. 177, 84 S. W. 41, 37 S. W. 828, to mean that the price charged was the full tariff rate. The statute (section 1136, Rev. St. 1899 [Ann. St. 1906, p. 975]) requires the railroad company to print and keep posted in their stations a schedule of freight rates, and it is forbidden to charge shippers more than those rates. The highest rate that this defendant could have charged the plaintiff for that shipment was the tariff rate, and that rate covered all that the carrier could demand for the performance of all its common-law or statute duty in respect of that shipment. Therefore, when the contract shows that that was the rate charged, it was vain to recite therein that it was "less than the rate charged for shipments transported at carrier's risk." The plaintiff is not here contending that the carrier assumed anything more in the way of a risk than that embraced in the duty which the law imposes upon a railroad company in the transportation of live stock carried at the regular tariff rate.

In *Kellerman v. Ry. Co.*, above referred to, the railroad company was seeking to limit the amount of its liability for the loss of the bull which was the subject of the transportation agreement, on the ground that the shipping contract specified that the valuation in case of loss should not exceed \$50, exactly like one of the clauses in the contract in the case at bar. In that case, as in this, it was claimed by the railroad company that the stipulation as to value was made in view of the special rate charged, and it was expressed in that contract that if the shipper valued the bull at more than the value stated therein an addition of 25 per cent. would be made to the freight rate for each 100 per cent. or fraction thereof added to the value therein expressed. Yet in spite of those specifications the trial court allowed the plaintiff, over defendant's objection, to introduce evidence showing that the bull was worth \$250, and the judgment was for

that case discusses the law as to the liability of the railroad company to limit its liability by contract, and, reviewing cases bearing on that subject, declares that whilst the company cannot contract to avoid liability for its own negligence, yet it may contract to limit its liability in the particulars in that case mentioned; but the court said: "It will be observed that in all the cases cited upon the question now under consideration there was an express agreement as to the value of the property, or its maximum value fixed at a specified amount in consideration for special or reduced rates, while no reduced or special rates were contracted for in the case at bar, nor was the value of the bull fixed at a specific sum." Then the court, after referring to other cases in this court, concludes: "Under these authorities we must hold that there was no consideration for the maximum value placed on the bull, and the contract in that respect is void." We call notice again to the fact that the recital in the contract in that case as to the freight rate charged is exactly like the recital in the case at bar—that is, "at the rate of ——— tariff ——— per cwt."—and the court said it meant the full tariff rate, and therefore there was no special or reduced rate, and therefore there was no consideration to support the contract.

In *Richardson v. R. R.*, 149 Mo. 311, 50 S. W. 782, the shipping contract contained a stipulation for notice similar to that in the case at bar, and also a clause limiting the value of the animal shipped, and defendant relied on both defenses. The only rate specified in the contract was, as in the case at bar, tariff rate. The court, in answering the contentions of the defendant, considers the cases cited, and concedes that the railroad company may lawfully make a contract, but concludes the subject by saying: "The shipment was charged for at the regular and usual first class tariff rates used by the defendant, and no reduction thereof was made. In all cases where such limited valuations have been held to be binding, such valuations have been fixed in consideration of some special or reduced rate. In this case there has been no such special or reduced rate. This rule has been repeatedly announced in this state. *McFadden v. Railroad*, 92 Mo. 343, 4 S. W. 639, 1 Am. St. Rep. 721, and cases cited; *Kellerman v. Railroad*, 136 Mo. 177, 84 S. W. 41, 37 S. W. 828, and cases cited."

In *Ward v. Ry. Co.*, 158 Mo. 226, 58 S. W. 28, the shipping contract contained this clause: "In consideration of the rate of tariff, which is less than the regular rate from Pittsburg, Kansas, to Kansas City, Missouri, being granted and agreed upon to apply to the shipment herein described," etc., a limited valuation of the goods was agreed on. The court, notwithstanding that recital, said:

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him home on the hand car.

Such is the substance of the testimony of this witness on his examination in chief. On cross-examination further light upon the situation is given. The substance of the cross-examination is as follows: That Sissel gave his age at time of employment as 27 years, and was a man of sound health, with good sight and hearing; that when he heard the train whistle he called the attention of the men, including Sissel, to the fact; that they had their hand car off on a private road crossing, which was against the rules of the company; that he thought the whistle was from No. 15, which was a World's Fair special passenger train, as it was about due; that he then said to Brewster and Sissel, "Now I expect that is 15, and the roadmaster might be on, and we had better run our car off the crossing and save giving us a jacking-up"; that they all talked about it being 15; that Brewster and Sissel went to remove the hand car, and he never noticed them any more until the train was getting close to deceased; that both he and Poston called to deceased to "look out," but hardly thought deceased heard them; that before this they all discussed the fact that the train was coming; that it was an upgrade there, and the train was making a loud noise by making a heavy exhaust or puffing, which he heard for half a mile; that the speed of the train was, in his judgment, 30 miles per hour; that he and Poston were working between the rails, and deceased and Brewster on the outside of the rails; that as the train approached he and Poston and Brewster stepped aside, and when they did so was in position to have been seen by the engineer; that the approaching train could be seen for at least a half mile; that the train was approaching from the northeast; that the end of the pilot beam which struck deceased projected at least 12 inches over the outside of the rails; that a man working on the ends of the ties, as was deceased, was within 12 inches of safety at any time; that the sectionmen were in the habit of remaining on the track and at work until the trains were very close to them and step out of the way; that, from the conduct of deceased after his employment, witness did not think he was an experienced railroad man; that in "dressing the track," such work as they were doing that day, two men generally worked together, two in the center of the track, between the rails, and two on the outer edge and outside of the rails; that witness and Poston were working in the center, and deceased and Brewster on the outer edge, one upon each side and about 10 feet apart; that Sissel was facing toward Republic and the approaching engine when he was struck.

Brewster was a witness, and practically corroborated Eagen in all respects. He added, however, that as he and deceased return-

that was coming, and that he remarked to deceased, "And she is coming some, too." That they then each returned to their work. To further detail this witness' testimony would be but to restate in substance what was said by Eagen.

Poston was likewise a witness, and his testimony agrees with that of the witness Eagen.

By witnesses Parker and Howard it was shown that they were in a buggy with a team, approaching the railroad at a crossing made by one of the streets of the city; that they observed the train, checked or turned their team to avoid a collision, that they heard no whistle or bell at that time, and that the train was running 33 or 34 miles per hour; that they did not know what might have been done at the whistling post east of Republic.

J. Ed. Ward was another and the last witness for plaintiff. By him it was shown that he was or had been an engineer in the employ of what is now the Frisco Road; that he was discharged in 1894; that in 1895 he worked in the same capacity for the Florence & Cripple Creek Railroad in Colorado, and quit of his own volition; that since then he had not run an engine, but was engaged in the paint and paper business in Republic; that it was customary for engineers to look out for persons and obstructions on the track; that it was customary for engineers to keep "a sharp lookout ahead at all times for sectionmen, bridgemen, and any other obstructions or anything of that kind, and it is the rules that a danger signal should be sounded, the bell rung, or whistle blown"; that it was a common rule to give signals to sectionmen, whether they were in danger or not. The witness does not say such a custom prevailed upon defendant's road at or about the date of accident.

On cross-examination he further said that when the engineer saw the sectionmen dispersing and getting off he would naturally conclude that all of them would do so; that whether the engineer would pay less attention to men outside of the rails would depend upon circumstances; that the fact that the men were facing the approaching engine and began to disperse was one of the circumstances that would govern the engineer in determining that there was no danger; that if a man is facing an engineer the engineer always presumes that he will get off; that witness would not consider such a man in danger—to use his language: "No, I wouldn't consider him in danger if he sees me."

The foregoing is a full synopsis of the testimony, upon which the action of the court nisi is challenged in this court.

1. It is urged that the alleged plea of contributory negligence set out in the answer is but a legal conclusion, and hence this cause is here practically upon the general denial

then fall to use all proper means at their command to prevent injuring them, in consequence of which they are injured, or are injured by the willful negligence of those in charge of the train, should the defendant be held liable, and there was nothing of that kind in this case. Our conclusion is that the demurrer to the evidence interposed by defendant should have been sustained."

To the same effect is *McGrath v. St. Louis Transit Co.*, 197 Mo. 97, 94 S. W. 872.

By plaintiff's learned counsel we are cited to *Hinzeman v. Ry. Co.*, 199 Mo. 56, 94 S. W. 973, which case was previously reviewed by this court in 182 Mo. 611, 81 S. W. 1134. The writer has expressed no views upon the facts in the *Hinzeman Case*, nor is it necessary so to do in this case. The facts of the two cases are widely apart. In this case the personal knowledge of the approaching train was brought home to deceased. Not so in the *Hinzeman Case*. In this case the evidence conclusively shows that upon the approach of the train the sectionmen began to get off the track, and the engineer had a right to presume that they would all do so, including the deceased, especially where the facts show that he was facing the moving engine.

To our mind the facts of the case at bar not only show conclusively the contributory negligence of deceased, but fail to show negligence upon the part of defendant. This deceased was not on the track, but to the side thereof, and 12 inches from absolute safety. From danger to safety was but the act of a second's time—the taking of a short step. The engineer, if he saw anything, saw these men moving out of the way, and was justified, under these circumstances, in entertaining the presumption that at the proper instant deceased, who was facing the engine, would take the one step.

It is urged that no signals were given at the crossing to the east of the point where these parties were at work. Grant it that no bell was sounded or whistle blown at the crossing. Grant it further that such facts were material at all, which we do not grant, in this kind of a case except for the argument, yet they are unavailing where knowledge of the approaching train was shown. The only purpose of signals is to give warning of the approach of a train, but the failure to give them can work no injury where the party knew the train was fast approaching.

The judgment of the trial court is right, and should be, and is, affirmed. **WOODSON, J.**, concurs in toto. **VALLIANT, P. J.**, and **LAMM, J.**, concur in the result, and in all of the opinion except what is said therein with reference to the *Evans* and *Hinzeman Cases*.

Nov. 25, 1908.)

1. EVIDENCE (§ 29*)—JUDICIAL NOTICE—PUBLIC STATUTES.

The Factory Act, Rev. St. 1899, § 6433 (Ann. St. 1906, p. 3217), imposing a liability upon certain employers for injuries to employes through failure to protect the gearing, etc., of machinery, being a public act, the courts will take judicial notice thereof though it is not pleaded.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 36, 37; Dec. Dig. § 29.*]

2. MASTER AND SERVANT (§ 121*)—INJURIES TO SERVANT—FAILURE TO PROTECT MACHINERY.

At common law, a master owed no duty to his servants to guard machinery and appliances so as to prevent injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 229; Dec. Dig. § 121.*]

3. COURTS (§ 37*)—JURISDICTION—TIME OF OBJECTING.

Questions of the jurisdiction of the subject-matter may be raised at any stage of the case, in any court, either by court or counsel.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 148; Dec. Dig. § 37.*]

4. CONSTITUTIONAL LAW (§ 46*)—MANNER OF RAISING QUESTION—OBJECTION—SUFFICIENCY.

In order to raise a constitutional question, the particular provision of the Constitution violated must be pointed out, and a general reference to the Constitution is insufficient; and a mere demurrer to the evidence, or request for a peremptory instruction, would not raise the unconstitutionality of a statute.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 44; Dec. Dig. § 46.*]

5. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—PREJUDICIAL EFFECT.

An instruction that nine of twelve jurors could render a verdict, even if erroneous, was harmless where the verdict rendered was unanimous.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1068.*]

6. CONSTITUTIONAL LAW (§ 46*)—DETERMINATION OF QUESTION—NECESSITY.

The constitutionality of a statute authorizing a verdict by nine jurors is not raised, and need not be decided, in a case where the verdict was unanimous.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 43; Dec. Dig. § 46.*]

7. COURTS (§ 231*)—MISSOURI SUPREME COURT—CONSTITUTIONAL QUESTIONS—QUESTIONS ALREADY DECIDED.

The constitutionality of the statute authorizing a verdict by nine jurors in civil cases has been settled, and the question cannot be raised to give the Supreme Court jurisdiction.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 658; Dec. Dig. § 231.*]

8. CONSTITUTIONAL LAW (§ 43*)—PERSONS WHO MAY RAISE CONSTITUTIONAL QUESTION—WAIVER.

While in some cases a constitutional question might be raised regardless of the pleadings, by a ruling on the admission of evidence, where proper objection was made and exception saved, or even on motion for new trial where appellant had no opportunity to raise the question sooner, such questions should be raised at the earliest possible moment consistent with good pleading.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fresh hide of a calf from Mrs. Dunn about the time the calf was alleged to have been killed, and it looked as if it had a handful of shot scattered over it. The defendant testified in his own behalf, and denied the killing of the calf. Admitted that he had a conversation with the witness Myers at his home on the farm on the evening on which the calf is alleged to have been killed, and that Myers was at his house late that afternoon. He stated that he had returned to his home from his father's about 4 o'clock in the afternoon, and went down to Turner's store for a little while, and then went over across the creek into the cornfield to get some fodder to feed his horses. He denied making the statement to the witness Myers to the effect that he had been down driving Mrs. Dunn's calves out of his field. He testified further that, if he made the statements attributed to him by Mrs. Dunn and Mr. Fitz, he had no recollection of them. Mrs. Nora Barton, the wife of the defendant, testified that after their arrival at home that afternoon the defendant was not out of her sight during the afternoon, and was not away during the night, and that the defendant did not have his gun out of the house that afternoon; that she went with him to the field, where they got the fodder and fed the team; that they did not take any gun with them, and she neither saw any calves or calf that afternoon, nor heard any shot fired. There was evidence also on the part of the defendant tending to impeach the character of Mrs. Dunn for chastity and veracity, but it would seem that the most of this unfavorable reputation had grown out of a suspicion that she had not been married to Mr. Dunn, but it further appeared that Mr. Turner had written to the recorder in St. Francois county and ascertained that the marriage certificate was duly recorded in said county. Practically all the evidence tended to show that there was no cause whatever to impeach her character after her marriage to Mr. Dunn. On the part of the state an attempt was also made to impeach the character of the defendant, but this resulted merely in showing a bad reputation for quarrelsomeness rather than for truth and veracity.

1. It was for the jury to pass upon the weight of the evidence, and this court will not disturb their finding, unless there is entire failure of proof, or the evidence on the part of the state is of such a flimsy character as to authorize the inference that the finding was the result of passion, prejudice, or mistake. That the calf was killed in the field of the appellant, and was shot with a shotgun, there is practically no dispute. There is not the least evidence tending to show that the owner herself had killed it, or any suggestion that any other person had a motive for killing the calf except the de-

that he was at home on his premises that afternoon was established by his own evidence. The witness Myers testified that he heard a shot that afternoon down in the field where the calves were feeding, and soon thereafter he drove up to the defendant's house, and the defendant stated to him that he had just been down in the field driving Mrs. Dunn's calves out. It is true the defendant denies the killing of the calf, and his wife testified that he did not have the gun when he was down in the field that afternoon; but the weight of this evidence on both sides was a matter for the jury, and we think the jury were authorized, if they believe the evidence for the state, to find that the defendant killed the calf.

2. The court in its instructions, among others, gave the following: "You are further instructed that one of the defenses interposed by the defendant is what is known as an alibi, by which is meant a claim on his part that he was at another and different place than that at which the alleged crime was committed, at the time when it was in fact committed. And in that connection, you are instructed that, if you have reasonable doubt of the presence of the defendant at the time and place where said crime was committed, you will acquit him; but you are instructed that a reasonable doubt by you of the defendant having been present at the time and place where said crime was committed, to authorize you to acquit him on the ground of your having such reasonable doubt, should be a substantial doubt by you of the defendant having been present at the time and place where such crime was committed, and not a mere possibility that he may have been at another and different place than that at which said crime was committed, at the time when it was committed." The defendant complains of this instruction that it in effect tells the jury that, unless they have a reasonable doubt of the appellant having been present at the time and place where the calf was killed, they will find him guilty, without requiring them to find that a crime had been committed, or, if committed, that the appellant committed it. We think this is a hypercritical objection. While it is true, it would have been better if the court had modified the instruction with a phrase, "if such offense had been committed by any one." When all the instructions are read together, as they must be, it is plain that the court required the jury to find beyond a reasonable doubt that the defendant committed the offense, and it was not an assumption that the defendant did in fact commit the offense, unless the jury could find that he was absent at the time. *State v. McGinnis*, 158 Mo., loc. cit. 122, 123, 59 S. W. 83; *State v. Hale*, 156 Mo. 102, 56 S. W. 881. We do not think that the

county in which such city is located. They returned a verdict of guilty, and the judge presiding at the trial approved the verdict, hence we are unwilling, there being substantial evidence to support the verdict, to in any way disturb it.

The judgment of the trial court should be affirmed, and it is so ordered. All concur.

STATE v. GEORGE.

(Supreme Court of Missouri, Division No. 2.
Nov. 24, 1908.)

1. CRIMINAL LAW (§ 1064*)—APPEAL—PRESENTATION AND RESERVATION OF ERROR—MOTION FOR NEW TRIAL.

Instructions to which the attention of the trial court was not directed in the motion for a new trial cannot be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2683; Dec. Dig. § 1064.*]

2. RAPE (§ 59*)—TRIAL—INSTRUCTIONS.

An instruction, on a trial for the rape of a child under 14, that, though defendant had intercourse with prosecuting witness, yet, unless she was at the time under 14, defendant should be acquitted, did not furnish any substantial basis for complaint by defendant.

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 59.*]

3. RAPE (§ 13*)—ELEMENTS—FORCE.

Under Rev. St. 1899, § 1837 (Ann. St. 1906, p. 1271), it is not essential to the offense of the rape of a child under 14 that it be committed with force or without consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 12; Dec. Dig. § 13.*]

4. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS—DISCRETION OF COURT.

The allowance of leading questions is largely within the discretion of the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 795; Dec. Dig. § 240.*]

5. WITNESSES (§ 306*)—PRIVILEGE OF WITNESSES—ANSWER TENDING TO DISGRACE WITNESS.

On a trial for the rape of a child under 14, prosecuting witness was properly permitted to testify, over objection by defendant that it was degrading to her, that she had sexual intercourse with defendant, and the court properly refused to instruct her that she need not testify to anything that would degrade her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1058, 1059; Dec. Dig. § 306.*]

6. CRIMINAL LAW (§ 1056*)—APPEAL—PRESENTATION AND RESERVATION OF ERROR—EXCEPTIONS.

A failure to instruct upon all the law of the case will not be considered on appeal, where the trial court's attention was not called to the failure to so instruct at the time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2668; Dec. Dig. § 1056.*]

7. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW—QUESTIONS OF FACT.

A conviction which there is substantial evidence to support will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

[Ed. Note.—For other cases, see Rape, Dec. Dig. § 52.*]

Appeal from Circuit Court, Camden County; Argus Cox, Judge.

A. W. George was convicted of the rape of a child under 14, and he appeals. Affirmed. See, also, 207 Mo. 16, 105 S. W. 598.

This is an appeal on the part of the defendant from a judgment of the circuit court of Camden county, convicting the defendant of the offense of rape. On the 14th of January, 1905, the prosecuting attorney of Camden county filed an information, duly verified, charging the defendant with rape. The date of the alleged offense was November 16, 1904, and Ida Florence George, a female child under the age of 14 years, is alleged to have been the victim of the defendant's assault and ravishment. At the February term, 1905, the defendant was put upon his trial. The evidence upon the part of the state tended to show that the prosecutrix resided with her parents, Mr. and Mrs. Mat George, on their farm some eight miles from Linn Creek, in Camden county. On the day of the commission of the alleged crime the prosecuting witness was about 13 years and 10 months old. On that day the father and mother of prosecutrix went to the town of Linn creek early in the morning, leaving prosecutrix and her younger sister, Pearl, at home. The parents did not return until about sundown. The defendant, who is the uncle of prosecutrix, came to the house and sent Pearl to the spring to get some water. Pearl was a small girl, and was not very bright. During her absence defendant took prosecutrix to the bed and had sexual intercourse with her. This was the second time defendant had sexual intercourse with prosecutrix, but she made no complaint of the former act. On the 28th of January following this last act, the prosecuting witness told her father and mother and older brother, and the defendant was arrested. Before the arrest of the defendant he had conversations with one Robert Jeffries and Arthur Smith in which the defendant clearly indicated that he was having sexual intercourse with one of Mat George's girls. The defendant took the witness stand in his own behalf, and denied ever having sexual intercourse with prosecutrix. He also denied the conversations with state's witnesses Jeffries and Smith. There were other witnesses introduced by the defendant who testified that the father of prosecutrix tried to get the defendant to pay some money to drop the case against him, and also tried to get defendant to leave the farm and leave the father of prosecutrix cultivate the same. Some of these witnesses, however, admitted that they were not on friendly terms with the father of the prosecuting witness. There was other

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

commission of the crime charged, and that her reputation was not good. In rebuttal, the state proved by a lady witness, who was present at the birth of prosecutrix, that the prosecuting witness was born January 25, 1891. The father of prosecutrix testified, and he contradicted the statements made by witness for the defendant that he was trying to get defendant's relatives to pay him to drop the prosecution, and this witness claimed that such relatives sought him and tried to get him to accept money for that purpose.

This is a sufficient indication of the facts developed upon which this case was submitted to the jury, and to enable us to determine the legal propositions involved in this cause. At the conclusion of the evidence the court instructed the jury, and the cause was submitted to them. The instructions upon which appellant predicates assignments of error will be given attention during the course of the opinion. The jury returned a verdict finding the defendant guilty as charged in the information, and assessed his punishment at imprisonment in the penitentiary for a term of five years. Timely motions for a new trial and in arrest of judgment were filed, and by the court overruled. Judgment and sentence was entered of record in conformity to the verdict returned, and from this judgment the defendant prosecuted this appeal, and the record is now before us for consideration.

N. B. Yandon, Barney Reed, and E. M. Carter, for appellant. Herbert S. Hadley, Atty. Gen., and N. T. Gentry, Asst. Atty. Gen., for the State.

FOX, P. J. (after stating the facts as above). The record before us discloses numerous complaints of error on the part of the trial court which are embraced in the motion for new trial.

1. The complaint of the appellant as to the instructions given to the jury is limited to two, Nos. 3 and 4. Those are the only declarations of law to which the attention of the trial court was directed in the motion for new trial, hence they are the only declarations which are before us for review. Instructions 3 and 4 complained of were as follows: "(3) Although you may believe that the defendant had sexual intercourse with Ida Florence George, yet unless you shall further believe that at the time he did so she was under 14 years of age, the defendant should be acquitted. (4) If you believe that the defendant had sexual intercourse with Ida Florence George at a time when she was under 14 years of age and at any time before the filing of the information in this case, then it is immaterial whether she consented to the act or not, and it is also immaterial as to whether it occurred on the 16th day of November, 1904, or on some other day."

willing to say that they furnish any substantial basis for the complaint of the appellant. Instruction No. 3 was one in favor of the defendant, and specially directed the jury that it was essential, in order to find the defendant guilty, to find that the prosecuting witness at the time of the alleged commission of the offense was under 14 years of age. It certainly will not be seriously contended that this furnishes any substantial ground of complaint which would authorize the reversal of this judgment.

2. Instruction No. 4, upon which the appellant predicates another complaint, simply told the jury that if the defendant had sexual intercourse with the prosecuting witness at a time when she was under 14 years of age, and at any time before the filing of the information in this case, then it was immaterial whether she consented to the act or not; and further told the jury that it was immaterial as to whether it occurred on the 16th day of November, 1904, or some other day. In our opinion this instruction does not constitute any error. Section 1837, Rev. St. 1899 (Ann. St. 1903, p. 1271), in treating of the offense with which the defendant is charged, provides: "Every person who shall be convicted of rape, either by carnally and unlawfully knowing any female child under the age of fourteen years, or by forcibly ravishing any woman of the age of fourteen years or upward, shall suffer death, or be punished by imprisonment in the penitentiary not less than five years, in the discretion of the jury." It will be observed that this section clearly points out the distinction between victims of the offense of rape. The first subdivision makes the offense complete by simple carnal and unlawful knowledge of any female child under the age of 14 years. The second subdivision makes it essential, as to any woman of the age of 14 years or upward, that the acts constituting the offense of rape shall be accomplished by force. It is clear that under the first subdivision, where the female is under the age of 14 years, it is not essential, in order to constitute the offense of rape under that subdivision, to show that it was committed with force or without the consent of the female. This court in *State v. Wray*, 109 Mo. 594, 19 S. W. 86, after quoting section 3480, Rev. St. 1889, which is the same as section 1837 herein quoted, expressly ruled that "carnal knowledge of a female child under fourteen years of age is rape under this statute, whether accomplished with or without force, or with or without the consent of the child." We repeat that instruction No. 4 was in perfect harmony with the provisions of the statute, as well as the rulings of this court in treating of such statute.

3. During the progress of the trial the record discloses numerous objections to the

caused said deed to be put of record; that afterwards on the 30th day of November, 1900, plaintiff settled his differences with Sarah Kubey and married her; that afterwards, at divers times (without avail), he requested defendant to return said deed, he not knowing it had been recorded; and that when he found it was recorded he requested her to quitclaim the land back, but she refused to do so.

The answer admitted Rosalie holds title by virtue of the deed, but denies each and every other allegation in the petition. It next goes on to allege that she is the rightful owner of the premises; that she purchased the same for a full and valuable consideration paid by her; that the conveyance was intended to be operative in conveying the legal title. Based on such allegations, she prayed affirmative equitable relief, viz., that the court declare she is in good faith the legal and rightful owner of the premises, discharged of any equity or trust whatsoever, and for all other and proper relief.

On such paper issues the cause was tried, and the chancellor found (1) there was no consideration for the deed, and (2) there was no delivery of the deed. On these findings the decree went as prayed in the bill.

The case on appeal presents three propositions, viz.: First. Was there error, nisi, in finding no consideration for the deed? Second. Did the chancellor err in finding there was no delivery of the deed? Third. On all the facts, will a court of conscience interfere?

1. Of payment. There was testimony by plaintiff that no valid or valuable consideration passed from defendant to him. Creamer testified that way. He introduced witnesses who testified to facts pointing the same way, and strongly corroborative to the effect that in 1890 Rosalie lived in a humble way in the town of Albany, and eked out a scant living for herself and family as a washwoman; that she had no visible signs of ready money, and practically admitted to others she paid nothing. Contra, defendant put in proof on the issue of payment, in substance, that the money was paid shortly after the date of the deed partly out of Rosalie's savings as a washwoman, partly out of her savings in raising and selling chickens, a few pigs, and a cow or so each year, and partly out of money sent and brought to her by Louis, her son, who on coming to man's estate worked in Colorado in restaurants and saloons at \$40 per month, and who went to Oklahoma at the opening of the territory for settlement. This money had been kept in a wardrobe in an upper chamber hid in the lining of an old fur muff, which said muff had a somewhat picturesque and variegated career. Not only was it at the start a wedding present, and presently the family mon-

a puppy (not understanding or respecting the purpose of its appearance within his reach and runways, nor its value as a family receptacle for money) appropriated it to his own use, and when through with it, it became straightway a reminiscence, as distinguished from a fact susceptible of tangible evidence by tender in open court.

If the issue of payment or no payment is to be determined by the mere bulk of the testimony and the number of the witnesses pro and con, then defendant had the better of it, for the existence of the muff, its use in secreting treasure, the existence of the hidden treasure itself, and its appropriation in paying for the land are shown by the copious testimony of several members of the Bivert family. As against their positive testimony stands that of plaintiff himself, supported by corroborative proof of the character stated. But the justice of a cause does not alone hang or turn on the count of witnesses on the fingers, or on mere numerical weight. That (by itself) would be a crude rule for establishing a fact. The philosophy of the plan of getting at the fact, in cases of conflict in testimony, has deeper and more sure guides than such easy scheme. Here there was a maze of testimony affecting the credibility of some of the witnesses on both sides; there were currents and cross-currents in it sharply affecting the probability and the improbability of the stories told on the stand. The bulk of the testimony was oral. In such condition of things, while this court has said over and over again that the whole record must come here in equity cases, so that (sitting as the final arbiter in chancery) we may weigh and decide de novo and thus do equity, yet the court is also fond of saying that deference should be given to the trial chancellor. He sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal. In a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson, or the itching over eagerness of the swift witness, as well as honest face of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, nisi, be-

obscurity in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify. Therefore, where an issue in equity rests alone on the credibility of witnesses, the upper court may with entire propriety rest somewhat on the superior advantage of the lower court in determining a fact. Therefore it is our opinion that, if there is nothing in this case but the issue of payment or no payment, we would not disturb the decree.

We are furthermore of the opinion that the issue of payment, whether found for plaintiff or defendant, is not a deciding one, but that the controlling questions are the second and third propositions. This conclusion makes it a useless task to state the evidence at large relating to payment, and brings us at once to the remaining propositions—propositions that depend upon common facts, and hence may be considered together, as they are in the next paragraph.

2. Jackson Creamer's true given name is Jacques, commonly called "Jack" by his plain Missouri neighbors, and dignified as "Jackson" for court purposes. Both parties litigant are of French birth, being born in Lorraine when that was a province of France. Neither of them can readily read or write English; both of them read and write French, we infer. Neither is shown to have any advantage of the other in intelligence. Jacques has served a term in the penitentiary for a felony, Rosalie in jail for a misdemeanor. Nor can we make out from the record that either of them stood in the relation to the other of business manager, adviser, or other fixed and settled general relation of confidence and trust. True, they were brother and sister, but their relations in that regard are not shown to put one in the vantage ground of managing or controlling the business acts and conduct of the other. Nor, under the proof, can it be justly held that her mind held mastery over his. It cannot be said in this case that theirs were "two souls with but a single thought" (or, as put by Bellinghausen in *Ingomar, The Barbarian*, "Zwei Seelen und ein Gedanke"), and that thought hers.

The case stands clear of any fiduciary relation, and the solicitude and jealousy with which courts of conscience watch and pry into such relation [*Stitt v. Stitt*, 205 Mo., loc. cit. 166, 103 S. W. 547] cannot be invoked to aid plaintiff. In 1882 or 1883 their mother deeded her home—the land in dispute—to Jacques. Her record title was somewhat cloudy. At the time of the trial Rosalie was 70 years old. He, we gather, was also old. The land was broken and thin, in 1890 worth possibly \$2,000 or \$2,500 with a clear title. Jacques resided on it in 1890 as a bachelor. Avoiding details, the record discloses that during that year and before he became en-

cupiscence became much battered in the wars of Venus," to borrow for use the figure of a distinguished judge. As a result, a child was born out of wedlock to them. Thereat he was arrested for violating the statutes denouncing open and notorious sexual immorality. Not only so, but he was sued by the woman for damages for breach of promise to marry. At that time, his sins having found him out, he was in hard lines. The evidence falling from his lips and put in by his witnesses shows beyond cavil or doubt that he feared the result of a civil suit, and, casting about him for a way out, he conceived the plan of circumventing the woman by disposing of his real estate. His first plan was to deed it to one C., who was to borrow \$700 on it, turn the money over to him, and then deed the land back subject to the loan when his troubles were over, if ever. This plan miscarried because of irregularities in the title. Thereupon a new scheme was hatched, to wit, that the land should be conveyed to Rosalie, who lived in Albany three or four miles away. The testimony shows that a lawyer was consulted by one or both.

It is alleged in the bill, faintly suggested by plaintiff's proof, and denied by defendant's, that the scheme finally carried out was hers; that she induced Jacques to make the deed. But we do not find it so, nor did the court below find it that way. It was Jacques, not her, who was stung by the nettle of danger. It was his affair, not hers. His eye, not hers, was looking this way and that for the path of safety out of the brambles of trouble. His, not hers, was the first abortive plan, and undoubtedly he it was that fell upon the second plan as a dernier ressort. That she fell in with it does not alter the fact. Adam's old and discredited ruse of shifting the blame on a woman must be strongly supported by the proof to be favored in a court of justice.

While there is a divergence and conflict in the testimony on the payment of the consideration, yet there is none on the fact that the physical custody of the deed signed by Creamer, duly acknowledged and reciting the payment, was handed over to defendant either by Creamer himself, or by the attorney who wrote the deed with Creamer's consent. She retained the custody of it until the 11th day of October, 1890, when it was spread of record.

It is asserted on one side, and denied on the other, that the deed was to be recorded. We deem that issue immaterial; because, if never delivered, it never became operative as a conveyance, and, in that view of the case, its record created a cloud on plaintiff's title removable in equity. If, however, it was in truth and in fact delivered, then the title passed, and its mere record (standing alone) caused plaintiff no injury

The bill contains an allegation that the deed was "executed." Now, to speak of a deed as executed means in law that it was signed, sealed (when that is necessary), acknowledged (when that is necessary), and delivered. In a broad way, then, the bill alleges delivery. But the context is of such sort as to show the pleader did not mean it that way. He states in effect that it was not to be delivered; that plaintiff did not lose dominion over it, but that it was to be handed back to him at his request. There is testimony sustaining that averment. There is very strong testimony the other way. We are constrained to disagree with the learned chancellor in his finding that there was no delivery. We base our conclusion not only on what seems to us the great weight of the credible oral testimony on that point, but on another and controlling fact, viz., that delivery was essential to consummate the admitted fraudulent purposes of plaintiff. He started out to do that very thing, to wit, commit a fraud. What stopped him? Is it supposable in reason that a grantor who starts out to make a deed for the avowed purpose of perpetrating a fraud would (absent twinge of conscience or visible obstacle) halt midway in his career of covin and approach to and yet not do the identical thing he set out to do, to wit, consummate the fraud by passing the title to his grantee by delivering the deed? Was something doing, and yet nothing done? He either delivered that deed or else he perpetrated a fraud within a fraud, i. e., he put himself and the grantee in a fix where, when the worst came to the worst, they both could swear in a court of justice that the deed was delivered. Why should we pick the latter theory in preference to the former, and thus add contemplated perjury to the fraud?

We think it must be held there was a delivery of the deed, and this is so although it may very well be there was an understanding the title should be conveyed back when the clouds rolled by, if ever. But, observe, an agreement to convey the title back assumes the fact that the title had once passed, and that is fatal to plaintiff's theory of no delivery.

Learned counsel for plaintiff rely greatly on *Bunn v. Stuart*, 183 Mo. 375, 81 S. W. 1091. At first blush that case is favorable to their view. But well looked to, it is not so. We have read the opinion painstakingly. We have examined the pleadings, abstracts, and briefs preserved in the judgment roll of that case. The most to be said is that it has some features in common with the case at bar. But there were other features distinguishing that case from this. In that case an old man had made a will devising certain property, to his daughter. Becoming dis-

satisfied about the same time as his own children, were in the nature of a testamentary disposition of his real estate. He held all of them for several months. He then married a third wife, and, trouble subsequently arising between them, he made some provision for her, and a divorce suit was pending. The record shows that it stood practically conceded in the proofs that all the deeds in question were handed over to the respective grantees about the time of the divorce suit with the express understanding they were to be kept for the grantor and handed back to him at his request. Some of them were handed back at his request in accordance with the agreement. The grantees in such as were handed back testified to the agreement. The grantees in the deeds placed of record and not handed back did not take the witness stand and deny the agreement. While, as said, the case has some common features to the one at bar, yet the proof is different, and it was held there was no delivery. That case, therefore, does not control this one.

After the record of the deed, plaintiff married the Kuhey woman, who has since died. There is some evidence sustaining the averment in the bill that, not knowing the deed was of record, plaintiff asked to have it returned to him. There is also evidence that after the deed was recorded plaintiff demanded back a quitclaim deed, which was refused, but we deem none of these features decisive.

Finally, plaintiff must be denied relief because of public policy. He does not come into a court of equity with clean hands. He is confronted with the related maxim that where the fault is mutual the law will leave the case as it finds it ("In pari delicto, potior est conditio," etc.). There are exceptions to those maxims, but none of them avail this plaintiff. The maxim that he who comes into equity must come with clean hands is a cardinal one. It touches to the quick the dignity of a court of conscience itself. Hence, its application does not depend upon the averments of the pleadings, or the wish of counsel, but it may be invoked and applied, *ex mero motu*, by the court. 16 Cyc. 148. The case may well rest on this ground, if no other. *Poston v. Balch*, 69 Mo. 115; *McNear v. Williamson*, 166 Mo. 358, 66 S. W. 160; *Holliway v. Holliway*, 77 Mo. 392; *Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709. On this ground, too, defendant should be denied affirmative relief on the averments of her answer, even if those averments are sufficient to entitle her to such relief (on which question we do not pass). The parties litigant made their bed—an unclean one—let them lie in it. Equity will not make it over. She is a handmaiden to Justice

day of July, 1907, the assistant circuit attorney of the city of St. Louis filed an information, duly verified, in the circuit court of said city, charging the defendant, first, with having served a term in the penitentiary for the offense of rape, and then proceeded to make the charge of taking one Florence Hamann, a female under the age of 18 years, from her father, having charge of her person, for the purpose of concubinage. August 19, 1907, the defendant was duly arraigned upon the information, and entered his plea of not guilty. The cause was then continued to the October term of said court, and on the 9th day of October, 1907, the defendant was put upon his trial. The evidence, upon the part of the state, developed at the trial tended to prove substantially the following state of facts: On the 21st day of May, 1907, Florence Hamann, a girl in short dresses, 15 years of age, was residing at 207 Douchouquette street, in the city of St. Louis, with her father, William Hamann, who had legal charge of her person. On the morning of said day, the girl Florence left her father's home in search of employment. On Chouteau avenue, in said city, while in company with two other girls, casual acquaintances, Lillie Scharfenberg and Fannie Dishbing, she met defendant, a stranger to her and to her companions. Defendant, under pretext that he could secure a position in a telephone office for her, induced Florence to go with him. He took her to a room in the Clover Leaf Hotel in said city. Arriving in the room, Florence screamed, but defendant threatened her, and put a bed against the door. He kept her in the room about two hours, during which time he had sexual intercourse with her. After leaving the Clover Leaf Hotel, defendant kept Florence in his company throughout the day. In the afternoon he secured a room for himself "and wife" at the boarding house of Mrs. Beamer, 715 South Broadway in said city, and he borrowed a bucket from Mrs. Beamer for coffee. Defendant and Florence spent the night together in said room, having sexual intercourse several times during the night. Mrs. Beamer did not know that the girl was with defendant in the room until next day. Defendant, upon his lawful relation to Florence being challenged that day by Mrs. Beamer, first asserted that the girl was his wife, and admitted that he had slept with her the preceding night. Later he admitted that Florence was not his wife, but claimed he had found her on the street, and had given her shelter at Mrs. Beamer's house as a matter of charity. He proposed to give Mrs. Beamer \$50 with which to buy clothes for the girl and find her a job. Mrs. Beamer kept the girl overnight. Next afternoon defendant, in company with a young man called

took Mrs. Beamer and the girl to the office of Mr. Parker, defendant's lawyer, who represented himself as a doctor. Defendant said he wished to have the girl examined to see that he had done nothing wrong with her. She was closeted there in a private office with the "doctor" for some time, during which time, according to the testimony of the girl, the "doctor" examined her and had intercourse with her. When the "doctor" came out of the private office, he said he would write a receipt for the money for Mrs. Beamer to sign. When the receipt was presented to Mrs. Beamer for her signature, she refused to sign it, for the reason that it appeared to be a written demand for the payment of money to avoid prosecution. Mrs. Beamer then went on home, and never saw Florence again until the day of the trial. Mrs. Beamer notified the police. The day before the date of the crime Mrs. Beamer had bought her said boarding house. Among the boarders whom she received from her predecessor was "Busybody," whom she summarily dismissed the night after the incident at Parker's office. After Mrs. Beamer left the police, defendant told Florence that her father had telephoned he was going to kill her, and he told the boy "Busybody" to take her out of the office. "Busybody" took her to the house of a Mr. Moore, from which place he immediately took her to defendant's stable. Shortly after they arrived at the stable, Baldwin appeared there and took her up into the stable loft, where he kept her about two days. During the two days Baldwin did not stay with her upstairs. He sent food up to her, and threatened her harm if she came downstairs. Saturday, May 24, 1907, one Anderson came to Florence at the stable, told her Baldwin had been arrested, and that she should leave. She had never before met Anderson. He took her to East St. Louis, thence to Chicago, and thence to Grand Haven, Mich., where he married her. After more than a week's absence from St. Louis, Anderson and Florence returned there. Florence admitted that on two occasions before she met defendant she had sexual intercourse in East St. Louis with a boy named Eddy. She said that her husband, Anderson, communicated to her a sexual disease. The testimony of Florence was fully corroborated by the testimony of Lillie Scharfenberg, Amelia Beamer, and her father, in so far as their connection with the facts of the case extended. It was shown by the father that he did not know of or consent to his daughter being with defendant. Court records of the trial court, copy of judgment, with sheriff's return, and certified copy of records of the Missouri penitentiary were introduced in evidence, showing that defendant was convicted of the crime of rape in

the prosecuting witness, to the effect that he did not give his consent to his daughter going away with the defendant. It is sufficient to say of this objection that, even conceding that this statement was immaterial, the admission of that testimony does not constitute reversible error, and in our opinion it was not incompetent to permit the father to say that he did not consent to the acts done by the defendant.

3. It is next earnestly urged, by counsel for appellant, that the admission of the records of the St. Louis circuit court and of the warden of the Missouri penitentiary, which showed a conviction, sentence, and discharge of one William Baldwin upon a charge of rape, committed some time prior to the date alleged in the information of the taking away of the prosecuting witness for the purpose of concubinage, without identifying the defendant as being the same William Baldwin, constitutes such error as would authorize the reversal of this judgment. The defendant, while on the witness stand, admitted that he had been convicted of an offense prior to the one charged in the information; and, while it is true that he did not state what the offense was, yet this, with the records as introduced showing that a defendant, William Baldwin, was convicted and sentenced and discharged from the penitentiary for the crime of rape, in the absence of any testimony to the contrary, was sufficient to submit that question to the jury, and authorize them to find such fact against the defendant. At this age of our jurisprudence, in the administration of the laws of the state, we have reached the commendable stage that practical views must be taken in the trial of causes. Upon this trial the records were introduced showing that William Baldwin had been convicted, sentenced to the penitentiary, and discharged therefrom for the commission of the offense of rape. There was no pretense, not even a suggestion or intimation, that the defendant charged in the information now before us was not the same William Baldwin. Hence we are of the opinion that this contention is highly technical, and we are unwilling to disturb this verdict upon that ground.

4. Appellant next insists that the court committed error in giving the second instruction to the jury. This instruction substantially told the jury that, even if they should find that the prosecuting witness, Florence Hamann, was of unchaste character, and had previously had sexual intercourse with the defendant, yet that state of facts did not constitute any defense to this action or prosecution. It is sufficient to say of this instruction that, in cases of this character, it has met the approval of this court. In *State v. Adams*, 179 Mo. 334, 78 S. W. 588, the trial court gave a similar instruction to the one now under consideration. The jury were told

easy virtue, or had previously had sexual intercourse with defendant, or had consented to go away with defendant, or that she consented to have sexual intercourse with defendant, yet none or all of these facts would constitute any defense to this prosecution. In that case all of the instructions were in judgment before this court, and the conclusion reached was that there was no reversible error in the record, and the judgment was affirmed.

Complaint is also made to the third instruction given by the court to the jury. This instruction was as follows: "By the word 'concubinage,' as used in the information and in these instructions, is meant the act or practice of a man cohabiting in sexual intercourse with a woman—a female with whom he is not married. If the jury believe and find from the evidence that the defendant, William Baldwin, did take the prosecuting witness, Florence Hamann, from her father, and that she was at the time a female under the age of 18 years, for the purpose of cohabiting with her in sexual intercourse for any length of time for more than one single act of sexual intercourse, then the defendant is guilty of the crime charged in the information. If you find that the defendant did not so take the said Florence Hamann from her father, or did not take her for the purpose or with the intent to practice sexual intercourse with her, as explained in these instructions, or if you find that said Florence Hamann was at the time 18 years of age, or over, then the defendant is not guilty of the crime charged, and you will so find." It is sufficient to say of this instruction that what was said as to the second instruction is equally applicable to this one. In *State v. Adams*, supra, an instruction substantially similar to instruction No. 3, given in the case at bar, met the approval of this court. We see no valid legal reason for departing from the conclusion reached in that case.

5. It is earnestly insisted that the court committed error in the giving of instruction No. 4. The complaint of error in that instruction is directed specially to the last paragraph, which is as follows: "It is not necessary that the defendant should have used any physical force in taking the said Florence Hamann away. It is sufficient in law if you find and believe from the evidence that defendant induced or persuaded the witness, Florence Hamann, to go away with him from her father's home for the purpose of having sexual intercourse with him, the defendant, William Baldwin." It is manifest that the court in this last paragraph was simply undertaking to direct the jury in respect to the nature and manner of the taking away of the prosecuting witness from her father; and, in order to fully appreciate that instruction, it must be considered in connection with the first paragraph,

defendant guilty; it is not necessary that the jury should find and believe from the evidence that the defendant, William Baldwin, took said Florence Hamann, the prosecuting witness, from the immediate possession, house, or home of her father, William Hamann, but it is a sufficient taking away if the defendant took her, the said Florence Hamann, from the control and possession of her father, and took her out of the neighborhood in which she had lived prior thereto, so that her whereabouts were unknown to her father, the said William Hamann, without his consent." We are of the opinion that, when the first and second paragraphs of this instruction are read in connection with all the other instructions in the case, it does not constitute reversible error. While it may be that it would have been more in harmony with legal principles to have limited the second paragraph to an explanation of the manner of the taking away of the prosecutrix from her father, yet we are unwilling to say that the additional words used in that paragraph constitute such reversible error as would authorize this court to reverse this judgment. In *State v. Johnson*, supra, the first instruction on the part of the state in that case told the jury that, if the defendant's purpose in taking the prosecuting witness away was to cohabit with her for a single night, then such taking away was for the purpose of concubinage within the meaning of the statute. The court in that case, speaking through Judge Burgess, in treating of this instruction, said substantially that, admitting that the instruction is subject to the objection urged against it, and that the taking away for one act of intercourse or for one night does not come within the meaning of the statute, and does not constitute the offense charged, yet when taken in connection with the other instructions, it could not have misled the jury.

6. It is next contended that the verdict of the jury is so informal as to render it insufficient to support the judgment. We quoted the verdict in the statement of this case; and, while technically it is not in the best form, yet when the jury found the defendant guilty of habitual criminal and taking away a female for the purpose of concubinage, as charged in the information, it cannot be otherwise interpreted than that their reference to habitual criminal meant a finding of a former conviction, as charged in the information. In other words, the jury saw proper to call the charge of a former conviction, sentence, and discharge from the penitentiary "habitual criminal," and they found that he was guilty of habitual criminal and taking away a female, etc., as charged in the information. It was not essential that the jury should make a specific finding of a former conviction. It was only necessary to make such finding as would

be sufficient to support the verdict. The jury should find and believe from the evidence that the defendant, William Baldwin, took said Florence Hamann, the prosecuting witness, from the immediate possession, house, or home of her father, William Hamann, but it is a sufficient taking away if the defendant took her, the said Florence Hamann, from the control and possession of her father, and took her out of the neighborhood in which she had lived prior thereto, so that her whereabouts were unknown to her father, the said William Hamann, without his consent." We are of the opinion that, when the first and second paragraphs of this instruction are read in connection with all the other instructions in the case, it does not constitute reversible error. While it may be that it would have been more in harmony with legal principles to have limited the second paragraph to an explanation of the manner of the taking away of the prosecutrix from her father, yet we are unwilling to say that the additional words used in that paragraph constitute such reversible error as would authorize this court to reverse this judgment.

7. Appellant insists that the court committed error by its failure to require the jury, in its instructions to them, to find that the defendant was not married to the prosecuting witness. It is true that the instructions are open to this objection. However, in our opinion, it does not constitute reversible error. There was no pretense during the progress of this trial that the defendant and the prosecuting witness were married, and all the facts developed at the trial, beyond any sort of question, show that they were not married. The defendant himself admitted to Mrs. Beamer that the prosecuting witness was not his wife. In addition to this, the defendant's own witness, Anderson, testifies that he was married to the prosecuting witness. In fact there was no issue upon the question of the defendant and the prosecuting witness being married or not married. It was practically conceded by the defendant and his counsel, and there is an entire absence of any testimony to the contrary, that the defendant and the prosecuting witness were not married. Therefore the failure of the court to require the finding of a fact which was practically admitted all through the trial we do not think constitutes such error as would authorize the reversal of this judgment.

8. Finally, it is earnestly contended, by learned counsel for appellant, that the evidence in this cause is insufficient to support the finding of the jury. Upon that question it is sufficient to say that, if the testimony on the part of the state was relied upon by the jury, it furnished ample support for the conclusions they reached. It goes without saying that, if they believed the testimony as introduced by the defendant, he was entitled to an absolute acquittal; but, at last, it is for the jury to settle this conflict. They had the witnesses before them, and a much better opportunity to judge of their credibility and the weight to be attached to their testimony than this court, and the rulings of this court are uniform that, where there is substantial testimony to support the verdict, it will not be disturbed on the ground that the testimony is conflicting. The evidence introduced upon the part of the state, showing the conduct and actions of the defendant with this girl, fully warranted the jury in finding the defendant guilty of the offense charged. Again the nature and character of this offense must not be overlooked. Judge Gantt, in *State v. Knott*, 207 Mo. 18,

of cases. We said: "These cases all hold that the gravamen of this offense is the purpose or intent with which the enticing and abduction are done, and hence the offense, if committed at all, is complete the moment the subject of the crime is removed beyond the power and control of her parents or of others having lawful charge of her, whether any illicit intercourse ever takes place or not. Subsequent acts are only important as affording the most reliable means of forming a correct conclusion with respect to the original purpose and intent of the accused"—citing *State v. Bussey*, 58 Kan. 679, 50 Pac. 891.

We see no necessity for pursuing this subject further. We have carefully analyzed in detail the disclosures of the record, and have given expression to our views upon the legal propositions involved, which results in the conclusion that the judgment of the trial court in this cause should be affirmed, and it is so ordered. All concur.

THOMPSON v. KEYES-MARSHALL BROS. LIVERY CO.

(Supreme Court of Missouri, Division No. 1. Nov. 25, 1908.)

1. NEGLIGENCE (§ 119*)—PLEADING—CONSTRUCTION—ISSUES.

The rule that, when a general allegation of negligence is followed by an enumeration of specific acts of negligence, plaintiff will be confined to the negligence specifically assigned, is a general rule of construction not limited to pleading.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

2. TORTS (§ 26*)—PLEADING—GENERAL AND SPECIFIC ALLEGATIONS.

Generally, a specification of particular misconduct is deemed to explain a preceding general charge of misconduct.

[Ed. Note.—For other cases, see *Torts*, Dec. Dig. § 26.*]

3. PLEADING (§ 52*)—DECLARATION—SEPARATE CAUSES OF ACTION—SCOPE OF COUNTS.

A petition for negligent personal injury may charge in the same count several acts not inconsistent with each other, any or all of which might have produced the result complained of, without violating the rule prohibiting the stating of more than one cause of action in one count, and the same count may charge common-law and statutory negligence pointing to the same result.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 113; Dec. Dig. § 52.*]

4. PLEADING (§ 34*)—CONSTRUCTION IN GENERAL.

In construing a petition for negligent injury to determine whether plaintiff intended to charge one or two acts of negligence, a court must consider not only what the pleader intended, but what defendant had reason to understand was the issue tendered.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 66-75; Dec. Dig. § 34.*]

prima facie negligence.
[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 706.*]

6. MUNICIPAL CORPORATIONS (§ 706*)—DRIVING IN STREET—INJURY TO PEDESTRIAN—PLEADING CONSTRUED.

A petition sufficiently states negligence at common law as well as under an ordinance, where it alleges that plaintiff was standing at a street crossing waiting for a car when defendant's employes voluntarily and negligently ran a team of horses against her, thereby injuring her; that, violating a specified ordinance, they drove faster than a moderate gait, did not slacken the pace in approaching the crosswalk, and drove against plaintiff, in consequence of which violation of the ordinance the team was violently and negligently run against plaintiff, etc.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 706.*]

7. MUNICIPAL CORPORATIONS (§ 705*)—STREETS—RIGHTS OF PEDESTRIAN.

A pedestrian has the right to stand at a street crossing in waiting for a car.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 705.*]

8. MUNICIPAL CORPORATIONS (§ 706*)—DRIVING IN STREET—PEDESTRIAN INJURED—CONTRIBUTORY NEGLIGENCE.

Evidence held to show that a pedestrian run over by a team while waiting on a street crossing for a car was not guilty of contributory negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 706.*]

9. MUNICIPAL CORPORATIONS (§ 706*)—REGULATION OF PUBLIC PLACES—STREETS—INJURIES—EVIDENCE.

In an action for injury to a pedestrian run over by a team, testimony that the driver did not seem to have good control of the horses was irrelevant, where plaintiff counted on the driver's voluntary fast driving.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 706.*]

10. EVIDENCE (§ 472*)—OPINIONS—MATTERS DIRECTLY IN ISSUE.

In an action for driving a team against one waiting on a street crossing for a car, it was proper to strike out of testimony of another that he saw the team coming very rapidly, and to avoid it jumped on the front end of the car instead of getting on in the usual way, the words "to avoid the team," since they constituted an opinion that the situation was dangerous, which was a question for the court or jury to decide.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.*]

Woodson, J., dissenting in part.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Ada Thompson against the Keyes-Marshall Bros. Livery Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

J. F. & R. H. Merryman, for appellant. Seddon & Holland, for respondent.

VALLIANT, P. J. Plaintiff sued for damages for personal injuries sustained by her through, as she alleged, the negligence of de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

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as risen, for and in consideration of the action of said buildings as aforesaid, to pay to the party of the second part the sum of \$781.50." The proof shows that plaintiff paid the contractor \$200 when the foundation of the house was completed, and at about the same time executed his note to the builder for the sum of \$970, securing the same by deed of trust on the lot of ground upon which the building was in the course of construction, which note and deed of trust the builder immediately sold for cash, which he retained. The proof further shows that the builder, after erecting the walls of the house and partially inclosing it, abandoned his contract and left the state. After the builder abandoned his contract, plaintiff paid the sum of \$614.97 in debts incurred by the builder for material used in the construction of the house and for labor done upon it. He also paid \$905.15 for the completion of the structure after the contractor abandoned it. By the terms of the contract the builder agreed to complete the house on or before September 10, 1905. It was not completed until June 1, 1906, and it was agreed that the rental value of the house was \$25 per month. The defense set up in the answer was that defendant was discharged from his obligation as a surety on the bond, for the reason plaintiff departed from the terms of the contract by making the payment of \$200, and indirectly the one of \$970, to the contractor before the completion of the building. The court, to whom the issues were submitted, ruled against this defense and found the issues for the plaintiff, assessing his damages at \$993.20, and rendering judgment therefor in his favor. As there was no time agreed upon when the contract price should be paid, the builder could not demand payment of any portion of the contract price prior to the completion of the building. *Coburn v. City of Hartford*, 38 Conn. 290; *Shanks v. Griffin*, 4 B. Mon. (Ky.) 153; *Thompson v. Phelan*, 2 N. H. 339. Plaintiff concedes that he was not bound to pay the contract price, or any part thereof, until the building was completed, but contends that, as the contract does not prohibit the payment of the contract price before the completion of the building, he was at liberty to pay as he chose, in advance, as the work progressed, or on the completion of the building, and in these circumstances the payment made before the building was completed was not a departure from the terms of the contract. In support of this contention plaintiff's learned counsel cite the following cases: *Fidelity & Deposit Co. of Maryland v. Robertson*, 136 Ala. 379, 34 South. 933; *Hand Mfg. Co. v. Marks*, 36 Or. 523, 52 Pac. 512, 53 Pac. 1072, 59 Pac. 549; *De Mattos v. Jordan*, 46 Pac. 402, 15 Wash. 378.

Fidelity & Deposit Co. v. Robertson was a suit on a builder's bond. The contract pro-

vided for the architect, and that 10 per cent. should be reserved on all payments until the building was completed. It was held that this provision was solely for the benefit of the owner, and that the answer by his surety, in which a departure from it was pleaded as a defense to the action on the bond, was demurrable. In *Hand Mfg. Co. v. Marks* it was ruled that a surety on a contractor's bond was not discharged by the owner making a premature payment to the contractor, when the payment did not impair any security reserved under the contract and which would inure to the benefit of the surety. In *De Mattos v. Jordan* it was held: "Where a building contractor was to be paid monthly, as the work progressed, upon the supervising architect's estimate of the amount of work completed, the fact that the owner accepts an order from the contractor in favor of a materialman and agrees to pay same, on the day the estimate becomes due, paying at the time in cash, however, a small percentage of the claim to accommodate the materialman, does not constitute such a payment in advance as will release the sureties upon the contractor's bond."

27 Am. & Eng. Ency. of Law, p. 496, states the law to be that: "Where the contract provides, as it usually does, that the owner shall withhold a certain per cent. of the contract price until the contractor has completed the building, the failure to withhold such money will discharge the surety, not only on the ground that it is an alteration of the contract, but that it is a surrender of security agreed to be held for his benefit." In the same paragraph it is noted that in some jurisdictions the surety is not discharged by the failure to retain such reserve percentage.

Evans v. Graden, 125 Mo. 72, 28 S. W. 439, was a suit on a builder's bond. The facts were that Rider & Son entered into a written contract with George S. Park whereby Rider & Son agreed to furnish all the material and erect a building for Park for the use of Park College. Park agreed to pay Rider & Son \$5,800; Rider & Son not to draw at any time "over seventy per cent. of the work done." Rider & Son gave bond to secure the performance of the contract with Graden as surety. Rider & Son abandoned the work, so that Park was compelled to complete the building himself. The amount paid Rider & Son and to complete the building exceeded the contract price \$1,408. Park died, and the plaintiff, as administrator, brought suit on the bond. One of the defenses set up in the answer was that Park from time to time paid Rider & Son more than 70 per cent. of the value of the work done. In respect to this defense, Black, P. J., writing the opinion of the court, at page 77 of 125 Mo., and page 440 of 28 S. W., said: "The defendant, as a surety, has a right to stand upon the agreement that Park would not pay Rider &

in a crossing on plaintiff's farm. The reach of that duty gave plaintiff a statutory right to construct a crossing and to recover from defendant the cost thereof, "together with a reasonable compensation for its time, trouble and labor, * * * together with 10 per cent. interest per annum hereon from the time of the service of process upon such corporation in such suit." Further, the statute provides: "In every such action, if the plaintiff recover judgment, here shall be taxed as costs against the defendant an attorney's fee * * * as may be a reasonable compensation for all legal services rendered for plaintiff in the case." Another remedy the statute gives the farmer whose land adjoins or is crossed by a railroad is the right to recover double damages for domestic animals belonging to him which may be injured by engines or cars operated on the railroad in consequence of the failure of the company to build and maintain legal fences, cattle guards, etc. The statute does not state in express terms that the farm owner may maintain an action for the damages he may sustain on account of any breach of duty imposed on the railroad company, and, if the statute is to be regarded as wholly penal, the proposition is incontrovertible that the remedies it affords, being penalties, are exclusive, and the cause of action here asserted must fail, since it does not fall within the scope of the statute.

In an action against a railroad company for damages to animals resulting from a failure to fence, brought when the statute only authorized the recovery of single damages, the Supreme Court held that the statute should be regarded as a police regulation, and therefore penal. *Gorman v. Railroad*, 26 Mo. 450, 72 Am. Dec. 220. In *Barnett v. Railroad*, 68 Mo., loc. cit. 62, 30 Am. Rep. 773, the Supreme Court said: "The statute under consideration is unquestionably a penal statute. It was so regarded by this court in the case of *Gorman v. Railroad*, 26 Mo. 450, 72 Am. Dec. 220, when single damages only were recoverable under its provisions. In *Trice v. H. & St. J. Railroad*, 49 Mo. 440, it was said: 'While the protection of adjacent proprietors is an incidental object of the statute, its main and leading one is the protection of the traveling public. To insure such protection railroads are imperatively required to fence their tracks, and the penal liability deemed necessary to enforce this requirement is a matter of legislative discretion.' * * * Being a penal statute, in the absence of any constitutional restriction, the Legislature may lawfully make such disposition of the penalty imposed by it as will, in its discretion, best serve the purpose of the enactment. Instead of giving the whole of the penalty to the state, or the county, or dividing the penal-

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aggrieved, and the method adopted is doubtless a most efficient one for enforcing the statute." Judge Black voiced the same opinion in *Perkins v. Railway*, 103 Mo., loc. cit. 57, 15 S. W. 322, 11 L. R. A. 426, saying: "Our statute giving the owner double damages for stock killed, where a railroad is not fenced as required by law, has been upheld in several cases on the ground that the law is a police regulation, and designed not only to protect the owners of the stock, but also the traveling public, and that the Legislature might impose a penalty for a violation of the law and give the penalty to the owner of the stock killed. * * * The statute in question is as much a police regulation as is the double damage section, and the attorney's fee may be lawfully imposed as a penalty for the violation of the law. It is a penalty allowed in all cases of a class, and the objection that the law is special legislation is not well taken."

Afterward the Supreme Court, following the opinion of the Supreme Court of the United States in *Railroad v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, held the provision allowing the recovery by the plaintiff of an attorney's fee unconstitutional. *Paddock v. Railway*, 155 Mo. 524, 56 S. W. 453. But this ruling was placed on the ground that a penalty could not be inflicted on one class of litigants and not others, and is wholly foreign to the question of whether the remedies provided for breaches of the duties imposed by the statute are penal or otherwise. It is one thing to penalize a man for failing to perform a duty imposed on him by law, and quite another thing to punish him for unsuccessfully defending a suit prosecuted against him. The St. Louis Court of Appeals, in *Sheridan v. Railway*, 56 Mo. App., loc. cit. 71, in a farm crossing case, held that the action is maintainable, saying: "The statute imposed on the defendant this duty, and, if it failed to perform it, the plaintiff had the right under the statute to construct the crossing and sue and recover from the defendant its cost. Section 2611, Rev. St. 1889, now section 1105, Rev. St. 1899 (Ann. St. 1906, p. 945). But this statutory remedy is not exclusive, and it has been so held both by this court and the Supreme Court." The decision of the Supreme Court referred to was *Baker v. Railroad*, 57 Mo. 285; but in that case the failure to construct the crossing constituted a breach of a contractual obligation of the railroad company to the landowner, and it was held that the owner might have sued for specific performance of the contract, for damages on account of its breach, or might have put in the crossing himself and compelled the defendant to reimburse him—an entirely different question from that decided in the *Sheridan Case*. Recently, in *Mangold v. Railway*, 116 Mo. App. 606, 92 S. W. 753,

an action for damages resulting from a breach of the duty to fence, that the statute is penal, must be strictly construed, and, as it "states the responsibility of the company, we think it must be limited to the particulars enumerated."

These apparently conflicting decisions may be harmonized only on one theory, viz., that in enacting the statute the Legislature intended there should be a radical difference in nature between the duty to fence and that of constructing farm crossings. The fact that the obligation to fence has for its main object the protection of the traveling public, while that to construct and maintain a farm crossing inures to the sole benefit of the farm owner, would appear to afford a plausible reason for saying that a statutory cause of action arising from a breach of the first of these obligations is penal in character, since it belongs to a person not a member of the class whose protection was the main purpose of the enactment, while a cause predicated on a violation of the obligation to construct a farm crossing belongs to the person for whose benefit the statute was enacted, and is purely compensatory. In this view, the statutory remedies are exclusive in the first-mentioned class of cases, but not in the second, since the breach of the duty imposed either by the common law or by provision of the statute not intended to be penal would support an action for damages, regardless of whether such remedy was expressly mentioned in the statute. In such cases statutory remedies are merely cumulative, and not exclusive. Such, evidently, was the conclusion reached by this court in *Quantock v. Railway*, 117 Mo. App. 469, 74 S. W. 1034, and by the Supreme Court in the same case, 197 Mo. 93, 94 S. W. 978. In that case, the question we now are called on to decide was not discussed by either court, but its solution was necessary to the decision rendered by both courts; and, as the conclusion reached by them must have agreed with that we have just expressed, we must pronounce it sound, for the reason, if for no other, that it is the last expression of the Supreme Court on this subject. Consequently we hold that plaintiff is entitled to maintain an action for damages resulting from defendant's failure to put in the crossing.

There is nothing in the suggestion that plaintiff necessarily received compensation for the damages he now would recover in the award given him in the condemnation suit, by which defendant acquired a right of way over his land. To the contrary, we must assume that, since the statute required defendant to give plaintiff a crossing, the court, acting in the belief that the duty would be performed, allowed plaintiff com-

charged.

We have carefully examined the other points presented by defendant for a reversal of the judgment, and find no merit in any of them.

The judgment is affirmed.

BROADDUS, P. J., concurs. ELLISON, J. concurs in the result.

CITY OF MACON ex rel. QUINCY NAT. BANK v. JAEGER.

(Kansas City Court of Appeals. Missouri.
Nov. 16, 1908. Rehearing Denied
Dec. 7, 1908.)

1. EXCEPTIONS, BILL OF (§ 6*)—REQUISITES.

The matters of exception, which must be stated in a bill of exceptions, are the proceedings at the trial, the result thereof, the action of the court on the motion for new trial, etc.

[Ed. Note.—For other cases, see *Exceptions*, Bill of, Cent. Dig. § 8; Dec. Dig. § 6.*]

2. APPEAL AND ERROR (§ 281*)—RECORD—QUESTIONS REVIEWABLE.

Without a motion for new trial, only errors appearing on the record proper will be reviewed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1650-1661; Dec. Dig. § 281.*]

3. APPEAL AND ERROR (§ 502*)—RECORD.

Where the motion for new trial was noted in the bill of exceptions, but the record proper does not show that it was filed, it will not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 502.*]

Appeal from Circuit Court, Macon County. Nat. M. Shelton, Judge.

Action by the City of Macon, on the relation of the Quincy National Bank, against Joseph Jaeger. Judgment for plaintiff, and defendant appeals. Affirmed.

R. S. Matthews & Son and R. W. Barrow, for appellant. Guthrie & Franklin, for respondent.

ELLISON, J. This action was brought on a special tax bill issued by a city of the third class for street improvements in such city. The judgment in the trial court sustained the tax bill, and defendant appealed.

Relator asks that the judgment be affirmed on the ground that the record, as preserved in the abstract, does not preserve any error in the trial. An examination of the abstract discloses a record proper in which appears the petition and answer. Then follow matters of exception which must be set forth in a bill of exceptions. These are the proceedings at the trial, the result thereof, the action of the court on the motion for new trial, etc. Here the motion for new trial is noted in the bill of exceptions; but the record proper, as distinguished from the bill of exceptions, does not show that such motion was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Index.

sense when he was hurt. He had left the car in a leap he considered necessary to escape harm, and broke his leg when he struck the ground. Clearly, too, the injury was sustained while he was getting off the car, or, rather, after he was off. The argument is that, in framing the contract for insurance with those provisos, the parties did not intend to excuse the company from liability for a hurt inflicted in leaving a car to escape violent injury or death, but only to excuse it if the insured was hurt when he was not riding as a passenger and securely in or upon a car. An attempt is made to bring this case within the rule of law which will not permit a plaintiff to be charged with contributory negligence when he hurts himself in an effort to escape sudden peril; but that principle has no application, because contract law must control the decision, not the law of torts. *Overbeck v. Ins. Co.*, 94 Mo. App. 453, 457, 68 S. W. 236; *Hull v. Acc. Ass'n*, 41 Minn. 231, 42 N. W. 936; *Travelers' Ins. Co. v. Snowden*, 45 Neb. 249, 63 N. W. 392; *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305. The inquiry relates to the meaning of the contract as indicated by its language, read in connection with the purpose for which it was written. Respondent was insured as a commercial traveler in the class of selected risks, and no doubt his purpose was to provide for indemnity in case he was injured or killed accidentally in trips over his territory. The policy should be interpreted so as to extend its protection over as wide a field of accidental injury as is consistent with its language, but its natural meaning must not be violated. If the effect of an insurance contract is clear, it must be enforced as written, without adding an increased liability by construction; but as its terms are prescribed by the company, if they are of doubtful meaning, they will be construed most strongly against the company. *Schoonmaker v. Hoyt*, 148 N. Y. 431, 42 N. E. 1059; *Janneck v. Ins. Co.*, 162 N. Y. 574, 57 N. E. 182; *Carr v. Ins. Co.*, 100 Mo. App. 602, 75 S. W. 180. We think the language of the policy in suit admits of no doubt in respect of the company's duty to pay double indemnity. Respondent was not in or upon the car when hurt, but was getting off—the two contingencies which the contract said should exempt the company from double indemnity. How can it be said it was not the intention to allow single indemnity only, if he was hurt in jumping from a car in a perilous emergency, when no such contingency is mentioned in favor of the insured? The policy does not undertake to state under what circumstances the party must be off the car, or in the act of getting off, to exclude double indemnity. If it enumerated certain circumstances, probably an injury received while off the car, or getting off under other

double indemnity would be paid only in case the insured was hurt while riding as a passenger in or upon a car, and single indemnity if he was hurt while off or getting off or on. We can see nothing ambiguous in the language used. The argument is put forward that, if the car was in flames, the insured would have to stay on it and be burnt to death or lose the right to double indemnity if he was in some way hurt in escaping from the conflagration. All insurance risks are taken by companies on the theory that human nature will prompt a man to do all he can in crises to avoid injury, and that the insuring company will get the benefit of this instinct of self-preservation. The sum of the matter in the present case is that appellant was willing to take the chance of double liability from accidents occurring while respondent was on a car; and, if he preferred to take the chance of injury or death in jumping off, he was bound to do so at his own hazard, and not the company's. In other words, the contract is so drawn as to exempt the company from double liability if the insured happens to be off a car, or getting off when hurt, no matter for what reason, and the company is entitled to the benefit of the exemption.

We have studied all the cases cited for either side, but do not care to review them, and will merely note them for the reader to look into if he wishes. The following involve policies whose terms were almost identical with those of the policy at bar, and in which companies were exonerated from accidents occurring under similar circumstances: *Van Bokkelen v. Ins. Co.*, 34 App. Div. 399, 54 N. Y. Supp. 307; *Anable v. Ins. Co.*, 73 N. J. Law, 320, 63 Atl. 92; *Smith v. Ins. Co.*, 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. Rep. 153; *Ætna Ins. Co. v. Vandecar*, 86 Fed. 282, 30 C. C. A. 48; *Miller v. Ins. Co.*, 39 Minn. 548, 40 N. W. 839; *Hull v. Ins. Co.*, 41 Minn. 231, 42 N. W. 936; *Huston v. Ins. Co.*, 66 Ohio St. 246, 64 N. E. 123; *Travelers' Ins. Co. v. Snowden*, 45 Neb. 249, 63 N. W. 392; *Travelers' Ins. Co. v. Brookover*, 71 Ark. 123, 71 S. W. 246. These cases are supposed to favor respondent's position, and perhaps they do in some measure. *Northrup's Adm'r v. Ins. Co.*, 43 N. Y. 516, 3 Am. Rep. 724; *Tooley v. Assur. Co.*, 3 Blss. 399, Fed. Cas. No. 14,098. The cases of *Insurance Company v. Muir*, 126 Fed. 926, 61 C. C. A. 456, and *Fidelity & Casualty Co. v. Morrison*, 129 Ill. App. 360, do not help him. In the *Muir* case the policy provided for double indemnity if the insured was injured while riding as a passenger "in or on a public conveyance provided by a carrier of passengers and propelled by steam," etc. The insured went on the platform to vomit, and was thrown from it and killed. The court decided the double indemnity clause covered injuries received while the insured was on

veyance propelled by steam," etc. Morrison fell from an elevated train in the suburbs of Chicago and was killed. The opinion reasoned on the facts, and concluded they proved that when Morrison fell off, one of his feet was on the step of the car, his other foot had been raised from the station platform, and he was holding by the handrail of the car; hence the court held he was actually on the car as a passenger.

The judgment is reversed and the cause remanded, with directions to the court to set aside the judgment for double indemnity and enter judgment for single. All concur.

THOMPSON et al. v. MISSOURI PAC. RY. CO.

(Kansas City Court of Appeals. Missouri. Nov. 16, 1908. Rehearing Denied Dec. 7, 1908.)

ATTORNEY AND CLIENT (§ 101*)—SCOPE OF EMPLOYMENT.

Plaintiffs, nonresident attorneys, hired a resident firm of lawyers to conduct a suit to judgment for part of plaintiffs' contingent fee. The resident attorneys and the parties to the action made a settlement, agreeing upon a judgment and that defendant should pay the sum to the clerk of court, which it did. *Held*, that the resident attorneys acted within the scope of their employment in effecting the settlement, and plaintiffs could not subsequently enforce against defendants their lien for the contingent fee.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 209; Dec. Dig. § 101.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by G. M. Thompson and others against the Missouri Pacific Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Martin L. Clardy and Ben J. Woodson, for appellant. J. W. Boyd and Thompson & Thompson, for respondents.

ELLISON, J. The plaintiffs are attorneys at law. They claim a lien on a judgment in favor of their client rendered against the defendant for \$2,500. This action was brought to enforce the lien. It was sustained in the trial court, and defendant has brought the case here.

It appears that one Gordon L. Rowe, an unmarried man, was killed in the state of Nebraska through the negligence of the defendant, and that his mother, who was appointed his legal representative, employed the plaintiffs, who resided in this state, to prosecute an action for damages in the courts of Nebraska, agreeing to pay them, as compensation for their services, 40 per cent. of the sum which might be recovered. The laws of

to "secure all evidence in the case," and had him agree to pay one-half of all expenses of the suit, and that he should receive therefor 20 per cent. of the amount recovered; that is to say, one-half of what they were to get from Mrs. Rowe. Plaintiffs then also themselves employed Pitzer & Hayward, a firm of attorneys in Nebraska, to assist them in instituting and conducting the suit to final judgment. For the services of this firm plaintiffs were to pay them 12½ per cent. of the amount recovered. Both these contracts were in writing, and it will be seen that plaintiffs contracted away, for assistance, the far greater part of what they were to get for their services. But of this we need not be concerned, nor, in view of the conclusion at which we have arrived, need we take further notice of the plaintiffs' contract with Holmes. When the case was about to come up in the Nebraska court for trial, Mrs. Rowe, the plaintiff in that case, asked these plaintiffs to go there to take part. They could not do so—whether because they felt that Pitzer & Hayward were on the ground and could do all that was necessary need not be inquired. Mrs. Rowe was there. It was there agreed by the attorneys for the defendant railway and Mrs. Rowe and Pitzer & Hayward that judgment should be rendered against the railway for \$2,500 and costs, and that defendant should pay the judgment to the clerk of the court, which it did. The costs being \$134.25, the total sum paid in satisfaction of the judgment was \$2,634.25. The manner in which this was paid out by the clerk is not clear. It seems from Mrs. Rowe's testimony that she only received, as the plaintiff, \$1,500, which would be the judgment, less 40 per cent., which was originally agreed upon to be paid to these plaintiffs, and which they afterwards agreed to share up with Holmes and Pitzer & Hayward, as already stated. It is a fair inference from the record that Holmes received what was to be paid to him, and so did Pitzer & Hayward. At least they appear to be satisfied.

But, however unsatisfactory the record may be as to the distribution of the amount of the judgment, it will not affect our conclusions on the case, drawn from undisputed matters, most of them conceded. They are that Pitzer & Hayward were employed by these plaintiffs to represent them in prosecuting the case. The wording of the employment is to "assist" them. But in fact they acted for them and were their agents. As such agents they could bind plaintiffs as to what they did in so far as the scope of their agency would permit. The judgment was agreed upon in a fair and open settlement

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion; assigning, also, error in an instruction for plaintiff, which permitted a recovery if the jury believed the speed of the car was higher than was prudent under the circumstances, and believed, further, the excessive speed "contributed to and was the direct cause of the collision." Other complaints are that plaintiff was permitted to prove his leg had been shortened by the fracture, when this fact was not alleged for special damages, and that the court permitted two witnesses who did not qualify as experts to testify regarding the speed of the car. The accident happened near the north end of the Twelfth Street Bridge, a structure 27 feet wide and 1,200 feet long, which rises above and extends over various steam railroad tracks. The transit company operates cars over this bridge on two tracks, of which the west is used by south-bound cars and the east by north-bound. The bridge is built, in the main, of timbers, but with iron trusses. The surface of the bridge is level most of its length, but descends in a gentle slope from a point 250 feet south of its northern terminus to the street. Plaintiff was employed by the Obert Brewing Company as driver of a wagon. About daybreak he drove on the bridge at its southern end, near Gratiot street, and thence followed the east track northward until he was close to the north end, when the car overtook him, struck the rear wheel of the wagon, and knocked him from the wagon seat to the street, where he lay unconscious. The roadbed or driveway of the bridge is about 19 feet 3 inches wide. On either side is a space 2 feet 4 inches wide from the sidewalk to the first rail of the car track; the intermediate space being taken up by the two tracks, each 4 feet 10 inches wide, with a space between them of the same width. A person could hardly drive across the bridge without proceeding on one track or the other, plaintiff said, and he was traveling along the east track, the one on which cars ran northward, the way he was going. By driving on this track he avoided meeting north-bound cars, as he would have done had he used the west track.

1. Plaintiff swore that when he drove on the bridge at Gratiot street he looked and listened for cars, and neither heard nor saw any, again looked some 200 feet from where the collision occurred, and was listening all the time, but never heard the rumble of a car, or the sound of a warning gong. Some witnesses who were on the car testified they heard no warning given, though one of them swore he stepped to the front door of the car just prior to the collision and saw plaintiff's wagon plainly visible ahead. Witnesses testified the speed of the car at the time of the collision was 30 miles an hour, and that the motorman, besides giving no warning, did not slacken speed after he must have seen a collision was impending. We discern

either on the theory of lack of negligence on the part of defendant or concurrence of negligence on the part of plaintiff. The speed at which the car was running was excessive, if some testimony is to be believed, and there was neglect in not warning plaintiff of the car's approach, if other is to be believed. These are the acts of negligence on which a recovery was submitted. According to plaintiff's statements, he used care both in looking and listening, but nevertheless failed to detect the car's approach. His not hearing its rumble is accounted for by the noise of trains and engines switching on the tracks under the bridge, and drowning the sound of the trolley car as it came up behind. It is contended for defendant that plaintiff was in a mood of abstraction when he should have been attentive, as there was noise below which rendered it difficult to hear an approaching trolley car. The testimony of plaintiff shows he was on the watch, had looked twice to the rear for a car, and had listened constantly. He might have heard the bell if it had been rung to warn him, even though he did not hear the rumble of the car, a sound which would be confused more readily with the rumble of trains below than would the clang of the gong. In our opinion these matters were all for the jury on conflicting testimony. The cases of *McGauhey v. Transit Co.* 179 Mo. 583, 79 S. W. 461, and *Theobald v. Transit Co.*, 191 Mo. 395, 90 S. W. 354, cited for defendant, are not in point. We are familiar with those cases, but do not care to digest their facts in this opinion, and will say simply the plaintiffs were nonsuited for special circumstances which do not appear in the present case.

2. The instruction of which complaint is made on the authority of *Hof v. Transit Co.* (decided by the Supreme Court, but not yet officially reported) 111 S. W. 1166, falls outside the principle of said decision. The instruction condemned in the *Hof Case* allowed a verdict for the plaintiff if the defendant's negligence directly "contributed to cause the collision"; whereas the present instruction required the jury to find the negligence of defendant, as specified, not only contributed to the collision, but was the direct cause of it. This instruction, and several given for defendant, told the jury plaintiff could not recover unless they found he was in the exercise of due care at the time of the collision. The thirteenth charge for defendant said, if plaintiff's negligence in any degree directly contributed to cause his injury, he could not recover, and the verdict must be for defendant. A finding for plaintiff was excluded if his own negligence contributed to cause his injury, and he was entitled to recover if defendant's negligence directly contributed to and caused it, though some adventitious fact, not constituting negligence of plaintiff, may have had something to do with the accident.

1. TENANCY IN COMMON (§ 28*)—OUSTING CO-TENANT—ACCOUNTING.

A tenant in common ousting his co-tenants must account to them for their share of the rents and profits, whether the premises are occupied by him or his lessee.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 76-88; Dec. Dig. § 28.*]

2. APPEAL AND ERROR (§ 501*)—RECORD—PRESENTATION AND RESERVATION OF GROUNDS OF REVIEW.

The question of propriety in striking out items pleaded as set-off is not reviewable; the bill of exceptions not containing the motion or any exception to the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2301; Dec. Dig. § 501.*]

3. TENANCY IN COMMON (§ 30*) — MUTUAL RIGHTS—TAXES.

Taxes paid by a tenant in common may be set off by her, when required to account for rents and profits to co-tenants, though paid after she ousted them and while asserting title adverse to them.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 96; Dec. Dig. § 30.*]

4. LIMITATION OF ACTIONS (§ 51*)—ACTIONS BETWEEN CO-TENANTS—ACCOUNTING.

Where a tenant in common ousts her co-tenants under a claim of superior right, their causes of action for an accounting for rents accrue, and the statute commences to run, as to each installment when it is payable.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 280-284; Dec. Dig. § 51.*]

5. LIMITATION OF ACTIONS (§ 51*)—OUSTER OF CO-TENANTS—CONTRIBUTION FOR TAXES.

The right of a tenant in common to contribution from her co-tenants for taxes paid by her on the common lands, after she ousted them, under a claim of superior title, accrues, and the statute commences to run from the time of each payment; so that she cannot set off those made more than five years before their action against her for an accounting for rents and profits.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 280-284; Dec. Dig. § 51.*]

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Suit by Maude L. Starks and others against Lizzie Kirchgraber. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

O. T. Hamlin, for appellants. Wright Bros. & Blair, for respondent.

NORTONI, J. This is a suit in equity for an accounting of rents and profits. Plaintiffs, who are tenants in common with the defendant of a certain parcel of land, filed their bill in the circuit court calling upon the defendant to account to them for rents and profits accrued by the act of defendant in renting the common estate to a stranger. Upon a hearing the court found the issues for the defendant, and the plaintiffs appeal. The several plaintiffs and defendant were

adjacent to the city of Springfield, Mo. The plaintiffs owned four-sixths of the land and the defendant owned two-sixths thereof. The defendant set up a claim to the entire estate, denied the rights of the plaintiffs as tenants in common with her, and caused them to be forcibly ousted from the common estate on the 1st day of April, 1899. On the same day the defendant rented the premises to a tenant, and installed him in possession. The defendant retained possession of the premises through her tenant for a period of six years and seven months, and until about the 1st day of November, 1905. After having been ousted, plaintiffs instituted a proceeding under the statute against the defendant to quiet title, as a result of which their rights in the premises were reinstated by a decision of the Supreme Court in 1905. See *Stark v. Kirchgraber*, 186 Mo. 633, 85 S. W. 868, 105 Am. St. Rep. 629. The law with respect to the rights of tenants in common is well settled in this state to the effect that if one tenant in common occupies the whole estate without any claim on the part of the co-tenants to be admitted into possession, and without hindrance to him of such possession, the occupying tenant is not liable to his co-tenants in an action of account. The reasoning of the law in respect of this proposition is stated in the following language by Judge Scott in *Ragan v. McCoy*, 29 Mo. 356-367: "Each tenant is entitled to the possession, and may enter and enjoy if he will. As each tenant is entitled to his share of every part of the undivided premises, one tenant cannot gain an exclusive right to any part of them. He may enter and enjoy a portion less than his share, yet the other tenants will be entitled to their share of that portion, as each tenant is seised of his portion of every part of the undivided premises; so that, if the law were otherwise, one tenant might refuse to enter, and the other could not enjoy any portion, even one less than his share, without making himself liable to the others for a share of the profits, and that without regard to the fact whether the occupation was beneficial or otherwise to the premises. Of course, if one co-tenant ousts another, he will be liable in an ejectment, or subject himself to the law of forcible entries. But where the land is free to all, and each may enter if he will and enjoy his rights undisturbed, there is no reason in compelling him who does enter to pay rent to him who neglects or obstinately refuses to do so."

However this may be, where one of the tenants in common ousts his co-tenants, as in this case, he may be held to account to them for their proportionate share of the rents and profits of the estate, and in such cases it is immaterial whether the premises were oc-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. LANDLORD AND TENANT (§ 277*)—LEASE—BREACH OF CONDITION—FORFEITURE—MODE.

While the usual mode of enforcing forfeiture of a lease is by re-entry, either by an action of unlawful detainer or ejectment, any act of the lessor, which unequivocally manifests his intention to claim the forfeiture and demand possession, is equivalent to a re-entry.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1178; Dec. Dig. § 277.*]

2. LANDLORD AND TENANT (§ 103*)—BREACH OF LEASE—FORFEITURE—RE-ENTRY.

A lease required a tenant to reimburse the landlord for increased insurance premiums because of the hazardous nature of the tenant's business, and declared that any violation of its covenants should work a forfeiture if the lessor declared the forfeiture by notice in writing. The lessor, having been compelled to sue for such increased premiums, gave the tenant notice of his election to declare a forfeiture and to surrender the premises. *Held*, that such notice terminated the lease, and was a complete defense to the lessee's liability for rent after a surrender of the premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 341; Dec. Dig. § 103.*]

3. LANDLORD AND TENANT (§ 112*)—FORFEITURE—NOTICE—WAIVER.

A landlord served notice of forfeiture under a lease providing for double rent after such notice. The tenant vacated the premises as soon as he could procure another building. He considered himself liable for double rent after notice, but excused his failure to pay more than regular rent for three months after such notice until an indebtedness he claimed against the lessor was adjusted. *Held* insufficient to show that both lessor and lessee had elected to waive the declaration of forfeiture and to continue the term.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Nathaniel Baxter, Jr., against Morris A. Heilmann, Jr. Judgment for defendant, and plaintiff appeals. Affirmed.

Vernon W. Knapp and Thomas J. Rowe, for appellant. Edwin Lee and Jos. S. McIntyre, for respondent.

GOODE, J. On July 20, 1902, plaintiff leased to defendant a building at the southwest corner of Lucas avenue and Seventh street, in the city of St. Louis, for a term of five years, to commence on said date, and at a yearly rental of \$4,000, payable in monthly installments of \$333.33½, in advance, for which defendant executed his 60 promissory notes under date of July 11, 1902, falling due on successive months thereafter. The notes contained this clause: "Subject to and in accordance with the provisions of the lease this day made for the leasehold at the corner of Seventh and Lucas." Defendant took possession of the

March 19, 1904, and refused to pay the subsequent rent notes as they matured. The present action is on the note which fell due May 20, 1904, more than two months after defendant had vacated the premises. He contends plaintiff had declared a forfeiture of the lease, and therefore he (defendant) was forced to abandon the premises, and rightly refused to pay rent. One clause of the lease provided that, if the insurance companies carrying policies on the building should charge increased premiums because the character of the business defendant conducted increased the risk of fire, the excess of premiums plaintiff was compelled to pay should be refunded by defendant. Plaintiff demanded reimbursement of increased premiums paid for the two years, from July 20, 1902, to July 20, 1904, and on defendant's refusal to reimburse him, suit was instituted to recover the amount of the excess plaintiff paid in consequence of the increased fire hazard due to defendant's business. These actions resulted in judgments for plaintiff for several hundred dollars, being the amount of premiums paid by him for insurance in excess of what would have been charged had not defendant's business increased the risk of a fire loss on the building. The lease contained a provision that any violation of its covenants or agreements by defendant, or those under him, should work a forfeiture of the lease, if the lessor declared a forfeiture by notice in writing, delivered to the lessee, and that the lessee should pay double rent for every day he occupied the premises after the lease was forfeited. On November 7, 1903, plaintiff notified defendant in writing the lease was forfeited because plaintiff had determined defendant had violated a covenant by refusing to repay plaintiff the excess of premiums paid by the latter for insurance, in consequence of defendant's business. The notice said defendant, by refusing to pay the premiums, had produced and worked a forfeiture of the lease; that the lessor declared the same canceled and forfeited, notified defendant of the termination of his tenancy, and demanded he forthwith vacate the premises and surrender and deliver up the same to plaintiff with all their appurtenances. On receipt of this notice defendant began to arrange for other quarters, and subsequently rented store rooms on Washington avenue. When he was served with notice defendant said he would see his attorney, and, if advised he was bound to vacate, would do so. The evidence in this cause shows defendant conducted a business so hazardous as to increase the rate of insurance. On February 4, 1904, defendant notified plaintiff that pursuant to the prior notice of forfeiture given by plain-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

(St. Louis Court of Appeals. Missouri. Nov. 5, 1908. Rehearing Denied Dec. 1, 1908.)

1. APPEAL AND ERROR (§ 1022*)—REVIEW—FINDINGS OF REFEREE.

Where a referee and referee are agreed on by the parties to a law action the referee's findings of the facts approved by the trial court are conclusive on appeal, if supported by substantial evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015; Dec. Dig. § 1022.*]

2. APPEAL AND ERROR (§ 848*)—REVIEW—FINDINGS OF REFEREE.

If a referee has erred in his conclusions of law, the Court of Appeals may set aside the erroneous conclusions, and apply the law as found by it to the facts found by the referee.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 848.*]

3. CONTRACTS (§ 170*)—CONSTRUCTION—CONSTRUCTION GIVEN BY PARTIES.

The rule that a practical construction of a contract by the parties themselves is a proper guide to its meaning applies only where the contract is ambiguous or obscure in its terms, or where there is some uncertainty as to the objects or subject-matter.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.*]

4. CONTRACTS (§ 194*)—CONSTRUCTION.

A contract provided that, to pay certain debts due to first party as well as for debts due a certain bank for which first party was indorser, second party empowered first party to collect and apply toward payment of the debts due first party and the bank the proceeds of certain timber belonging to second party, also that, after a claim of a mill company against second party had been paid, the proceeds from timber from certain land should be subject to first party's order until the debts mentioned in the contract should be paid. *Held*, that the proceeds of the timber, after paying the debt to the mill company, was to be applied in payment of the specific debts mentioned and described and then due, and not to debts contracted after the execution of the contract.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 194.*]

5. ESTOPPEL (§ 55*)—MEANS OF KNOWLEDGE OPEN TO BOTH PARTIES.

Where the means of knowledge are equally open to both parties, silence or some act done does not estop the party doing the act or remaining silent; and hence, where a contract providing for the application of proceeds of lumber belonging to second party to payment of specified debts due first party and a bank after liquidation of defendant's claim was in possession of first party's son who continued the business after his father's death, the fact that defendant's agent told the son that the contract was all right, that he (the agent) would stand to it, and anything the son sold second party was all right, would not estop defendant from denying that the subsequent sales by first party's son were covered by the contract, and to be paid for by the proceeds of the lumber, but it could contend for a true interpretation of the contract.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 138, 139; Dec. Dig. § 55.*]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by J. W. Bader, administrator, against the Chicago Mill & Lumber Company.

Judgment for plaintiff on the report of a referee, and defendant appeals. Reversed and rendered.

Faris & Oliver, for appellant. C. G. Shepard and S. J. Corbett, for respondent.

BLAND, P. J. The action is bottomed on the following contract: "This agreement, made and entered into this thirty-first day of July, 1900, by and between W. H. Huffman, of Pemiscot county, in the state of Missouri, party of the first part, and J. W. Thompson, of Pemiscot county, Missouri, party of the second part, witnesseth: That the said party of the second part, in consideration of the covenants and agreements herein contained, and in consideration of and in order to pay certain debts due and owing to first party, as well as for debts due Pemiscot County Bank for which said first party is indorser, the second party agrees to and with the said first party, that said first party shall be empowered to collect and shall collect and apply toward the payment of the debts due to the said first party and to Pemiscot County Bank the proceeds of all timber which I have bought from Joe Little, Frank Avis, Scott McDonald, also the timber on forty acres land bought of John Sullivan, near Kinfolks Ridge, and that which is on my land, and all the timber now on the bank of river, all on Island 16 and under contract to Chicago Mill & Lumber Company, and any and all timber which I may come in possession of, excepting a claim of Chicago Mill & Lumber Company of \$303, which is to be paid first out of proceeds of said timber; all other proceeds of timber shall be subject to order of said first party until the debts above mentioned are paid. This agreement shall not be revoked or rescinded by either of the parties hereto, until the whole of the said indebtedness owing from the said second party to the first party and Pemiscot County Bank shall have been paid and discharged in full; provided, that the same may be revoked and rescinded if both of said parties hereto agree to revoke and rescind the same. This agreement shall be taken and considered by the Chicago Mill & Lumber Company as an order for the payment of said sum to the said first party. This agreement may be accepted by the said Chicago Mill & Lumber Company by their indorsement, but the same shall be as valid and binding upon the parties hereto as though indorsed by said party above named." The defendant accepted the provisions of the contract, and from time to time paid money to W. H. Huffman in recognition of its acceptance.

The facts and circumstances leading up to and existing at the time the contract was made, succinctly stated, are as follows: The mill company had a contract with Thompson for the delivery of timber on the banks of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the contract sued on was entered into. Some of the timber Thompson agreed to deliver was to be cut from his own land, the balance from the lands of the parties named in the contract, which timber the mill company had purchased for Thompson. Huffman was engaged in a general mercantile business at Caruthersville, and Thompson had become indebted to him in the sums named in the contract. After the execution of the contract, Huffman furnished Thompson such supplies on credit as were necessary to enable him to continue the delivery of logs on his contract with defendant. Huffman died January 1, 1901, at which date Thompson owed him the sum of \$358.68 for supplies furnished after the execution of the contract. After Huffman's death, his son Carl continued the mercantile business in his father's name, and continued to extend credit to Thompson until the amount, including the notes mentioned in the contract, amounted to \$1,811.19, exclusive of credits by payments made by the mill company. The action is to recover this balance. By agreement of parties the cause was referred to B. A. McKay, Esq., as referee. McKay qualified, heard the evidence, and made the following report to the court: "I, the undersigned, duly appointed by the Pemiscot circuit court as referee to hear and try all the issues in said cause, a certified copy of which appointment is hereto annexed, do hereby report my proceedings as such referee: I did on the 16th day of May, 1906, take the oath prescribed by law, which said oath is hereto annexed, and herewith returned. And on the 17th day of May, 1906, said plaintiff appearing by S. J. Corbett and C. G. Shepard, his attorneys, and said defendant appearing by Faris and Oliver, its attorneys, and both parties waiving notice by the referee of the time and place for the hearing of said cause, announced themselves ready for the hearing of said cause, I proceeded to hear the evidence. The evidence offered by both plaintiff and defendant, together with the rulings thereon, will appear by the transcript thereof hereto annexed, which, together with the exhibits offered and referred to in said hearing, and which are attached to the transcript of the evidence, make a part of this report. Upon the evidence thus adduced I find the facts to be as follows: On the 31st day of July, 1900, one J. W. Thompson, who was engaged in placing along the banks of the Mississippi river certain logs for the defendant herein, and being a man of limited means, desired to have plaintiff furnish him with merchandise and extend to him certain other credit; that upon said 31st day of July, 1900, said J. W. Thompson and W. H. Huffman made and entered into a written contract, by which said Thompson agreed to, and by the terms of said contract empowered said W. H. Huffman to collect all moneys due to said J. W. Thompson by defendant herein

by said Huffman. By the terms of said contract certain indebtedness was expressed as being the debts due and owing by said Thompson to said Huffman, as well as certain debts due Pemiscot County Bank. I further find that said defendant herein became guarantor for said Thompson under the terms of said contract; that subsequent to the making of said contract said defendant notified said Huffman that it had been informed that Thompson intended giving him, said Huffman, an order for all balance due on all logs; and that as soon as defendant was notified of such fact it would pay no money to any one except Huffman. I further find that on the 1st day of January, 1901, said W. H. Huffman departed this life, and that said J. W. Thompson was at said date then indebted to said W. H. Huffman in a considerable sum; that, subsequent to the death of said W. H. Huffman, Carl Huffman, the son of the deceased, carried on and conducted said mercantile business of the said W. H. Huffman for the benefit of the estate; that said Carl Huffman was uncertain as to his right, after the death of said W. H. Huffman, to further extend credit under the terms of this contract, and, before proceeding further under said contract, he advised with said Thompson and with one D. L. Russell, who was the agent of the defendant, as to the propriety of proceeding further under the terms of said contract; that they all conferring together interpreted said contract to give Carl Huffman the right, representing the estate of W. H. Huffman, to continue furnishing Thompson the same as W. H. Huffman had been doing in his lifetime, and that J. W. Thompson was to receive no money out of said logs until the indebtedness then owing to the estate of W. H. Huffman, as well as all the goods, moneys, and merchandise furnished said J. W. Thompson by Carl Huffman, was paid in full; that thereafter and upon that basis said Carl Huffman continued to furnish said J. W. Thompson with the goods, wares, and merchandise as set out in the itemized statement filed with the petition of plaintiff herein, which fact was fully known to the agent, D. L. Russell, of defendant, Carl Huffman frequently asking said agent, D. L. Russell, when the payment would be made for the goods, wares, and merchandise he was then furnishing said J. W. Thompson. I further find that during the life of said contract that J. W. Thompson delivered to defendant \$3,559.69 worth of logs, all of which said amount was paid to said J. W. Thompson or on his drafts and orders except \$303, the amount due and owing to defendant from J. W. Thompson at the date of said contract, \$763.91, which was paid through W. H. Huffman during his lifetime and Carl Huffman conducting the business of deceased for the benefit of the estate, leaving a balance of \$2,492.78, out of which to

defendant paid said amount to J. W. Thompson or through his orders. As a conclusion of law from the above facts, I find that defendant, having together with Carl Huffman and J. W. Thompson construed said contract so as to permit said Carl Huffman to continue furnishing said Thompson, and having received the benefits therefrom, that defendant is now estopped to deny the validity of the entire transaction under said contract. I therefore recommend that judgment be rendered in favor of plaintiff in the sum of \$599.90, balance due on the store account, and \$748.84, balance due on notes, making a total of \$1,348.74. And all the said papers, exhibits, evidence, orders, proceedings, and report are herewith returned to court, as witness my hand this, the eighteenth day of July, 1906. B. A. McKay, Referee." Defendant moved to set aside the report, assigning 12 reasons therefor. The court overruled the motion, approved the report, and entered judgment for plaintiff as recommended by the referee.

As stated above, the reference and the referee were agreed on by both parties, and, the action being one at law, the referee's finding of the facts, when approved by the trial judge, are conclusive on an appellate court, if supported by substantial evidence. *Young v. Powell*, 87 Mo. 128; *Vogt v. Butler*, 105 Mo. 479, 16 S. W. 512; *Howard County v. Baker*, 119 Mo. 397, 24 S. W. 200; *Bissell v. Warde*, 129 Mo. 439, 31 S. W. 928; *Roberts v. Hendrickson*, 75 Mo. App. 484; *Lee v. Dunn*, 29 Mo. App. 467. We think there is substantial evidence to support the referee's finding of the facts, and therefore will not disturb the same. But, if the referee erred in his conclusions of law, we may set aside his erroneous conclusions, and apply the law as we find it to the facts found by him. *Steffen v. City of St. Louis*, 135 Mo. 44, 36 S. W. 81; *Lingenfelder v. Wainwright Brewing Co.*, 108 Mo. 578, 15 S. W. 844; *Monteau National Bank v. Miller*, 73 Mo. 187; *Kennard v. Peck*, 19 Mo. App. 342; *Goetz v. Piel*, 26 Mo. App. 634. The contract between Huffman and Thompson provided "that said first party [Huffman] shall be empowered to collect and shall collect and apply toward the payment of the debts due to the said first party and to Pemiscot County Bank the proceeds of all timber," etc. It also provided, in substance, that after the payment of \$303 to the mill company all the other proceeds from the timber (from lands described in the petition) should be subject to Huffman's order until the debts mentioned in the contract should be paid. It is therefore not a matter of doubt as to what the parties meant, namely, that the proceeds of the timber to be delivered to defendant by Thompson, after paying his debt to the company, should be applied to the payment of the specific debts mentioned

in the contract. But it is contended by plaintiff that the parties to the contract construed it as a security for supplies to be thereafter furnished Thompson by Huffman, and acted upon this construction. There is some evidence in support of this contention, and the referee found as a fact that the parties so construed the contract and so acted upon it. Adopting this finding as the truth of the situation, the legal question presented for solution is: Shall the court disregard the plain and unambiguous terms of the contract and adopt that construction which the parties put upon it, though that construction operates to read into the contract words not found in it and which cannot be supplied by implication or by any reasonable intendment, or by reason of any doubt as to the meaning of the contract as written? Where the parties themselves have given a contract a practical construction, their construction is a proper guide to its meaning. *Patterson v. Camden*, 25 Mo. loc. cit. 21; *Green v. Higham*, 161 Mo. loc. cit. 338, 61 S. W. 798; *San Jacinto Oil Co. v. Ft. Worth Light & Power Co.*, 41 Tex. Civ. App. 293, 98 S. W. 173. This wise and practical rule for the interpretation of contracts applies only where the contract is ambiguous, vague, or obscure in its terms, or where there is some uncertainty as to the objects or subject-matter intended to be embraced in or excluded from its operation. It cannot be invoked when there is no doubt as to the meaning of the contract—where there is no room for interpretation. It is only in doubtful cases that the action of the parties has any influence in the interpretation of the contract. *Drug Co. v. Saunders*, 70 Mo. App. loc. cit. 227, and cases cited therein. To give the contract the interpretation the referee found the parties acted upon would, in effect, permit a party to a plain, unambiguous contract to vary its terms by parol proof that he and the other party did not act upon the contract as written, but upon an interpretation of it clearly unwarranted by the contract as agreed upon and reduced to writing. We think, therefore, that the referee and the learned circuit judge were in error in holding that the contract embraced the debts of Thompson to Huffman contracted after the date of the execution of the contract.

Though the referee did not so find, plaintiff contends that defendant should be held liable under the doctrine of equitable estoppel. The evidence relied on as estopping defendant from denying liability is this: That Carl Huffman testified that after his father's death he "went to see Mr. Russell [defendant's agent] about the contract and talked with him in regard to it, and he [Russell] said the contract was all right and he would stand to it." That anything witness sold Thompson was all right, and thereafter witness sold Thompson the supplies between January and June, 1901, itemised in the ac-

circumstances shown are such as to satisfy the court of the truth of plaintiff's evidence, and he makes out a clear case by his own evidence entitling him to a divorce, and shows a good character and that he was not himself an offender, then he should not be denied a decree on the sole ground that he is not corroborated as a witness to the acts argued in the petition. From the evidence in the record and the memorandum of the ordered trial judge we think plaintiff is entitled to a new trial.

Therefore we reverse the judgment and award the cause. All concur.

PULITZER PUB. CO. v. ALLEN.

Louis Court of Appeals. Missouri. Nov. 17, 1906. Rehearing Denied Dec. 1, 1906.)

JUDGMENT (§ 815*)—AMENDMENT—NUNC PRO TUNC.

An amendment of a judgment nunc pro tunc must be based on matter of record, and not on extraneous evidence.

1. Note.—For other cases, see Judgment, Dig. § 618; Dec. Dig. § 815.*]

JUDGMENT (§ 323*)—AMENDMENT—NOTICE OF APPLICATION.

Notice must be given to the adverse party of an application to amend a judgment nunc pro tunc, unless it is obvious that he cannot be aggrieved by the proposed amendment.

1. Note.—For other cases, see Judgment, Dig. § 622; Dec. Dig. § 323.*]

JUDGMENT (§ 331*)—AMENDMENT—OPERATION AND EFFECT.

On collateral attack, an order amending a judgment nunc pro tunc must be sustained, unless it is apparent that the court was without authority to make the amendment, but on a collateral attack the sufficiency of the evidence admitted to show that the original entry was erroneous may be inquired into.

1. Note.—For other cases, see Judgment, Dig. § 331.*]

JUDGMENT (§ 324*)—AMENDMENT—NUNC PRO TUNC.

Where the circuit court, on dismissing an appeal from a justice of the peace, wrote on the docket, "Dis. by deft. App'l," the entry was insufficient to make it appear of record that the former order of dismissal was incorporated. It was error to amend the entry, nunc pro tunc, without notice to the adverse party, so as to make it appear that the appeal, and the cause, was dismissed.

1. Note.—For other cases, see Judgment, Dig. § 624; Dec. Dig. § 324.*]

Appeal from St. Louis Circuit Court; Reynolds, Judge.

The cause commenced before a justice of the peace by the Pulitzer Publishing Company vs. S. B. Allen, and appealed by defendant to the circuit court. From an order granting a judgment of the circuit court, dismissing the cause, T. O. Wengler, surety on appeal bond, appeals. Reversed and affirmed.

GOODEN, J. Respondent brought suit on an account for \$282.40 against appellant Allen before a justice of the peace. Allen filed a counterclaim for \$312.80. The justice rendered judgment in favor of respondent against Allen in the sum of \$282.40, and found the issues for respondent on the counterclaim. Allen took an appeal from the justice's court to the circuit court, and executed an appeal bond, signed by appellant as surety. The appeal was perfected, and the cause continued, from time to time, until the February term, 1906. A judgment entry appears of record in the circuit court under date of March 12, 1906, at the February term, as follows: "Upon motion of defendant (appellant) by attorney, it is ordered by the court that this cause be, and the same is hereby, dismissed at the cost of defendant and T. O. Wengler, as surety on the appeal bond herein, and that execution issue." At a subsequent term, and on May 15, 1907, respondent filed a motion in the circuit court to have the aforesaid entry corrected by an order nunc pro tunc, so as to show the appeal was dismissed instead of the cause. Allen's attorney Haas and the surety Wengler, who is appellant here, were notified of the application for a nunc pro tunc order. Mr. Haas, on whom, as attorney for Allen, notice of the application for an order nunc pro tunc to correct the judgment entry had been served, testified he represented Allen in the suit, but that his relation terminated with the original entry, and he had not since seen Allen or been employed by him. Thereupon respondent's motion for an entry pro tunc was overruled, but a motion for rehearing was granted, it seems; for on June 28th, and during the term at which the motion had been overruled, the court entered an order correcting said original entry to read as follows: "On motion of the defendant (appellant) by attorney, it is ordered that this appeal be, and the same is hereby, dismissed at the cost of the defendant and T. O. Wengler, surety on the appeal bond herein, and that execution issue." Wengler excepted to this action of the court, and brought the cause here by appeal.

The only evidence on which the court relied in making the nunc pro tunc order was an entry on the judge's docket by the judge who sat when the order of dismissal was given. The form in which the minute appears on the docket is important and will be shown:

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It is conceded no notice was given to defendant, Allen, since the notice to the lawyer who had been his attorney in the cause was

road, 71 N. Y. 183, 27 Am. Rep. 28, it is held: "Where by a contract of shipment of animals the carrier in consideration of a reduced rate was released from liability 'from whatsoever cause arising,' held this did not include a loss arising from the carrier's own negligence." The reasoning of the court was that the defendant as a common carrier was absolutely liable for the safe carriage and delivery of property entrusted to its care, except for loss or injury occasioned by the acts of God or public enemies; that the obligation was imposed by law, and not by contract. Here liability is not denied, but the extent of such liability is in issue. We cannot see that the case has any application. In *Schutte v. Weir*, 111 N. Y. Supp. 240, the contract of shipment was as follows: "In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars, unless greater value is disclosed, the shipper agrees that the value of said property is not more than fifty dollars unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value stated nor for more than fifty dollars if no value is stated herein." It was held that the shipper could recover the full value of the goods shipped; that the stipulation that the carrier should not be liable for more than \$50 was invalid under the provisions of the amendment to the interstate commerce act of June 29, 1906 (34 Stat. 595, c. 3591, § 7 [U. S. Comp. St. Supp. 1907, p. 909]). And it is further said that the carrier received the goods for transportation without any representation of the shipper as to value and issued its receipt limiting its liability to \$50. The case is somewhat different from the one at bar, as the receipt in question does fix the value of the goods at \$50, and the evidence showed that a higher rate obtained where the goods were of greater value. *Bates v. Weir*, supra, *Magnin v. Densmore*, supra, and *Zimmer v. Railroad*, supra, are not in conflict with *Schutte v. Weir*, supra, the contracts being different and the distinction being clear. We believe it is entirely competent for a carrier to limit the amount of its liability for negligence where the shipper fixes a valuation upon the goods shipped, and agrees that the carrier's liability shall not be in excess of such value, when it is shown that on goods of greater value a higher rate is exacted. In such cases it is not a question of reduced rate, but a classification of rates according to value. In such cases "a carrier may make reasonable regulations, graduating its compensation, and providing that, in case of failure of the shipper to declare the val-

§ 1510.

Further referring to the testimony, it appears that Johnson, Cowdin & Co., who shipped the goods as agent for plaintiff, were familiar with the defendant's rule for classification of rates according to value, and, with such knowledge, fixed the valuation on the goods shipped to plaintiff. It is common knowledge that shippers by express as a rule fix the value of their goods. Suppose a man has shipped very valuable goods, but in order to get a lower rate greatly undervalues it, and the goods are lost, ought his claim for the actual value of the goods be allowed? In the first place, his representation of value was a fraud upon the carrier and made for the purpose of obtaining a lower rate of carriage; and so it is in every case where the real value of the goods is not given, but one of less value is represented in order to obtain the lesser charge for carriage. In such cases the law is, or should be, that the shipper be held to abide by his contract. In cases where no value is given the carrier assumes the risk, and is liable for the actual value of the goods lost by his negligence. On the other hand, the shipper who undervalues his goods for the purpose of availing himself of a lower rate assumes the risk in case of loss of the difference between their assumed and their real value. Such, we conclude, to be the law of the State of New York *lex loci contractus*, and the law in every other jurisdiction.

For the reasons given, the cause is affirmed. All concur.

SCHAUB v. KANSAS CITY SOUTHERN RY. CO.

(Kansas City Court of Appeals. Missouri. Oct. 5, 1908. Rehearing Denied Nov. 16, 1908.)

1. TRIAL (§ 139*)—QUESTION FOR JURY—SUFFICIENCY OF EVIDENCE.

Where testimony is clearly incompatible with the physical facts, it is not sufficient to raise a question of fact, but will be disregarded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332-338; Dec. Dig. § 139.*]

2. RAILROADS (§ 348*)—CROSSING ACCIDENTS—ACTIONS—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad for injuries sustained at a crossing, evidence held to show that plaintiff either did not look for the approaching train, or, if he saw it, did not take proper precaution, so that his negligence barred a recovery.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1144-1149; Dec. Dig. § 348.*]

3. RAILROADS (§ 330*)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—RELIANCE ON PRECAUTIONS OF RAILROAD COMPANY.

One approaching a public crossing on a street must look and listen, when he is in a position of safety, to discover approaching trains, and the fact that the crossing watchman was not at the crossing did not entitle plaintiff

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of any probative value the statement of plaintiff and his companion that they looked to the west as soon as they came from behind the building and saw no train. If they looked, they must have seen the train, since, as we have said, it could not have been more than 200 feet away, and there was no obstruction to their line of vision. It has been decided again and again by the courts of last resort in this state that, when the testimony of witnesses is clearly incompatible with the indisputable physical facts and laws of the situation, courts will not hold such testimony sufficient to raise an issue of fact, but will disregard it as a thing palpably false. Plaintiff either did not look in the direction of the advancing train, or, looking, did not give heed to what he saw. In either case, he was guilty of negligence which will preclude him from a recovery in this action.

But it is argued that he was justified in presuming, from the absence of the watchman, that the way was clear, and, further, was justified in presuming that a train would not be run at a higher rate of speed than six miles per hour. The absence of the watchman, though it may have indicated to plaintiff that he was in his "dog house," and that the crossing was clear, gave plaintiff no right to shut his eyes and rely implicitly on the presumption that the watchman was at his post and was doing his duty. A railroad crossing is a place of danger, is in itself a warning signal, and in approaching it a traveler on a public street must always make reasonable use of his senses to protect himself. When from a position of safety he may see and hear, he must look and listen, since this is what an ordinarily prudent person would do in his place. *Edwards v. Railway*, 94 Mo. App. 36, 67 S. W. 950; *McNamara v. Railway*, 126 Mo. App. 152, 103 S. W. 1093. Plaintiff had no right to rely on the conclusion he might have drawn from the absence from view of the watchman, and his own statement of what he did shows that he did not act on it. He says he did look, and no train was in sight, and he is bound by this admission that he did not permit himself to be lulled into a false sense of security by the

was entitled to indulge in any presumption at all from what he saw at the crossing is the following extract from the opinion of the Supreme Court in *Mockowik v. Railroad*, 196 Mo. 550, 94 S. W. 256: "'Presumptions,' as happily stated by a scholarly counselor, ore tenus, in another case, 'may be looked on as the bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.' That presumptions have no place in the presence of the actual facts disclosed to the jury, or where plaintiff should have known the facts had he exercised ordinary care, is held in many cases, of which samples are: *Reno v. Railroad*, 180 Mo., loc. cit. 483, 79 S. W. 464; *Nixon v. Railroad*, 141 Mo., loc. cit. 439, 42 S. W. 942; *Bragg v. Railroad*, 192 Mo. 331, 91 S. W. 527. To give place to presumptions, on the facts of this case, is but to play with shadows and reject substance."

On the subject of whether plaintiff was entitled to assume that the train would not be run at an excessive rate of speed, we repeat what we said recently in *Grout v. Railway*, 125 Mo. App., loc. cit. 559, 102 S. W. 1028: "He was justified in indulging in this presumption; but, as we have recently declared in a number of cases, this did not absolve him from the performance of the duty of attending to his own safety. He had no right to rely solely on a presumption, but should have used his senses to acquaint himself with the actual circumstances open to his observation, and, had he done this, it is very clear he would not have entered into danger. Had he looked at the car with any degree of attentiveness, he could have seen that it was coming at a high rate of speed, and, had he looked again before entering the sphere of danger, he would have known that it was highly dangerous for him to attempt to cross. The thing that brands his conduct as censurable in law is the fact that with the car in striking distance, and with every opportunity to protect himself, he blindly risked his life and limb on a mere presumption that others would be more careful than he."

The judgment is reversed. All concur.

Flint & Co. and David R. Godwin. From the judgment, Flint & Co. appeal. Affirmed. Kieberg, Davidson & Neethe, for appellants. W. F. Kelly, for appellee.

FISHER, C. J. We find no error in the record, and the judgment is affirmed.

SNEED et al. v. SAN ANTONIO & A. P. RY. CO. et al. (Court of Civil Appeals of Tex-

tween J. T. Sneed and others and the San Antonio & Aransas Pass Railway Company and others. From a judgment for the San Antonio & Aransas Pass Railway Company and others, J. T. Sneed and others appeal. Affirmed. Thos. V. Adams and Freeman & Morrison, for appellants. Henderson & Lockett, for appellees.

FISHER, C. J. We find no error in the record, and the judgment is affirmed.

END OF CASES IN VOL. 113.

see Criminal Law, § 406; Evidence, §§ 220-258.
Operation and effect of admissions as ground of estoppel, see Estoppel, §§ 65-95.

I. NATURE AND NECESSITY.

§ 5. Act April 23, 1907 (Laws 1907, p. 308, c. 165), amending Rev. St. 1895, art. 2312, *held* not to validate a deed of married women void from its inception because not executed or acknowledged as required by Act April 30, 1846 (Laws 1846, p. 156).—Klump v. Stanley (Tex. Civ. App.) 602.

§ 6. A deed of a man and wife defectively acknowledged *held* good as between the parties, and with the grantee's possession was notice to the world of his ownership.—Burton-Whayne Co. v. Farmers' & Drovers' Bank (Ky.) 445; *Id.*, 114 S. W. 238.

II. TAKING AND CERTIFICATE.

§ 36. The omission from a certificate of acknowledgment to a deed of a recital that it was executed for the purposes and consideration therein expressed is not a fatal defect.—Ariola v. Newman (Tex. Civ. App.) 157.

§ 41. Where a married woman's signature to a deed was not essential to a conveyance of the land, an objection to the certificate of her acknowledgment *held* immaterial.—Ariola v. Newman (Tex. Civ. App.) 157.

§ 47. Defects in acknowledgment of certain deeds of record for more than 10 years *held* cured by Rev. St. 1895, art. 2312, as amended by Acts 1907, p. 308, c. 165.—Ariola v. Newman (Tex. Civ. App.) 157.

§ 47. A deed, defectively acknowledged, *held* properly received in evidence, under Rev. St. 1895, art. 2312, as amended by Gen. Laws 1907, p. 308, c. 165.—Haney v. Gartin (Tex. Civ. App.) 166.

§ 47. Rev. St. 1895, art. 2312, as amended by Gen. Laws 1907, p. 308, c. 165, *held* to include conveyances of land, and to embrace a deed defectively acknowledged, where such deed had been actually recorded for 10 years.—Haney v. Gartin (Tex. Civ. App.) 166.

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§ 8. Since the enactment of Sayles' Ann. Civ. St. 1897, art. 3351, in 1887, no title by adverse possession can be acquired against any counties or municipality to any public road or street.—Perry v. Ball (Tex. Civ. App.) 588.

§ 13. To acquire title by adverse possession, there must be open, notorious, peaceable, continuous, and adverse possession of the land for more than seven years.—Jeffery v. Jeffery (Ark.) 27.

§ 13. One taking possession of real estate under a verbal gift *held* to acquire title by adverse possession.—Robinson v. Huffman (Ky.) 458.

§ 13. Adverse possession under color of title to a well-defined boundary for 50 years *held* to confer an absolute title.—Conley v. Breathitt Coal, Iron & Lumber Co. (Ky.) 504.

§ 13. Evidence *held* to show defendant to be entitled to land by adverse possession.—Smith v. Simpson Bank (Tex. Civ. App.) 568.

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§ 19. Under the statute, the fact that land was inclosed *held* not sufficient use of the land to constitute adverse possession.—Dunn v. Taylor (Tex.) 265.

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§ 19. The mere fact that a river, used as a barrier on one side of land, fenced on the other sides, was not a perfect barrier against stock, was not conclusive against the claim of possession of the land.—Dunn v. Taylor (Tex.) 265.

§ 19. Rev. St. 1895, art. 3346, relating to adverse possession, construed in connection with Rev. St. 1895, arts. 3340, 3342-3345, 3348, 3349, and *held* to apply only to cases where 10 years' limitation is claimed.—Dunn v. Taylor (Tex.) 265.

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(E) DURATION AND CONTINUITY OF POSSESSION.

§ 42. Where there is an absolute verbal gift of real estate and nothing further is contemplated, the holding of the premises by the donee is adverse from the beginning.—Robinson v. Huffman (Ky.) 458.

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§ 43. Possession under a recorded deed *held* not to be connected with prior possessions, so as to create title under the five-year statute of limitation.—Dunn v. Taylor (Tex.) 265.

§ 43. A tenant, having acquired title from his landlord, *held* entitled to assert the rights of possession acquired by the landlord.—Harris v. Iglehart (Tex. Civ. App.) 170.

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§ 46. Breaks in the occupancy of tenants of defendant, relying on adverse possession, *held* to break the continuity of the possession.—Dunn v. Taylor (Tex.) 265.

§ 46. The necessity of the continuous use of land to create title by adverse possession *held* not affected by the difficulty of procuring tenants.—Dunn v. Taylor (Tex.) 265.

§ 46. The uses to which land was put may be considered, in determining whether the intervals between the occupancy of different tenants was only such as might be considered as reasonably required for a change of tenants.—Dunn v. Taylor (Tex.) 265.

(F) HOSTILE CHARACTER OF POSSESSION.

§ 60. Where one enters into possession with the consent of the owner under the expectation that a conveyance will be made, the holding is not adverse without notice to the owner.—Robinson v. Huffman (Ky.) 458.

§ 62. The adverse possession of devisees of community property as against the widow of testator *held* not to be destroyed by their acceptance of a deed from her.—Frey v. Myers (Tex. Civ. App.) 592.

§ 62. A certain matter *held* not inconsistent with possession being adverse.—Frey v. Myers (Tex. Civ. App.) 592.

§ 66. Possession *held* adverse so as to ripen into title after the requisite period.—Wells v. Bentley (Ark.) 639.

§ 71. That a deed under which defendants claimed title was fatally defective did not prevent the vendee from claiming the whole land into the possession of which he entered adversely against his grantors.—Hatfield v. Hatfield (Ky.) 59.

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§ 100. Rights of one in adverse possession of a tract, the particular boundaries of which have not been defined by occupancy or claim for the statutory period, stated.—Smith v. Simpson Bank (Tex. Civ. App.) 568.

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§ 110. Allegations by an abutter *held* to be insufficiently show title to land inclosed by her and claimed by the city as parts of streets.—Perry v. Ball (Tex. Civ. App.) 588.

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§ 112. A defendant, in trespass to try title, *held* required to show that the occupancy of successive possessors of the premises was continuous.—Dunn v. Taylor (Tex.) 265.

§ 112. One relying on title by adverse possession *held* required to show facts from which the conclusion of continuity of the possession of successive possessors might be deduced.—Dunn v. Taylor (Tex.) 265.

§ 113. In ejectment, where plaintiffs claimed under adverse possession, evidence that plaintiffs' father had told them that the land belonged to their mother was admissible only to show the extent of his possession.—Jeffery v. Jeffery (Ark.) 27.

§ 113. Where one claimed land by adverse possession, and showed that the land was inclosed, certain evidence *held* admissible to indicate to the owner that the land was appropriated and used by others.—Dunn v. Taylor (Tex.) 265.

§ 114. Admissions of defendant, holding the paper title to land, *held* not sufficient to establish title by adverse possession in others.—Jeffery v. Jeffery (Ark.) 27.

§ 114. Evidence *held* to warrant a finding that defendants had been in possession of the land in controversy for a sufficient period to give them title by adverse possession.—Hatfield v. Hatfield (Ky.) 59.

§ 114. Evidence *held* not to show title by adverse possession, under the 10-year statute of limitation.—Dunn v. Taylor (Tex.) 265.

§ 114. The fact of possession of real estate relied on to establish title by adverse possession, *held* sufficiently shown by certain testimony.—Dunn v. Taylor (Tex.) 265.

§ 114. Certain evidence *held* not to establish adverse possession as against the heirs of the deceased ancestor.—Hess v. Webb (Tex. Civ. App.) 618.

§ 116. In trespass to try title, the defendant being fraud and the statute of limitations as instruction authorizing recovery by defendant under his adverse possession *held* sufficient, though not defining peaceable and adverse possession separately, and in the language of the statute.—Stoker v. Fugitt (Tex. Civ. App.) 316.

§ 116. A charge defining the right of the defendant in partition to recover on his plea of limitation *held* erroneous.—Hess v. Webb (Tex. Civ. App.) 618.

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§ 171. One will not be permitted, after unsuccessfully trying a case on one theory, to change front in the appellate court.—Farmers' & Merchants' Bank of Springfield v. Zook (Mo. App.) 678.

§ 171. Where a party tries a case on the theory that a certain issue is a question for the jury, the verdict is conclusive on appeal.—Grimes v. Cole (Mo. App.) 685.

§ 171. A party is bound by the theory adopted on the trial in the lower court.—Grimes v. Cole (Mo. App.) 685.

§ 174. The objection that relators, in a mandamus proceeding for the public, did not proceed in the name of the commonwealth cannot be raised for the first time on appeal.—Louisville Home Telephone Co. v. City of Louisville (Ky.) 855.

§ 176. In a passenger's action for loss of baggage, where the complaint alleged that the articles listed in a bill of particulars attached were baggage, and the answer did not deny that any article was baggage, defendant cannot first object on appeal that an article was not baggage.—Kansas City S. Ry. Co. v. Skinner (Ark.) 1019.

(B) OBJECTIONS AND MOTIONS, AND RULINGS THEREON.

§ 185. An objection to the jurisdiction of the court is available on appeal, though not raised below.—McDaniel v. Staples (Tex. Civ. App.) 596.

§ 190. The court will not reverse a case because the attachment therein was not authorized, there having been no motion to discharge the same.—Ballou v. Skidmore (Ky.) 441.

§ 193. It need not be determined on appeal whether statements of the cause of action should be stated in different counts where the objection is not raised in the court below.—Alten v. Metropolitan St. Ry. Co. (Mo. App.) 691.

§ 199. Where an equity suit remained on the equity docket and was so tried after it was turned into a common-law action, it is too late on appeal to allege error in not transferring the case or to complain that defendants did not move for a new trial.—Pennebaker Bros. v. Bell City Mfg. Co. (Ky.) 829.

§ 209. An objection not made to the verdict in the lower court will be deemed to have been waived on appeal.—Missouri, K. & T. Ry. Co. of Texas v. House (Tex. Civ. App.) 154.

§ 216. Where an instruction stated the correct rule of law when fairly construed, if the other party believed it conveyed a different meaning, he should have asked the court to correct it, and, not having done so, cannot com-

omissions upon which defendant should have requested instructions, had he desired them, and to present no available error.—Steger & Sons Piano Mfg. Co. v. MacMaster (Tex. Civ. App.) 337.

§ 216. An instruction which is defective because omitting an important modification will not be considered on appeal, where no instructions supplying the omission were requested.—Orange Lumber Co. v. Thompson (Tex. Civ. App.) 563.

§ 230. Where the objection that the petition joined in one count a common-law cause of action for negligence, and an action for violation of a city ordinance was made for the first time on the introduction of evidence, the defect would not be considered on appeal.—Wills v. Atchison, T. & S. F. Ry. Co. (Mo. App.) 713.

§ 232. An objection to "the reading from the first paragraph of the answer" and the statement of the proposed proof on that point is too general to justify review, where the paragraph, though stricken out before trial, contained some matter which could properly be proved.—Kansas City Southern Ry. Co. v. Anderson (Ark.) 1030.

§ 238. The record proper cannot be reviewed, where no motion in arrest of judgment was filed.—Baird v. Baird (Mo. App.) 216.

(C) EXCEPTIONS.

§ 271. The denial of a motion to amend a notice of appeal from a justice's court and the granting of a motion to dismiss the appeal cannot be reviewed, where no exceptions were saved.—Tower Grove Planing Mill Co. v. Hornber (Mo. App.) 222.

§ 273. Where a general exception is taken to the refusal of several instructions and one of the instructions is bad, the exception does not preserve the other instruction for review.—St. Louis, I. M. & S. Ry. Co. v. Hambricht (Ark.) 803.

(D) MOTIONS FOR NEW TRIAL.

§ 281. Without a motion for new trial, only errors appearing on the record proper will be reviewed.—City of Macon v. Jaeger (Mo. App.) 1138.

§ 292. A motion for new trial is not required to render available error in instructions.—Farenthold v. Tell (Tex. Civ. App.) 635.

§ 302. A motion for a new trial held sufficiently specific to embrace as a ground the court's ruling excluding parts of a deposition.—Mullins v. Columbia County Bank (Ark.) 296.

§ 302. Errors in the rejection of evidence and in the instructions, not called to the attention of the court in the motion for new trial, cannot be considered on appeal.—Almond v. Modern Woodmen of America (Mo. App.) 695.

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(C) PAYMENT OF FEES OR COSTS, AND BONDS OR OTHER SECURITIES.

§ 387. Under Sayles' Ann. Civ. St. 1897, art. 1387, and Acts 1907, p. 198, c. 100, where a bond was not filed within 20 days after notice of appeal, held, that the appeal must be dismissed.—Hillman v. Galligher (Tex. Civ. App.) 321.

§ 501. Ruling on motion to strike items of set-off *held* not reviewable; the bill of exceptions not containing the motion or exception to the ruling.—*Starks v. Kirchgraber* (Mo. App.) 1149.

§ 502. Where the motion for new trial was noted in the bill of exceptions, but the record proper did not show that it was filed, it would not be considered on appeal.—*City of Macon v. Jaeger* (Mo. App.) 1138.

§ 508. The record *held* not to show the appeal bond was filed in time to give the appellate court jurisdiction.—*Sloan v. McMillin* (Tex. Civ. App.) 587.

(B) SCOPE AND CONTENTS OF RECORD.

§ 518. Petitions, the filing of which were disallowed in the chancery court, may be sufficiently embodied in a decree to be presented to the Supreme Court, but the decree must fully recite the nature of the petitions with their material averments, together with the relief sought and the action of the chancellor thereon.—*United States Fidelity & Guaranty Co. v. Rainey* (Tenn.) 397.

§ 518. Petitions filed in a creditors' suit after final decree and at a subsequent term, without an order of the chancellor, did not thereby become part of the record, especially where the chancellor had declined permission to file them.—*United States Fidelity & Guaranty Co. v. Rainey* (Tenn.) 397.

§ 537. A bill of exceptions, filed out of time, cannot be considered on appeal.—*Baird v. Baird* (Mo. App.) 216.

(C) NECESSITY OF BILL OF EXCEPTIONS, CASE, OR STATEMENT OF FACTS.

§ 545. To make a petition, the filing of which was disallowed in the lower court, a part of the record on appeal, it must be embodied in the transcript by a sufficient bill of exceptions.—*United States Fidelity & Guaranty Co. v. Rainey* (Tenn.) 397.

§ 547. Refusal to transfer a cause to equity *held* not reviewable, in the absence of a bill of exceptions.—*Ayer & Lord Tie Co. v. Greer* (Ark.) 209.

§ 547. In the absence of a bill of exceptions, *held*, it could not be said defendant was prejudiced by a refusal to transfer the cause to equity.—*Ayer & Lord Tie Co. v. Greer* (Ark.) 209.

§ 548. A stipulation that statutes and decisions might be submitted to show the laws of other states, and that copies thereof might be incorporated in the record for use in any court, *held* not to warrant the court on appeal in looking to statutes and decisions cited in argument, in the absence of bill of exceptions showing what statutes and decisions were submitted below.—*Union Cent. Life Ins. Co. of Cincinnati v. Dukes* (Ky.) 454.

§ 548. Questions arising upon the evidence cannot be reviewed on appeal, in the absence of a statement of facts.—*Applebaum v. Bass* (Tex. Civ. App.) 173.

§ 548. In the absence of a statement showing that the evidence authorized the giving of an instruction, the error complaining of the refusal to give the instruction cannot be considered.—*Hess v. Webb* (Tex. Civ. App.) 618.

(D) CONTENTS, MAKING, AND SETTLEMENT OF CASE OR STATEMENT OF FACTS.

§ 564. As a matter of law, a trial judge does not fail to perform his duty to file a

record at purpose, and the duty continues until performed, notwithstanding lapse of that period.—*Applebaum v. Bass* (Tex. Civ. App.) 173.

§ 571. Mandamus *held* to lie in specified cases, including a case where a trial judge refused to make and file a statement of facts.—*Applebaum v. Bass* (Tex. Civ. App.) 173.

(F) MAKING, FORM, AND REQUISITES OF TRANSCRIPT OR RETURN.

§ 601. Under Laws 1907, p. 512, c. 24, § 15, the original statement of facts must be sent up with the record in all appeals from the district court.—*Redland Fruit Co. v. Sargent* (Tex. Civ. App.) 330.

(I) DEFECTS, OBJECTIONS, AMENDMENT, AND CORRECTION.

§ 634. Where the bill of exceptions and appellant's abstract are conflicting, the appeal will be dismissed.—*Dawson v. Ash Grove White Lime Ass'n* (Mo. App.) 718.

§ 644. While under Acts 30th Leg. c. 24 (Gen. Laws 1907, p. 509), approved May 25, 1907, and Acts 30th Leg. c. 7 (Gen. Laws 1907, p. 446), approved May 14, 1907, the original statement of facts, and not a copy thereof, should accompany the record on appeal, it does not necessarily follow that the appellate court may not consider the copy.—*Texas & P. Ry. Co. v. Stoker* (Tex.) 3.

(J) CONCLUSIVENESS AND EFFECT, IMPEACHING AND CONTRADICTING.

§ 664. Where the bill of exceptions and statement of facts were contradictory as to the admission or refusal of evidence, *held*, that an assignment of error to the exclusion of the evidence would not be considered.—*Helsley v. Moss* (Tex. Civ. App.) 599.

(K) QUESTIONS PRESENTED FOR REVIEW.

§ 672. "Error apparent upon the face of the record," as used in Rev. St. 1895, art. 1014, defined.—*Applebaum v. Bass* (Tex. Civ. App.) 173.

§ 688. Remarks of counsel in the jury's presence cannot be complained of on appeal, where they are not part of the bill of exceptions, appearing only by appellant's counsel's affidavit.—*Kentucky Wagon Mfg. Co. v. Duganics* (Ky.) 128.

§ 688. The opening statement of counsel for a party, not preserved in the bill of exceptions, cannot be considered on appeal for any purpose.—*Frisby v. St. Louis Transit Co.* (Mo.) 1059.

§ 699. Where the court struck from the record the part of it which purported to contain the instructions, errors in the instructions could not be considered.—*Latham v. Lindsay* (Ky.) 878.

§ 699. Instructions of the lower court cannot be reviewed where not made part of the record by a bill of exceptions.—*Gambrell v. Gambrell* (Ky.) 885.

§ 701. In the absence of a statement of facts, the appellate court will not review the sufficiency and correctness of the charge.—*Green v. State* (Tex. Cr. App.) 15.

XI. ASSIGNMENT OF ERRORS.

§ 719. It would be the duty of the Court of Civil Appeals to determine the sufficiency of the petition as against a general demurrer, even though there were no assignments of error as to its sufficiency.—*Steger & Sons Piano Mfg. Co. v. MacMaster* (Tex. Civ. App.) 337.

Irrigation Co. v. Sanders (Tex. Civ. App.) 558.

§ 742. Appellants are confined to the objections raised by their propositions.—Ariola v. Newman (Tex. Civ. App.) 157.

§ 742. An assignment of error, which presents several distinct propositions of law, and which cannot be considered in itself as a proposition, cannot be considered.—Hess v. Webb (Tex. Civ. App.) 618.

§ 742. A proposition *held* not germane to the assignment of error, and cannot be considered on appeal.—Hildebrandt v. Hoffman (Tex. Civ. App.) 785.

§ 747. Whether a petition states a cause of action may be questioned on plaintiff's appeal, though cross-assignments to the overruling of a demurrer may not have been filed as required by rule 101, for district and county courts.—Farenthold v. Tell (Tex. Civ. App.) 635.

§ 750. An assignment of error complaining of the refusal of the court to give a charge *held* not to raise the question of the error of the court in failing to give a correct charge, on its attention being called to a point by the requested charge which was erroneous.—Hess v. Webb (Tex. Civ. App.) 618.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 776. A party may end litigation in the Supreme Court by agreeing in open court to suffer judgment to be pronounced against him for his opponent's claim with interest and costs, and he need not pay the money into court.—United States Fidelity & Guaranty Co. v. Rainey (Tenn.) 397.

§ 780. Under Civ. Code Prac. § 757, *held*, that where, pending appeal in a suit to enjoin the fiscal court from appropriating county funds for certain purposes, the taxpayer prosecuting the same became a nonresident of the county, the appeal must be dismissed.—Harney v. Fayette County Fiscal Court (Ky.) 108.

§ 780. That an appeal in a creditor's suit may not be dismissed because the defendants of record are being sued as the representatives of a class of creditors, the bill must show that they were made defendants as representatives of a class.—United States Fidelity & Guaranty Co. v. Rainey (Tenn.) 397.

§ 781. A review being rendered unnecessary by the payment of the judgment appealed from, the appeal will be dismissed.—Myher v. Myher (Mo. App.) 689.

XV. HEARING AND REHEARING.

§ 818. The Supreme Court will not continue a hearing to enable appellant to cure a defect in the record where it appears that no error occurred below.—Ward v. McPherson (Ark.) 42.

XVI. REVIEW.

(A) SCOPE AND EXTENT IN GENERAL.

§ 837. Certain assignments of error *held* to be in the nature of demurrers to the petition, so that the proper practice would have been to first demur to the petition and assign an adverse ruling thereon as error, and hence called for review only far enough to determine whether the petition was good on general demurrer.—Steger & Sons Piano Mfg. Co. v. MacMaster (Tex. Civ. App.) 337.

§ 842. Where there is any evidence tending to prove a fact essential to a recovery, the issue is for the jury; but whether there is such evidence in the record is a question of law for the Supreme Court.—International & G. N. R. v. Vallejo (Tex.) 4.

porated employees liable for injuries to employees by the negligence of other servants, defendant being a corporation, the validity of the statute only as to corporations need be determined on appeal.—Ozan Lumber Co. v. Biddie (Ark.) 796.

§ 843. Certain questions raised by assignments of error *held* purely academic.—Beaumont Rice Mills v. Campbell (Tex. Civ. App.) 971.

§ 848. If a referee has erred in his conclusions of law, the Court of Appeals may set aside the erroneous conclusions, and apply the law as found by it to the facts found by the referee.—Bader v. Chicago Mill & Lumber Co. (Mo. App.) 1154.

§ 861. Where a case is certified by a Court of Civil Appeals to the Supreme Court, the latter court will not decide questions not presented by the certificate.—Snyder v. Baird Independent School Dist. (Tex.) 521.

(B) INTERLOCUTORY, COLLATERAL AND SUPPLEMENTARY PROCEEDINGS AND QUESTIONS.

§ 873. Where there was no appeal from a judgment allowing an attorney's fee as part of plaintiff's costs in an action of interpleader, the allowance cannot be reviewed.—Grooms v. Mullett (Mo. App.) 683.

(C) PARTIES ENTITLED TO ALLEGE ERROR.

§ 877. A party cannot predicate error on exceptions to the refusal of instructions requested by the adverse party.—Dawson v. Ash Grove White Lime Ass'n (Mo. App.) 718.

§ 877. Plaintiff in partition *held* not entitled to complain on appeal of the denial of his motion to strike out the answer filed by a next friend of one of the defendants.—Lindly v. Lindly (Tex.) 750.

§ 877. In an action against initial and connecting carriers, the direction of a verdict for one of the carriers *held* not prejudicial.—Gulf, C. & S. F. Ry. Co. v. Cunningham (Tex. Civ. App.) 767.

§ 878. Appellee's failure to prosecute a cross appeal is a waiver of rulings against him.—Feland v. Berry (Ky.) 425.

§ 882. Error in an instruction is waived by the prejudiced party requesting instructions containing the same error.—Little Rock & M. Ry. Co. v. Russell (Ark.) 1021.

§ 882. Appellant *held* not entitled to object to an instruction as assuming certain facts to constitute negligence, when it requested an instruction containing the same assumption.—St. Louis & S. F. Ry. Co. v. Vaughan (Ark.) 1037.

§ 882. A party cannot complain of an instruction assuming a fact where a similar instruction was given at his own request.—Peters v. Gille (Mo. App.) 706.

§ 882. Appellant cannot complain of an instruction conforming to her position on the trial.—Oexner v. Loehr (Mo. App.) 727.

§ 882. A party who erroneously put in evidence a judgment may not complain of the trial court's refusal to instruct that such judgment should have no influence upon the issues.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 882. Where a party has procured the giving of a special charge, it cannot complain of the court's refusal to give others on the same subject in conflict therewith.—Texas & N. O. R. Co. v. Jackson (Tex. Civ. App.) 628.

§ 883. The parties may consent that the court shall consider foreign statutes and deci-

§ 1004. Where a verdict appears to be the result of the jury's honest judgment, and not of passion or prejudice, it will not be disturbed on appeal as allowing an excessive recovery.—*Louisville & N. R. Co. v. Pedigo* (Ky.) 116.

§ 1008. A finding of the court is binding on the court on appeal.—*Poteet v. Daniel* (Mo. App.) 1139.

§ 1009. The Supreme Court will not reverse a chancery decree, unless the finding is against the preponderance of the evidence.—*Blackburn v. Cherry* (Ark.) 25.

§ 1009. Where the evidence is conflicting, the testimony accredited by the chancellor will be accepted on appeal; nothing else appearing to determine the preponderance.—*Souter v. Witt* (Ark.) 800.

§ 1009. In an action for the price of lumber, a finding on conflicting matter by the chancellor that there was not such a substantial departure from the contract as to warrant the inference of fraud will not be reviewed on appeal.—*Wiburg & Hannah Co. v. U. P. Walling & Co.* (Ky.) 832.

§ 1009. On appeal in equity, the Court of Appeals will determine whether the facts authorized the judgment.—*Howell v. Union Grocery Co.* (Ky.) 912.

§ 1009. Notwithstanding the Supreme Court has, in an equity case, the right to review the evidence, the usual practice *held* to be to defer largely to the trial court's findings.—*Phillips v. St. Louis Union Trust Co.* (Mo.) 1065.

§ 1009. Notwithstanding the Supreme Court, in an equity case, may weigh the evidence, deference should be given to the findings of the trial chancellor.—*Creamer v. Bivert* (Mo.) 1118.

§ 1009. Where an issue in equity rests alone on the credibility of witnesses, the Supreme Court may rest on the trial court's superior advantage in determining a fact.—*Creamer v. Bivert* (Mo.) 1118.

§ 1010. A finding of the lower court, supported by ample evidence, is conclusive on appeal.—*Grooms v. Mullett* (Mo. App.) 683.

§ 1012. Where evidence was such that the trial court was not bound to give it credence, its finding of fact thereon *held* conclusive on appeal.—*Autry v. Reasor* (Tex.) 748.

§ 1022. Where a reference and referee are agreed on by the parties to a law action, the referee's findings of the facts, approved by the trial court, are conclusive on appeal, if supported by substantial evidence.—*Bader v. Chicago Mill & Lumber Co.* (Mo. App.) 1154.

(H) HARMLESS ERROR.

§ 1026. To be reversible, error must be prejudicial.—*Farmers' & Merchants' Bank of Springfield v. Zook* (Mo. App.) 678.

§ 1028. The trial of an action by a street railroad passenger for injuries in a collision with a railroad train at a crossing, on the erroneous theory that a certain statute regulated defendant's duties, *held* not prejudicial.—*Wills v. Atchison, T. & S. F. Ry. Co.* (Mo. App.) 713.

§ 1029. Where the evidence was not conflicting and a peremptory instruction for plaintiff would have been proper, errors in instructions were immaterial on defendant's appeal.—*Kansas City S. Ry. Co. v. Skinner* (Ark.) 1019.

§ 1029. Where, under any view of the facts, plaintiff was not entitled to recover, the refusal to allow a trial amendment of his pleading was not prejudicial.—*Goodney v. International & G. N. R. Co.* (Tex. Civ. App.) 171.

does not affect defendant's rights *held* not to have acquired title by adverse possession.—*Hess v. Webb* (Tex. Civ. App.) 618.

§ 1031. Where the instructions taken as a whole present a false and highly prejudicial doctrine, it will be presumed on appeal that the jury was misled thereby.—*Hovey v. Aaron* (Mo. App.) 718.

§ 1033. A party cannot complain of instructions which are too favorable to him.—*Hamiter v. Brown* (Ark.) 1014.

§ 1033. Error in instructions placing too great a burden of proof on plaintiff is not available to defendants.—*Bell v. Old* (Ark.) 1023.

§ 1033. Appellant cannot complain that the trial court granted him relief for which he did not ask.—*Wiburg & Hannah Co. v. U. P. Walling & Co.* (Ky.) 832.

§ 1033. A party *held* not prejudiced by an instruction where one more unfavorable to it should have been given.—*Louisville & N. R. Co. v. Schroader* (Ky.) 874.

§ 1033. The defendant in an action of claim and delivery cannot complain that the jury failed to award certain of the articles claimed, where it does not appear that they were taken out of his custody by the writ.—*Gambrell v. Gambrell* (Ky.) 885.

§ 1039. Judgment in an action in which two causes of action were improperly joined will not be reversed under Kirby's Dig. § 6148, where separate actions might have been consolidated, under Act May 11, 1905 (Act 1905, p. 798), and the verdict on one cause of action is for \$1 only.—*Ashford v. Richardson* (Ark.) 808.

§ 1040. Error in failing to resort to the proper practice to eliminate a cross-petition *held* not material, where the right conclusion was reached.—*Mattingly v. Eversole* (Ky.) 447.

§ 1040. Where the court overruled exceptions to an issue presented by the petition, its subsequent refusal to submit the issue cured any error in its previous ruling.—*Texas & G. Ry. Co. v. Pate* (Tex. Civ. App.) 994.

§ 1042. The dismissal of a counterclaim in an action to quiet title *held* not prejudicial.—*Cawood v. Howard* (Ky.) 109.

§ 1042. In an action for partition, the ruling of the court, on plaintiff's motion to strike out an answer filed by a next friend on behalf of one of the defendants, *held* not prejudicial error.—*Lindly v. Lindly* (Tex.) 750.

§ 1042. In an action on a contract for the construction of a county bridge, the striking of allegations in the answer *held* harmless, in view of the issues and the findings of the court.—*Webb County v. Hasie* (Tex. Civ. App.) 188.

§ 1046. One sued on a note, who answered under oath, denying generally, and alleging that she was an indorser and not a maker, was not prejudiced by any error in denying her the right to open and close.—*Oexner v. Loehr* (Mo. App.) 727.

§ 1050. In a suit to restrain a railroad company from obstructing a farm crossing, the error in admitting certain testimony *held* not prejudicial to the company.—*Forsythe v. Southern Ry. in Kentucky* (Ky.) 85.

§ 1050. The erroneous admission in evidence of an incomplete ordinance, not necessary to plaintiff's case, and which in no way strengthened his position, *held* harmless.—*Wills v. Atchison, T. & S. F. Ry. Co.* (Mo. App.) 713.

§ 1051. Admission of deposition in evidence *held* harmless, in view of subsequent steps.—*Cress v. Belknap Hardware & Mfg. Co.* (Ky.) 93.

the judgment *non curabitur* by remittitur.—*St. Louis Southwestern Ry. Co. of Texas v. Long* (Tex. Civ. App.) 316.

§ 1140. Where a judgment appealed from was erroneous only in so far as it contained an allowance for doctors' bills and medicines and plaintiff agreed that such amounts should be deducted, judgment should be reformed and affirmed.—*Houston & T. C. R. Co. v. Cheatham* (Tex. Civ. App.) 777.

(C) MODIFICATION.

§ 1154. Where a judgment for the recovery of land fails to describe the land, but may be corrected by the record, the court on appeal will affirm it with directions to the trial court to properly describe the land in the judgment.—*Latham v. Lindsay* (Ky.) 878.

(D) REVERSAL.

§ 1156. The Court of Civil Appeals *held* to have no power, on motion to reverse for absence of a statement of facts, to consider accompanying affidavits. Rev. St. 1895, art. 998.—*Rush v. J. E. Thompson & Co.* (Tex. Civ. App.) 546.

§ 1165. Under Rev. St. 1895, arts. 998, 1014, 1015, 1382, a failure of judge to make up and file a statement of facts within the time prescribed by law *held* not assignable as error in the Court of Civil Appeals on *ex parte* affidavit.—*Applebaum v. Bass* (Tex. Civ. App.) 173.

§ 1170. In a personal injury action, the admission of testimony of plaintiff that he worried because of his belief that he would not be able to work again, if error, *held* so insignificant as not to be ground for reversal.—*Funck v. Metropolitan St. Ry. Co.* (Mo. App.) 694.

§ 1171. Where a verdict is for \$300, instead of \$299, the error of \$1 is too small to authorize reversal.—*Gambrell v. Gambrell* (Ky.) 885.

§ 1172. Where plaintiff recovered a verdict on each of four counts, awarding damages separately on each count, that the damages in one count were based on an unconstitutional statute, so that judgment thereon was erroneous, did not require a reversal as to the other counts.—*George v. Chicago, R. I. & P. Ry. Co.* (Mo.) 1099.

§ 1176. Error in directing a verdict for defendants, after a proper verdict for plaintiff, does not require a new trial, and judgment may be ordered on the first verdict.—*Bell v. Old* (Ark.) 1023.

§ 1177. Where the record indicates that additional evidence may be obtained, the Supreme Court will remand the cause for another trial.—*Dunn v. Taylor* (Tex.) 265.

§ 1177. Where, in an action by a mortgagee of mules for their conversion by a purchaser from the mortgagor, a judgment for defendant was reversed on appeal, but the findings of the trial court did not show the value of the mules, the appellate court, on reversing the judgment, cannot render judgment for plaintiff, but will remand the cause.—*Adams-Burke-Simmons Co. v. Johnson* (Tex. Civ. App.) 176.

§ 1178. Under *Sayles' Ann. Civ. St.* 1897, art. 1027, *held*, that on reversal of a judgment for defendants for improvements, the only matter in doubt being how much they were entitled to, the cause would be remanded.—*Fain v. Nelms* (Tex. Civ. App.) 1002.

(F) MANDATE AND PROCEEDINGS IN LOWER COURT.

§ 1194. A decision on former appeal that certain evidence was rendered admissible by defendant's cross-examination *held* not res judi-

the testimony.—*Ables v. Ackley* (Mo. App.) 698.

APPEARANCE.

Authority of partner after dissolution of firm to enter appearance for copartner, see Partnership, § 296.

§ 8. A defendant who prosecutes an appeal from the judgment refusing to set aside a default judgment enters his appearance, and, on reversal and the return of the case, he will be before the circuit court.—*Asher v. Cornett* (Ky.) 131.

APPLIANCES.

Liability of employer for defects, see Master and Servant, §§ 101, 107, 121, 221.

APPLICATION.

For jury trial, see Jury, § 25.

Of assets in general, see Marshaling Assets and Securities.

Of payment, see Payment, § 41.

APPOINTMENT.

Of executor or administrator, see Executors and Administrators, § 29.

Of sheriff or constable, see Sheriffs and Constables, § 18.

APPROPRIATION.

For payment of municipal debts, see Municipal Corporations, § 890.

ARBITRATION AND AWARD.

III. AWARD.

Departure in pleading, see Pleading, § 180.

§ 74. Both parties to an award of arbitrators may repudiate it and litigate the controversy on the basis of the contract claimed by them.—*Spiess' Adm'x v. Bartley* (Ky.) 127.

§ 81. Upon the submission of the contract, rights of the parties to arbitrators and a valid award being by them, the controversy was merged in the award.—*Spiess' Adm'x v. Bartley* (Ky.) 127.

ARGUMENT OF COUNSEL.

In civil actions, see Trial, §§ 109-133.

In criminal prosecutions, see Criminal Law, §§ 706-730.

ARREST.

See Bail.

Illegal arrest, see False Imprisonment.

I. IN CIVIL ACTIONS.

On civil warrant issued by justice court, see Justices of the Peace, § 85.

II. ON CRIMINAL CHARGES.

Reward for arrest, see Reward, § 4.

§ 65. Under *Cr. Code Prac.* §§ 37, 38, relating to arrest by private persons, a posse selected by a special bailiff appointed by a justice of the peace to execute a warrant for a homicide not committed in the justice's presence *held* not authorized to make the arrest.—*Commonwealth v. West* (Ky.) 76.

§ 68. One making an arrest on a criminal charge should inform the person arrested, if there was reasonable opportunity to do so, of his intention to make the arrest, and of the

ASSAULT AND BATTERY.

II. CRIMINAL RESPONSIBILITY.

Assault with intent to kill, see Homicide, §§ 84, 96, 257, 310.

(B) PROSECUTION AND PUNISHMENT.

Res gestæ, see Criminal Law, § 364.

§ 83. Evidence on prosecution for assault held irrelevant.—Vanhooser v. State (Tex. Cr. App.) 285.

§ 88. Evidence involving prior threats held admissible on a prosecution for assault.—Vanhooser v. State (Tex. Cr. App.) 285.

§ 91. Evidence held sufficient to support a conviction of simple assault.—Malone v. State (Tex. Cr. App.) 530.

§ 96. Certain matters held not to constitute assault.—Vanhooser v. State (Tex. Cr. App.) 285.

ASSESSMENT.

Of compensation for property taken for public use, see Eminent Domain, § 262.

Of damages, see Damages, §§ 206-216.

Of expenses of public improvements, see Municipal Corporations, §§ 429-487, 587.

Of loss on insured, see Insurance, §§ 197, 198, 368, 765.

Of tax, see Taxation, §§ 317-482.

ASSETS.

Marshaling, see Marshaling Assets and Securities.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 664, 719-750, 837, 843, 1165.

ASSIGNMENTS.

Fraud as to creditors, see Fraudulent Conveyances.

Transfer of cause of action ground for abatement, see Abatement and Revival, § 45.

Transfers of particular species of property, rights, or instruments.

See Bills and Notes, §§ 315, 508; Insurance, §§ 209-222, 347; Mortgages, §§ 275, 282.

Corporate shares, see Corporations, § 123.

Leases, see Landlord and Tenant, §§ 76, 111.

I. REQUISITES AND VALIDITY.

(B) MODE AND SUFFICIENCY OF ASSIGNMENT.

§ 31. An assignment of a chose in action to secure a debt, whether written or by parol, must in fact set apart the chose in action to the payment of a specified liability.—Little v. Berry (Ky.) 902.

§ 48. Statements made by the maker of a note in order to secure the signature of a surety thereon held not to constitute an equitable assignment of certain insurance.—Little v. Berry (Ky.) 902.

§ 55. Plaintiff held to have proved a sufficient interest in an assigned claim to entitle him to recover thereon.—Doty v. Moore (Tex. Civ. App.) 955.

ASSOCIATIONS.

See Beneficial Associations.

Mutual benefit insurance associations, see Insurance, § 687.

See Work and Labor.

Residence of defendant as affecting privilege as to venue, see Venue, § 21.

Transitory character of action in general, see Venue, § 4.

Waiver of tort to sue in assumpsit, see Action, § 28.

ASSUMPTION.

Of risk by employé, see Master and Servant, §§ 213-225.

ATTACHMENT.

See Execution; Garnishment; Sequestration. Exemptions, see Exemptions; Homestead.

III. PROCEEDINGS TO PROCURE

(B) AFFIDAVITS.

§ 91. Under Rev. St. 1895, arts. 6, 186, held that an affidavit for attachment must be signed by affiant.—Davis v. Sherrill (Tex. Civ. App.) 556.

§ 117. An affidavit under Sayles' Ann. Civ. St. 1897, art. 187, alleging that the attachment was not sued out to injure or harass the defendants, held not defective.—Doty v. Moore (Tex. Civ. App.) 955.

§ 122. Where a purported affidavit for attachment is not signed by the affiant, it is not an affidavit, and cannot be amended.—Davis v. Sherrill (Tex. Civ. App.) 556.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY.

As affected by notice of lis pendens, see Lis Pendens, § 16.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

Motion to discharge as prerequisite to review on appeal, see Appeal and Error, § 190.

ATTENDANCE.

Of juror, see Jury, § 70.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see Trial, §§ 109-133.

Arguments and conduct of counsel at trial in criminal prosecutions, see Criminal Law, §§ 706-730.

Attorneys as public officers, see District and Prosecuting Attorneys.

Attorneys in fact, see Principal and Agent.

Harmless error in argument and conduct of counsel, see Appeal and Error, § 1060.

Review of discretionary rulings as to argument and conduct of counsel, see Appeal and Error, § 972.

Review of remarks and conduct of counsel as dependent on record on appeal or writ of error, see Appeal and Error, § 688.

II. RETAINER AND AUTHORITY.

Specific performance of contract to employ counsel, see Specific Performance, § 93.

§ 71. The authority of an attorney to bring a suit which he brings can be attacked by defendant only in the manner prescribed by Rev. St. 1895, arts. 272, 273.—Hess v. Webb (Tex. Civ. App.) 618.

§ 71. A defendant in partition, relying on title by adverse possession, cannot defeat a re-

not such a suit as contemplates a lis pendens, and it would require the express direction of plaintiff to her attorney to bind her by representation as to the title to the land described.—*Linck v. Linck* (Mo.) 1096.

§ 88. An attorney's neglect is in law the client's.—*Parker v. Britton* (Mo. App.) 239.

§ 101. An attorney, employed to sue on and collect a claim, *held* not entitled to compromise the same for less than the full amount.—*D. C. Heath & Co. v. Commonwealth* (Ky.) 69.

§ 101. Attorneys hired by nonresident lawyers *held* to have acted within the scope of their authority in settling the suit and providing that the defendant should pay the judgment to the clerk of court.—*Thompson v. Missouri Pac. Ry. Co.* (Mo. App.) 1142.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) FEES AND OTHER REMUNERATION. Attorneys' fees in action on insurance policy, see Insurance, § 675. Attorneys' fees in interpleader, see Interpleader, § 35.

ATTRACTIVE NUISANCES.

Railroad turntables, see Negligence, § 23.

AUTHORITY.

Of attorney, see Attorney and Client, §§ 71-101. Of bank cashier, see Banks and Banking, § 105. Of justice of the peace, see Justices of the Peace, § 44.

AWARD.

See Arbitration and Award, §§ 74, 81.

BAGGAGE.

Of passenger, see Carriers, §§ 391, 414. Review in action for loss of as dependent on presentation in lower court of grounds of review, see Appeal and Error, § 176.

BAIL.

Time for recovery of fees by justice of the peace for taking bail bond, see Justices of the Peace, § 18.

II. IN CRIMINAL PROSECUTIONS.

§ 62. A recognizance *held* to bind accused to answer a second information subsequently filed for the same offense which was in fact but an amended information, notwithstanding Rev. St. 1890, § 2522 (Ann. St. 1906, p. 1303).—*State v. Fillingham* (Mo.) 1057.

§ 70. The taking of a bail bond by a justice of the peace, acting both as judge and clerk of his own court, is a clerical act.—*State v. Cooper* (Tenn.) 1048.

BAILMENT.

See Carriers, §§ 46-187; Pledges. Embezzlement or larceny by bailee, see Embezzlement.

RUPT'S ESTATE.

(F) CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.

Compelling creditor of bankrupt to exhaust his remedies against bankrupt's estate before proceeding against third person, see Marshaling Assets and Securities, §§ 1, 8.

BANKS AND BANKING.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(D) OFFICERS AND AGENTS.

What constitutes embezzlement within meaning of indemnity bond against dishonesty or fraud of officer, see Insurance, § 430.

III. FUNCTIONS AND DEALINGS.

(B) REPRESENTATION OF BANK BY OFFICERS AND AGENTS.

§ 105. Under Rev. St. 1895, art. 661, and a bank's charter and by-laws the bank *held* not bound by its cashier's agreement that a lessee might use leased premises for a purpose prohibited by the lease.—*Dycus v. Traders' Bank & Trust Co.* (Tex. Civ. App.) 329.

(C) DEPOSITS.

Deposit in bank as payment of judgment, see Judgment, § 874.

(E) LOANS AND DISCOUNTS.

Criminal liability for obtaining loan from bank by false pretenses, see False Pretenses, § 23. Estoppel against bank to show nature of indorsement of note, see Bills and Notes, § 242.

BAR.

Of action by former adjudication, see Judgment, §§ 570, 632. Of action by limitation, see Limitation of Actions, § 165.

BASTARDS.

II. CUSTODY, SUPPORT, AND PROTECTION.

§ 16. A father's obligation to support illegitimate daughters is greater than any obligation to his collateral kin.—*Best v. House* (Ky.) 849.

BATTERY.

See Assault and Battery.

BELIEF.

As to truth of facts as justification of libel or slander, see Libel and Slander, § 56.

BENEFICIAL ASSOCIATIONS.

Conspiracy to procure expulsion from, see Conspiracy, §§ 20, 21.

Mutual benefit insurance associations, see Insurance, § 687.

Questions of law or fact in general in action for wrongful expulsion, see Trial, § 136.

§ 10. A finding of the members of a beneficial association acting fairly and in good faith that a letter written by a member was a violation of the constitution and laws of the order is conclusive on the court on the question.—*St.*

§ 242. The presumption that one who indorsed a note did so as a maker and not as an indorser, he being neither payee nor indorsee, continues until overthrown by clear proof.—*International Bank v. Enderle* (Mo. App.) 262.

§ 242. Facts held not to estop a bank to show that a note did not become an obligation in its hands until after its date, and that defendant signed as a maker and not as an indorser.—*International Bank v. Enderle* (Mo. App.) 262.

§ 242. That a note, though dated January 25th, was not discounted until February 1st, and after defendant signed his name thereon, is evidence that it was not accepted by the payee until February 1st.—*International Bank v. Enderle* (Mo. App.) 262.

(C) ASSIGNMENT OR SALE.

§ 315. In an action on acceptances, plaintiff not being the beneficial owner, the maker could assert all defenses that were admissible against the maker, and could plead and prove part payment under Rev. St. 1895, art. 750.—*Haggard v. Bothwell* (Tex. Civ. App.) 965.

(D) BONA FIDE PURCHASERS.

Right of bona fide purchaser to cancel note, see *Cancellation of Instruments*, § 31.

§ 359. One taking a note in payment of an antecedent debt held to be a holder for value.—*Hamiter v. Brown* (Ark.) 1014.

§ 371. That a holder for value knew when he received notes that one of the makers was an accommodation surety did not affect his right to recover.—*Hamiter v. Brown* (Ark.) 1014.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

§ 394. Under Negotiable Instruments Act § 115 (Laws 1899, p. 159, c. 94), a stockholder who indorsed a note before delivery given to raise money for the corporation, for the benefit of himself and the other indorsers, held not entitled to notice of dishonor.—*Mercantile Bank of Memphis v. Busby* (Tenn.) 390.

§ 394. A stockholder who with other stockholders indorsed a note before delivery given to raise money for the corporation and for their own benefit held to be a joint maker, and not entitled to notice of dishonor.—*Mercantile Bank of Memphis v. Busby* (Tenn.) 390.

VII. PAYMENT AND DISCHARGE.

§ 440. A joint maker of mortgage notes, which had been paid by his co-maker, held able to reissue them before maturity, by assuming their payment by covenant in a deed as part consideration for his co-maker's interest in the equity of redemption in the mortgaged land.—*Curry v. La Fon* (Mo. App.) 246.

VIII. ACTIONS.

Equitable defenses against assignee, see ante, § 315.

Construction of charge as a whole, see *Trial*, § 296.

Instructions commenting on weight and sufficiency of evidence, see *Trial*, § 235.

Jurisdiction of justice's court in action on note, see *Justices of the Peace*, § 44.

Restraining action on note till plaintiff has exhausted his remedies against bankrupt estate of third person, see *Marshaling Assets and Securities*, § 8.

Right to open and close, see *Trial*, § 25.

§ 441. The indorsement of acceptances by plaintiff put the legal title thereto in him so as to sustain an action thereon against the maker, though plaintiff was not the equitable owner of the acceptances.—*Haggard v. Bothwell* (Tex. Civ. App.) 965.

§ 443. The indorsement of the legal title only to acceptances was equivalent to an assignment of all the legal and equitable interest of the beneficial owner so far as the maker was concerned.—*Haggard v. Bothwell* (Tex. Civ. App.) 965.

§ 484. In an action on acceptances by one holding only the legal title, defendant not having pleaded a part payment, plaintiff was entitled to recover the amount due thereon under the pleading and evidence.—*Haggard v. Bothwell* (Tex. Civ. App.) 965.

§ 496. Burden of proof in an action to recover notes and mortgages assigned by decedent to her son and by him to plaintiff, defended upon the ground of the son's fraud, etc., stated.—*McKay v. Peterson* (Tex. Civ. App.) 981.

§ 508. On an issue as to whether a set exercised undue influence over his mother to procure an assignment of notes and mortgages, testimony held improperly received.—*McKay v. Peterson* (Tex. Civ. App.) 981.

§ 519. Evidence held to show that one was a surety on a note.—*Morehead v. Citizens' Deposit Bank* (Ky.) 501.

§ 538. Instructions, in a suit on a note defended on the ground defendant was merely an indorser, held proper.—*Oexner v. Loehr* (Mo. App.) 727.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see *Bills and Notes*, §§ 359, 371.

Of land, see *Vendor and Purchaser*, §§ 230-242. Right to cancel note, see *Cancellation of Instruments*, § 31.

BONDS.

Filing of appeal bond as matter to be shown by record on appeal or writ of error, see *Appeal and Error*, § 508.

Of sellers of text-books, see *Schools and School Districts*, § 81.

Sureties on bonds, see *Principal and Surety*.

Bonds for performance of duties of trust or office.

See *Officers*, § 37.

Bonds in judicial proceedings.

See *Appeal and Error*, § 387; *Bail*; *Garnishment*, § 244.

Traverse bond in forcible detainer proceedings, see *Landlord and Tenant*, § 291.

I. REQUISITES AND VALIDITY.

Conditions in official bonds, see *Officers*, § 37. Validity of school district bonds, see *Schools and School Districts*, § 97.

§ 35. A bond of a public officer not in conformity with the statute held enforceable as a common-law bond.—*United States Fidelity & Guaranty Co. v. Rainey* (Tenn.) 397.

IV. PERFORMANCE OR BREACH OF CONDITION.

Enforcement of contribution, see *Contribution*, § 9.

BOUNDARIES.

See Fences.

I. DESCRIPTION.

§ 10. A conveyance of a township "according to plats of the surveys" does not include ands which do not appear on the plat of the surveys.—*Little v. Williams* (Ark.) 840.

§ 10. Description of land according to terminology employed in the system of government surveys and plats is necessarily a reference to the plats of those surveys.—*Little v. Williams* (Ark.) 340.

§ 12. The title of owners of lands adjoining a nonnavigable lake extends to the center of the lake.—*Little v. Williams* (Ark.) 840.

§ 12. The effect of patents of fractional sections surrounding the meandered lines of a lake according to the official plats of the public survey *held* to vest in the owners *prima facie* title to the bed of the lake between the meandered shore lines and the center.—*Little v. Williams* (Ark.) 340.

I. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 33. In a suit by an abutter against a city involving boundaries of streets, the burden was on her to show that her boundaries did not conflict with the streets.—*Perry v. Ball* (Tex. Civ. App.) 588.

§ 33. In an action to try title to property lying between a boundary fixed by former owners by agreement and the original line, where defendant claims that plaintiffs were estopped to dispute the location of the line as fixed by agreement, burden is on defendant to show knowledge of such agreement.—*Louisiana & T. Lumber Co. v. Dupuy* (Tex. Civ. App.) 973.

§ 41. In a suit to try title, instructions *held* not misleading.—*Louisiana & T. Lumber Co. v. Dupuy* (Tex. Civ. App.) 973.

§ 41. Instructions in an action to try title of a strip of land lying between a boundary line as fixed by agreement and the original boundary line *held* properly refused.—*Louisiana & T. Lumber Co. v. Dupuy* (Tex. Civ. App.) 973.

§ 46. Evidence *held* to show such a dispute over boundary line between adjoining proprietors as to authorize establishment by parol agreement.—*Wells v. Bentley* (Ark.) 639.

§ 46. Knowledge of one purchasing property that one of its boundaries fixed by agreement of former owners is not the true line will not affect his right to hold to the agreed line.—*Louisiana & T. Lumber Co. v. Dupuy* (Tex. Civ. App.) 973.

§ 46. Where the boundary line is fixed by agreement, one of the owners is estopped to deny that the line so fixed is the proper line after purchase of the interest of the other owners on the faith that the line was properly located.—*Louisiana & T. Lumber Co. v. Dupuy* (Tex. Civ. App.) 973.

§ 46. An instruction in an action to try title as to the effect of fixing the location of a certain boundary line by former owners *held* properly refused.—*Louisiana & T. Lumber Co. v. Dupuy* (Tex. Civ. App.) 973.

BREACH.

If condition, see Insurance, §§ 256, 283, 328-368.

If contract, see Contracts, §§ 303, 305.

Of warranty, see Sales, §§ 286, 288, 427-442.

BRIDGES.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 20. Under Rev. St. 1895, art. 4792, a county *held* authorized to contract for the construction of a bridge according to plans different from those originally adopted.—*Webb County v. Hasie* (Tex. Civ. App.) 188.

§ 20. A contract for the construction of a county bridge *held* to refer to the plans for the bridge on file at the time of the execution of the contract.—*Webb County v. Hasie* (Tex. Civ. App.) 188.

§ 20. In an action on a contract for the construction of a county bridge, the court *held* not to have erred in admitting in evidence the tracing of a plan for the bridge in view of the allegations of the petition.—*Webb County v. Hasie* (Tex. Civ. App.) 188.

BROKERS.

See Principal and Agent.

Insurance brokers, see Insurance, § 93.

II. EMPLOYMENT AND AUTHORITY.

Consideration of contract with, in general, see Contracts, § 65.

IV. COMPENSATION AND LIEN.

§ 40. A broker cannot recover for services rendered voluntarily, and without authority or promise from the owner of real property concerning the sale thereof.—*Fordtran v. Stowers* (Tex. Civ. App.) 631.

§ 40. A broker has authority to act for his principal only by appointment, though no particular form is necessary for such appointment, and ordinarily all that is necessary is that the broker acted with the consent of his principal, whether by a written instrument, orally or by implication.—*Fordtran v. Stowers* (Tex. Civ. App.) 631.

§ 48. A real estate broker, to entitle him to his commission, need not disclose the identity of a purchaser prior to the time of closing the sale.—*Hovey v. Aaron* (Mo. App.) 718.

§ 48. A real estate broker to be entitled to commissions for selling land must have been employed by the owner to obtain a purchaser, and must have procured a purchaser ready, able, and willing to purchase on the terms at which the broker was authorized to sell.—*Hovey v. Aaron* (Mo. App.) 718.

§ 52. A broker *held* not required to see that the purchase price was paid by the purchaser before the broker was entitled to commissions.—*Pinkerton v. Hudson* (Ark.) 35.

§ 54. A broker, employed to procure a purchaser of real estate, *held* entitled to his commissions.—*Moss & Raley v. Wren* (Tex.) 739.

§ 55. Where a broker has procured a purchaser for land, and while his agency is unrevoked and he is still negotiating with the purchaser at the owner's stipulated price the owner sells to the same purchaser at a lower price through another broker, the original broker *held* entitled to his commission.—*Hovey v. Aaron* (Mo. App.) 718.

§ 63. A broker, having produced a purchaser with whom defendant made a valid contract, *held* entitled to commissions.—*Pinkerton v. Hudson* (Ark.) 35.

For cases in Dec. Dig. & Amer. Digs. 1907 to date & Indexes see same topic & section (§) NUMBER

§ 65. A broker, employed to sell land for one-half cash and balance on credit, *held* not entitled to recover a commission on the owner refusing to consummate a sale for all cash.—Taylor v. Read (Tex. Civ. App.) 191.

V. ACTIONS FOR COMPENSATION.

Admissions as evidence, see Evidence, § 220.
Assumptions of facts in instructions, see Trial, § 191.

Weight and sufficiency of testimony of plaintiff, see Evidence, § 589.

§ 80. A broker's refusal to comply with a promise to pay half of the costs of the seller's suit to compel performance of the sale contract *held* no defense to the seller's right to commissions.—Pinkerton v. Hudson (Ark.) 85.

§ 80. Claim for commissions for selling land *held* not defeated by the fact that the tract contained a greater number of acres than that specified in the contract authorizing the sale.—Howell v. Denton (Tex. Civ. App.) 314.

§ 82. In a broker's action for commissions under an express contract fixing the compensation plaintiff was to receive, evidence of the value of his services was inadmissible.—Fordtran v. Stowers (Tex. Civ. App.) 631.

§ 85. In an action for a broker's commission, certain evidence *held* not admissible to corroborate defendant's testimony.—Hansen v. Williams (Tex. Civ. App.) 312.

§ 85. In an action by a broker for commissions in selling defendant's land, evidence of a conversation between plaintiff and the prospective purchaser regarding the sale, defendant not being present, *held* admissible only to show what efforts, if any, plaintiff made to sell the land.—Fordtran v. Stowers (Tex. Civ. App.) 631.

§ 86. Evidence in an action to recover a commission for the sale of defendant's real estate *held* to support a finding for defendant.—McLaughlin v. Hardin (Mo. App.) 681.

§ 88. Instruction, in an action for a broker's commission, *held* improperly refused.—Taylor v. Read (Tex. Civ. App.) 191.

§ 88. In an action for a broker's commission on the sale of real estate, an instruction *held* not misleading for omission to refer to a condition alleged to have been imposed on the sale, in view of another instruction on that subject.—Hansen v. Williams (Tex. Civ. App.) 312.

§ 88. Findings in an action for commissions for the sale of land *held* not to limit the amount of land sold to 320 acres so as to defeat the action; the authority being to sell 327 acres.—Howell v. Denton (Tex. Civ. App.) 314.

§ 88. In an action by a broker for commissions for the sale of land, an instruction *held* proper.—Fordtran v. Stowers (Tex. Civ. App.) 631.

BUILDING CONTRACTS.

Answer setting up counterclaim in action on, see Pleading, § 146.

Discharge of surety, see Principal and Surety, § 100.

Liability of surety, see Principal and Surety, § 82.

BURGLARY.

II. PROSECUTION AND PUNISHMENT.

Adjournment pending trial, see Criminal Law, § 649.

BY LAWS.

Of bank, see Banks and Banking, § 105.

CALENDARS.

Computation of time, see Time.

CANCELLATION OF INSTRUMENTS.

See Quieting Title.

Setting aside fraudulent conveyances, see Fraudulent Conveyances, §§ 208-300.

Grounds for cancellation or rescission of particular instruments.

Antenuptial contract, see Husband and Wife, § 34.

Contracts for sale of goods, see Sales, § 119.

Contracts for sale of realty, see Vendor and Purchaser, § 95.

Lease of school lands, see Public Lands, § 173.

Mutual benefit insurance contract, see Insurance, § 730.

I. RIGHT OF ACTION AND DEFENSES.

§ 1. Equity has power to vacate a fraudulent deed as a cloud upon the title of the owner of land independent of statute.—Cawood v. Howard (Ky.) 109.

§ 27. An action to vacate a fraudulent deed as a cloud upon plaintiff's title *held* not an action under Ky. St. 1903, § 11, authorizing an owner in possession of land to bring an equitable action to quiet his title, though the object is the same.—Cawood v. Howard (Ky.) 109.

§ 31. A buyer having executed notes for the price which were transferred to a bona fide purchaser could not have the notes canceled on rescinding the sale.—Pennebaker Bros. v. Bell City Mfg. Co. (Ky.) 829.

II. PROCEEDINGS AND RELIEF.

Incompetency of grantor to testify to transactions between himself and grantee deceased, see Witnesses, § 144.

§ 47. In a suit to cancel a deed to a railroad right of way, evidence *held* not to show fraudulent misrepresentations of defendant's agent as to the location of the right of way.—Woods v. Pine Mountain R. Co. (Ky.) 94.

CARBON COPIES.

Of letters, necessity for accounting for non-production of original before admission of copies in evidence, see Evidence, § 181.

CARNAL KNOWLEDGE.

See Rape.

CARRIERS.

Franchise tax on corporation engaged in freight carrying merely incidental to its main business, see Taxation, § 117.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) IN GENERAL.

Denying equal protection of the law, see Constitutional Law, § 242.

Deprivation of property without due process of law, see Constitutional Law, § 298.

the stock, the shipper, who had undertaken to procure feed and water for the stock, was not required to procure feed and water elsewhere.—*Gulf, C. & S. F. Ry. Co. v. Cunningham* (Tex. Civ. App.) 767.

§ 213. A carrier is required at its peril to inform the shipper of necessary delay.—*St. Louis & S. F. Ry. Co. v. Vaughan* (Ark.) 1035.

§ 213. A carrier *held* liable for injuries to cattle caused by their being kept in the cars for eight or nine hours on the carrier's agent's assurance to the shipper that they could be moved at once.—*St. Louis & S. F. Ry. Co. v. Vaughan* (Ark.) 1035.

§ 215. In an action for delay in the transportation of cattle, a claim that misrepresentations by defendant's agent was not the proximate cause of the damage *held* unsustainable.—*St. Louis & S. F. Ry. Co. v. Vaughan* (Ark.) 1035.

§ 218. Where plaintiff's cattle were injured by being kept in the cars for 12 hours, because of defendant's agent's misstatement as to when they could be forwarded, a contract waiver of delay *held* irrelevant to defendant's liability.—*St. Louis & S. F. Ry. Co. v. Vaughan* (Ark.) 1035.

§ 218. A railroad company, may for a lawful consideration, contract with the shipper that it shall not be liable for delay in shipments or for loss or injury to stock, unless notice thereof is given within a certain time.—*George v. Chicago, R. I. & P. Ry. Co. (Mo.)* 1099.

§ 218. A contract for the shipment of live stock, which releases the carrier from liability for delay in transportation and for injuries unless notice thereof was given within a certain time, *held* not binding when not supported by a consideration.—*George v. Chicago, R. I. & P. Ry. Co. (Mo.)* 1099.

§ 219. In an interstate shipment of horses under a contract limiting the liability of each carrier to injuries occurring on its own line, a connecting carrier *held* not responsible for injuries resulting to the horses before they were received by it.—*Gulf, C. & S. F. Ry. Co. v. Cunningham* (Tex. Civ. App.) 767.

§ 227. In an action against a carrier for injury to a shipment of horses, evidence of the contract made with the carrier's station agents and of the ratification thereof by a superior officer of the carrier, *held* admissible.—*Gulf, C. & S. F. Ry. Co. v. Cunningham* (Tex. Civ. App.) 767.

§ 228. Evidence *held* to show that horses were injured during transportation by the carrier's negligent handling of the car in its switching yard.—*Louisville & N. R. Co. v. Pedigo* (Ky.) 116.

§ 228. A carrier is not liable for the death of stock several days after its arrival, where it does not appear whether disease was contracted before or after carriage or from injury in transit.—*McDowell v. Louisville & N. R. Co. (Ky.)* 519.

§ 228. Evidence that other similar agreements of a traveling freight agent to furnish cars at points on other lines for through shipments to points on his line were acted upon by the carrier *held* to tend to show that the making of such agreements was within the agent's actual authority.—*St. Louis, I. M. & S. Ry. Co. v. Boshear* (Tex.) 6.

§ 228. Facts *held* to justify an inference that a carrier furnished cars on another line upon an agreement by its agent.—*St. Louis, I. M. & S. Ry. Co. v. Boshear* (Tex.) 6.

the Court reduced to \$600; *held* not excessive.—*St. Louis & S. F. Ry. Co. v. Vaughan* (Ark.) 1035.

§ 229. Certain facts *held* to show that the measure of a shipper's recovery against a connecting carrier would be presumed to be controlled by the market at the point of destination beyond its line.—*Gulf, C. & S. F. Ry. Co. v. Cunningham* (Tex. Civ. App.) 767.

§ 230. Whether a carrier's traveling freight agent had authority to contract to furnish cars to plaintiff to transport his cattle *held*, under the evidence, for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Boshear* (Tex.) 6.

§ 230. Whether a carrier ratified the contract of its traveling freight agent to furnish cars for a through transportation over a connecting line, if he acted without authority, *held*, under the evidence, to be for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Boshear* (Tex.) 6.

§ 230. A requested charge to find for defendant carrier if it could not have run its train containing plaintiff's cattle from where they were received to their destination in 28 hours *held* properly refused, where defendant's line did not extend to the destination.—*Missouri, K. & T. Ry. Co. of Texas v. House* (Tex. Civ. App.) 154.

§ 230. A charge in an action against a carrier for delay in transporting cattle and for unloading and holding them in a muddy pen *held* properly refused, as ignoring the latter issue.—*Missouri, K. & T. Ry. Co. of Texas v. House* (Tex. Civ. App.) 154.

IV. CARRIAGE OF PASSENGERS.

(B) FARES, TICKETS, AND SPECIAL CONTRACTS.

Act requiring carrier to furnish free return transportation to shippers of stock as denial of equal protection of the law, see Constitutional Law, § 242.

Act requiring carrier to furnish free return transportation to shippers of stock as depriving of property without due process of law, see Constitutional Law, § 298.

(C) PERFORMANCE OF CONTRACT OF TRANSPORTATION.

§ 271. A pullman car conductor in failing to transfer a passenger to her proper car at a junction *held* the agent of the railroad over whose line she was transported, so that it alone was liable for the damages sustained.—*Cincinnati, N. O. & T. P. Ry. Co. v. Raine* (Ky.) 495.

§ 271. Where a carrier's servants know that a passenger is in the wrong car, they may tell him what to do, and leave him to follow such directions.—*Cincinnati, N. O. & T. P. Ry. Co. v. Raine* (Ky.) 495.

§ 277. Physical injury to a female passenger *held* not the proximate result of the carrier's default in failing to see that she got into the right sleeper, and that the measure of her damages was expense incurred and the value of the time lost by the resulting delay.—*Cincinnati, N. O. & T. P. Ry. Co. v. Raine* (Ky.) 495.

(D) PERSONAL INJURIES.

Argument and conduct of counsel, see Trial, §§ 114, 120.

Consistency in pleading, see Pleading, § 21.

Reception of rebuttal evidence, see Trial, § 62.

Res gestæ, see Evidence, § 123.

Right to open and close argument to jury, see Trial, § 25.

§ 280. The failure of a railroad company to exercise reasonable care to avoid a collision with a street car at a crossing *held* not to excuse the street railway company's failure to exercise the highest degree of care to protect its passengers.—*Wills v. Atchison, T. & S. F. Ry. Co.* (Mo. App.) 713.

§ 282. A carrier is not liable for the death of one who falls from a moving train after accompanying a passenger into the car, where its servants had no notice that deceased intended to leave the train.—*Cole's Adm'r v. Chesapeake & O. Ry. Co.* (Ky.) 822.

§ 286. Carrier *held* required to provide lights at stations.—*St. Louis, I. M. & S. Ry. Co. v. Briggs* (Ark.) 644.

§ 295. Carrier *held* required to stop its trains at platforms.—*St. Louis, I. M. & S. Ry. Co. v. Briggs* (Ark.) 644.

§ 297. A carrier's servants are charged with knowledge of the condition of the carrier's railroad track.—*Houston & T. C. R. Co. v. Cheatham* (Tex. Civ. App.) 777.

§ 298. Trainmen, operating a freight train carrying passengers, must, after the caboose has been drawn up to a station to receive passengers, anticipate the presence of passengers in the caboose and exercise care not to injure them.—*St. Louis, I. M. & S. Ry. Co. v. Gilbreath* (Ark.) 200.

§ 300. Where a passenger on a street car was injured in a collision between the car and a city hose wagon, the railway company was responsible for the negligence of the conductor in failing to discover and avert the danger, as well as for the negligence of the motorman.—*Williamson v. St. Louis & M. R. R. Co.* (Mo. App.) 239.

§ 303. Statement of duty of carrier, when starting up a street car, to look for passengers alighting.—*Central Kentucky Traction Co. v. Chapman* (Ky.) 438.

§ 303. It is the duty of the conductor of a car to know whether a passenger is alighting from the car before starting it while the car is stopping at a regular stopping place.—*Alten v. Metropolitan St. Ry. Co.* (Mo. App.) 691.

§ 303. A passenger, riding on a freight train by contract with the brakeman in violation of the company's rules, *held* precluded from recovering for injuries sustained in alighting while the train was in motion.—*Goodney v. International & G. N. R. Co.* (Tex. Civ. App.) 171.

§ 305. In an action by a street railway passenger for injuries in a collision with a railroad train, negligence of the railroad company *held* not to absolve the street railway company from liability, unless such negligence was the sole cause of the collision.—*Wills v. Atchison, T. & S. F. Ry. Co.* (Mo. App.) 713.

§ 314. Complaint for injury to street railway passenger *held* not confined to one ground of negligence.—*Paducah Traction Co. v. Baker* (Ky.) 449.

§ 316. Where the cause of injury is not within the reasonable knowledge of plaintiff, *held* that he may go to the jury, in an action against a carrier, upon evidence of negligence and injury.—*Paducah Traction Co. v. Baker* (Ky.) 449.

§ 316. The sudden starting of a street car with a jerk sufficient to throw to the ground a passenger *held* to justify an inference of negligence.—*Paducah Traction Co. v. Baker* (Ky.) 449.

street railway company under the doctrine of *res ipsa loquitur*.—*Williamson v. St. Louis & M. R. R. Co.* (Mo. App.) 239.

§ 316. Where injury to a passenger results from derailment, the carrier's negligence is presumed.—*Houston & T. C. R. Co. v. Cheatham* (Tex. Civ. App.) 777.

§ 317. In an action for injuries sustained by a passenger in attempting to alight, defendant *held* properly not permitted to ask certain question.—*St. Louis, I. M. & S. Ry. Co. v. Briggs* (Ark.) 644.

§ 317. In an action by a street railway passenger for injuries in a collision between defendant's street car and a railroad train, an ordinance requiring watchmen to be kept at all railroad crossings to perform such duties as might be prescribed by ordinance *held* inadmissible, in the absence of ordinances prescribing such duties.—*Wills v. Atchison, T. & S. F. Ry. Co.* (Mo. App.) 713.

§ 318. Where a train is started while a passenger is alighting, and he is injured, a prima facie case of negligence *held* made out against the company, within Kirby's Dict. § 6773.—*St. Louis, I. M. & S. Ry. Co. v. Briggs* (Ark.) 644.

§ 318. In an action by a passenger, the evidence *held* to warrant a finding that the company was negligent in failing to maintain its track free from low places and defects.—*St. Louis, I. M. & S. Ry. Co. v. Richardson* (Ark.) 794.

§ 318. In an action for the death of plaintiff's intestate, killed while alighting from a moving train after entering a car with a passenger, evidence *held* insufficient to show that defendant's servants had notice that the deceased intended to get off the train.—*Cole's Adm'r v. Chesapeake & O. Ry. Co.* (Ky.) 822.

§ 320. In an action for injuries to a street car passenger in a collision between the car and a city hose cart, evidence *held* to require submission of the railway company's negligence to the jury.—*Williamson v. St. Louis & M. R. R. Co.* (Mo. App.) 239.

§ 320. In an action by a street car passenger against the street railway company and a railroad company for injuries in a collision at a crossing, the questions whether the railroad company exceeded the speed prescribed by ordinance, or failed to give the necessary warning of its approach, *held* for the jury under the evidence.—*Wills v. Atchison, T. & S. F. Ry. Co.* (Mo. App.) 713.

§ 320. In an action for injuries to a passenger, evidence *held* to justify submission to the jury of defendant's negligence in permitting its track to become defective and in the operation of the train at a high rate of speed over its track at the time of the accident.—*Houston & T. C. R. Co. v. Cheatham* (Tex. Civ. App.) 777.

§ 321. Instruction *held* not susceptible of the construction that it required defendant carrier to stop its train until the passengers had alighted.—*St. Louis, I. M. & S. Ry. Co. v. Briggs* (Ark.) 644.

§ 321. Instruction in action for injuries sustained by a passenger when alighting improper.—*St. Louis, I. M. & S. Ry. Co. v. Briggs* (Ark.) 644.

§ 321. In an injury action by a passenger an instruction, though not as explicit as it may be, *held*, when fairly interpreted, to conform to the law, and to be proper.—*St. Louis, I. M. & S. Ry. Co. v. Richardson* (Ark.) 794.

§ 321. In an action by a passenger for injuries from falling because of the sudden jerk

wrongful execution against mortgaged chattels, see Execution, §§ 461, 462, 469, 472.

III. CONSTRUCTION AND OPERATION.

(D) LIEN AND PRIORITY.

Waiver of lien by seller of goods consenting to mortgage by the buyer, see Sales, § 313.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 176. Instruction, in an action for conversion, *held* to properly present the issue of defendant's liability.—Crouch Hardware Co. v. Walker (Tex. Civ. App.) 163.

VII. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR.

(A) RIGHTS AND LIABILITIES OF PARTIES.

§ 217. The mere change in the locality or possession of a mortgaged chattel would not affect the mortgage.—McDaniel v. Staples (Tex. Civ. App.) 596.

§ 228. In an action for the conversion of mortgaged cotton, defendant was properly allowed his rent and the expenses incident to gathering and preparing the cotton for the market.—McDaniel v. Staples (Tex. Civ. App.) 596.

VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

Discharge of mortgage by change in locality of possession of property, see ante, § 217.

§ 241. The taking of a second mortgage to secure the same debt secured by a first mortgage on the same property does not operate as a satisfaction and release in law of the first mortgage.—Adams-Burks-Simmons Co. v. Johnson (Tex. Civ. App.) 176.

§ 246. The statutory entry of satisfaction of a chattel mortgage *held* but prima facie evidence of payment which may be overcome by parol.—Brown v. Koffler (Mo. App.) 711.

IX. FORECLOSURE.

Jurisdiction dependent on amount or value in controversy, see Courts, § 122.

Jurisdiction dependent on location of property, see Courts, § 19.

Right of mortgagee to writ of sequestration on default in suit to foreclose, see Sequestration, § 21.

§ 269. An action *held* one at law to foreclose a chattel mortgage.—Brown v. Koffler (Mo. App.) 711.

§ 272. As between mortgagor and mortgagee, a direct proceeding to impeach a statutory entry of satisfaction of the mortgage is not required.—Brown v. Koffler (Mo. App.) 711.

§ 272. In an action on a note and to foreclose a chattel mortgage securing it, plaintiff could show that the release of the mortgage was entered by a third person without authority, and that payment had not been made.—Brown v. Koffler (Mo. App.) 711.

§ 278. In an action to foreclose a chattel mortgage, allegations that plaintiff and defendant resided in P. county, where the suit was filed, and that the mortgaged property was of the value of \$345, were sufficient to show proper venue and subject-matter in amount.—McDaniel v. Staples (Tex. Civ. App.) 596.

§ 283. In foreclosure of a chattel mortgage, where it is impossible to reach the property to

closure.—McDaniel v. Staples (Tex. Civ. App.) 596.

CHEAT.

See False Pretenses.

CHECKS.

See Bills and Notes.

CHILDREN.

See Bastards; Guardian and Ward; Parent and Child.

Care required of railroads, see Railroads, § 373.

CHOSE IN ACTION.

Assignment, see Assignments.

CITIES.

See Municipal Corporations.

CITIZENS.

Equal protection of laws, see Constitutional Law, § 242.

Privileges and immunities, see Constitutional Law, §§ 205, 208.

CIVIL DAMAGE LAWS.

See Intoxicating Liquors, §§ 283-317.

CIVIL RIGHTS.

See Constitutional Law, §§ 205, 208, 242.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

Against county, see Counties, § 207.

Against estate of decedent, see Executors and Administrators, § 221.

Against state, see States, § 181.

CLASS LEGISLATION.

See Constitutional Law, § 208.

CLERICAL ERRORS.

In judgment in ejectment, see Ejectment, § 114.

CLERKS OF COURTS.

§ 32. A clerk of court has no right to collect his fees from a litigant before termination of the case in which the services are rendered.—State v. Cooper (Tenn.) 1048.

§ 61. The question of the liability of the clerk of the criminal court of a county for fines, costs, and fees collected and paid to the county trustee *held* properly embraced in a petition filed in the criminal court for the retaxation of the costs involved therein.—State v. Richards (Tenn.) 370.

§ 75. Acts 1903, p. 705, c. 258, § 80, *held* not to confer jurisdiction on the chancery court in a suit to recover costs illegally collected.—State v. Richards (Tenn.) 370.

§ 75. The chancery court will not assume jurisdiction of a suit for costs illegally collected by the clerk of a criminal court on the ground of mistake or fraud.—State v. Richards (Tenn.) 370.

§ 75. The remedy for the recovery of costs illegally collected by the clerk of the criminal

mony.—*Western Union Tel. Co. v. Dian* (Tex. Civ. App.) 164.
§ 26. The denial of a continuance *held* within the discretion of the court.—*Louisville & N. R. Co. v. Pedigo* (Ky.) 116.

CONTRACTS.

Alteration, see *Alteration of Instruments*.
Assignment, see *Assignments*.
Cancellation, see *Cancellation of Instruments*.
Damages for breach, see *Damages*, § 124.
Liquidated damages or penalties, see *Damages*, § 79.
Operation and effect of champerty, see *Champerty and Maintenance*.
Operation and effect of customs or usages, see *Customs and Usages*.
Operation and effect of usury laws, see *Usury*, §§ 18, 49.
Parol or extrinsic evidence, see *Evidence*, §§ 397-434.
Specific performance, see *Specific Performance*.

Contracts of particular classes of persons.

See *Carriers*, §§ 46-63; *Counties*, § 130½; *Husband and Wife*, § 48; *Master and Servant*; *Municipal Corporations*, §§ 223-255½; *Schools and School Districts*, § 81; *States*, § 110.
Married women, see *Husband and Wife*, §§ 85, 86.

Contracts relating to particular subjects.

See *Boundaries*, § 46; *Interest*; *Mines and Minerals*, § 70.
Construction of bridge, see *Bridges*, § 20.
Ground for mechanics' liens, see *Mechanics' Liens*, §§ 58, 63.
Making bequest or devise, see *Wills*, §§ 58, 68.
Transportation of goods, see *Carriers*, §§ 46-63.
Transportation of live stock, see *Carriers*, § 211.
Water supply, see *Waters and Water Courses*, § 261.

Particular classes of express contracts.

See *Bonds*; *Covenants*; *Indemnity*; *Insurance*; *Joint Adventures*; *Mortgages*; *Partnership*; *Rewards*; *Sales*.
Agency, see *Principal and Agent*.
Bills of lading, see *Carriers*, §§ 46-63.
Employment, see *Master and Servant*.
Leases, see *Landlord and Tenant*.
Marriage settlements, see *Husband and Wife*, §§ 29, 34.
Mutual benefit insurance, see *Insurance*, §§ 720-730.
Sales of realty, see *Vendor and Purchaser*.
Stipulations in actions, see *Stipulations*.
Suretyship, see *Principal and Surety*.

Particular classes of implied contracts.
See *Contribution*; *Work and Labor*.

Particular modes of discharging contracts.
See *Compromise and Settlement*; *Payment*; *Release*.

I. REQUISITES AND VALIDITY.

(A) NATURE AND ESSENTIALS IN GENERAL.

§ 3. The terms "express contract" and "contracts implied in fact" do not indicate a distinction in the principles of contract, but a difference in the character of the evidence by which it is proved.—*Fordtran v. Stowers* (Tex. Civ. App.) 631.

(B) PARTIES, PROPOSALS, AND ACCEPTANCE.

§ 15. To constitute a binding contract, there must be a meeting of the minds of the parties.

ment or meeting of the minds of the parties by an offer on the one hand, and an acceptance on the other.—*Fordtran v. Stowers* (Tex. Civ. App.) 631.

(D) CONSIDERATION.

Settlement of claim of title as consideration for deed of smaller tract, see *Deeds*, § 17.

§ 47. A valid contract must be supported by a consideration.—*George v. Chicago, R. I. & P. Ry. Co.* (Mo.) 1099.

§ 65. A broker's contract to pay half the costs of a suit by the seller to enforce the contract of sale *held* without consideration.—*Pinkerton v. Hudson* (Ark.) 35.

§ 68. Compromise of a servant's claim for personal injuries *held* a sufficient consideration for the master's agreement to furnish subsequent employment to the servant.—*Kelly v. Peter & Burghard Stone Co.* (Ky.) 486.

(E) VALIDITY OF ASSENT.

Fraud of agent, see *Principal and Agent*, § 158.

§ 94. A promise to perform some act in the future when made with intent to disregard the promise is actual fraud, and affords ground for rescission of a contract.—*Mutual Reserve Life Ins. Co. v. Seidel* (Tex. Civ. App.) 945.

(F) LEGALITY OF OBJECT AND OF CONSIDERATION.

§ 103. All contracts which provide for doing a thing which is contrary to law, morality, and public policy are void.—*Heart v. East Tennessee Brewing Co.* (Tenn.) 364.

§ 140. Where the original consideration for notes was legal, *held* that a subsequent contract based on the consideration could be enforced, though the notes might be void, as against the policy of the law, because of a connivance between the vendor of land which was the consideration and one of the joint purchasers and makers of the notes, whereby the one purchaser received a profit unknown to the other.—*Curry v. La Fon* (Mo. App.) 246.

II. CONSTRUCTION AND OPERATION.

(A) GENERAL RULES OF CONSTRUCTION.

§ 147. The old rule that a patent ambiguity in a clause of a contract might render the stipulation void is no longer strictly observed, and whether an ambiguity be patent or latent a court will endeavor to glean the parties' intentions from the whole instrument and the incidents attendant on its execution.—*Conservative Realty Co. v. St. Louis Brewing Ass'n* (Mo. App.) 229.

§ 170. Application stated of the rule that where parties to a contract have themselves given the contract a practical construction, it is a proper guide to its meaning.—*Bader v. Chicago Mill & Lumber Co.* (Mo. App.) 1154.

(C) SUBJECT-MATTER.

§ 194. A contract for the application of proceeds of timber to payment of debts *held* to contemplate only debts owing when the contract was executed.—*Bader v. Chicago Mill & Lumber Co.* (Mo. App.) 1154.

(D) PLACE AND TIME.

§ 214. A builder *held* not entitled to any portion of the contract price prior to the com-

(B) SUBSCRIPTION TO STOCK.

§ 84. A subscriber to corporate stock *held* released from liability by the dissolution and reorganization of the corporation.—Owensboro Seating & Cabinet Co. v. Miller (Ky.) 423.

§ 84. The effect of a material alteration on a contract of subscription for corporate stock stated.—Owensboro Seating & Cabinet Co. v. Miller (Ky.) 423.

(D) TRANSFER OF SHARES.

§ 123. The answer *held* to charge not that plaintiff, to whom defendant pledged stock which W. pledged to defendant, surrendered it to W., but that plaintiff neglected to record the transfer by W., whereby W. was able to dispose of the stock.—Loeb v. German Nat. Bank (Ark.) 1017.

§ 123. Kirby's Dig. § 849, as to recording transfers of stock, *held* not to apply to a transfer as collateral.—Loeb v. German Nat. Bank (Ark.) 1017.

§ 123. Kirby's Dig. § 853, as to transfer of stock on books of corporation, *held* not to apply as between the parties to a transfer as collateral.—Loeb v. German Nat. Bank (Ark.) 1017.

§ 123. Statement of duty as between pledgees to record in case of successive transfers of stock as security.—Loeb v. German Nat. Bank (Ark.) 1017.

V. MEMBERS AND STOCKHOLDERS.

Right of stockholder to notice of dishonor of note indorsed for accommodation of corporation, see Bills and Notes, § 394.

(A) RIGHTS AND LIABILITIES AS TO CORPORATION.

Jurisdiction of Supreme Court of application for supersedeas in proceedings for inspection of corporate books, see Courts, § 240.

(B) MEETINGS.

§ 197. A mere subscriber for corporate stock, before its issue or payment therefor, has no right to vote, and can not participate in the corporate management.—Owensboro Seating & Cabinet Co. v. Miller (Ky.) 423.

(C) SUING OR DEFENDING ON BEHALF OF CORPORATION.

Embezzlement of corporate funds, see Embezzlement, §§ 28, 33, 44.
Limitation of, prosecution for embezzlement, see Criminal Law, § 147.

(D) LIABILITY FOR CORPORATE DEBTS AND ACTS.

§ 249. The holder of unpaid stock in a corporation against whom a judgment creditor of the corporation proceeds by motion for execution under the statute may set off against his debt a prior debt of the corporation to him.—Stinebaker v. National Restaurant Co. (Mo. App.) 237.

§ 269. Evidence *held* to sustain a finding that cash furnished to a corporation by the holder of partly unpaid stock, above what was credited on his stock, was advanced with the consent of the managing officers, and was treated as a debt of the corporation to the stockholder.—Stinebaker v. National Restaurant Co. (Mo. App.) 237.

§ 312. A policy insuring against loss or damage by fire, not covering a loss caused by lightning which did not burn the building, payment of the policy for such loss would have been a misapplication of the corporation's money by its officers.—Sleet v. Farmers' Mut. Fire Ins. Co. of Boone County (Ky.) 515.

VII. CORPORATE POWERS AND LIABILITIES.

(A) EXTENT AND EXERCISE OF POWERS IN GENERAL.

§ 371. Corporations have only those powers conferred upon them by charter, either expressly or as incidental to their existence.—Ozan Lumber Co. v. Biddie (Ark.) 796.

(B) REPRESENTATION OF CORPORATION BY OFFICERS AND AGENTS.

Admissions by agent, see Evidence, § 244.

§ 423. While a contract with a corporation may be rescinded for false representations by the corporate officers or agents, though the corporation had no knowledge of and did not consent to such representations, the corporation is not liable in damages as for deceit, unless it authorized the making of the representations.—Mutual Reserve Life Ins. Co. v. Seidel (Tex. Civ. App.) 945.

(F) CIVIL ACTIONS.

§ 503. Under Rev. St. 1895, art. 1194, and the circumstances, a plea of privilege by a company sued for tort committed in another county *held* properly sustained.—Boehrens v. Brice (Tex. Civ. App.) 782.

(G) CRIMES AND CRIMINAL PROSECUTIONS.

Evidence of other offenses in prosecution of corporate officer for embezzlement, see Criminal Law, § 371.
Penalties for failure to pay discharged employees, see Master and Servant, § 83.

VIII. INSOLVENCY AND RECEIVERS

Abatement of action on discharge of receivership, see Abatement and Revival, § 45.

§ 542. A lease of an insolvent corporation's quarry to its president and general manager, whose relatives were the principal stockholders, was fraudulent as to the corporation's creditors.—Ward v. McPherson (Ark.) 42.

§ 542. In suits to replevin stone levied upon under executions against an insolvent corporation, which leased the quarry to plaintiff, its president and general manager, the burden was on him to show the fairness of the lease.—Ward v. McPherson (Ark.) 42.

§ 547. Creditors *held* entitled to relief in a law action against a corporation on the ground of fraud.—Ward v. McPherson (Ark.) 42.

XII. FOREIGN CORPORATIONS.

§ 634. Rev. St. 1895, art. 745, *held* to merely place a foreign corporation holding a permit to do business in the state on the same footing as domestic corporations in the transaction of its business.—Coca Cola Co. v. Allison (Tex. Civ. App.) 308.

§ 636. It is not within the judicial province of the courts of a state to supervise and direct the internal affairs and management of a foreign

the cause.—*Lawrence County v. Lawrence Fiscal Court* (Ky.) 824.

§ 160. Const. § 180, requiring every resolution levying a county tax to specify the purpose of the levy, and prohibiting its appropriation to any other purpose, does not limit the revenues of a year to the payment of the liabilities incurred during that year, but only that revenues levied for a particular purpose, as for road purposes, be used for that purpose.—*Lawrence County v. Lawrence Fiscal Court* (Ky.) 824.

§ 192. A county has no authority to levy a special tax to pay expenses of the circuit court.—*Cincinnati, N. O. & T. P. R. Co. v. Hamilton County* (Tenn.) 361.

V. CLAIMS AGAINST COUNTY.

§ 207. The fact that a county lost the money collected for paying its indebtedness for a certain year before paying the debts would not affect its liability for such debts, but it would remain bound until they were discharged.—*Lawrence County v. Lawrence Fiscal Court* (Ky.) 824.

VI. ACTIONS.

Parties entitled to appeal, see Appeal and Error, § 151.

COURTS.

Authority of county to levy special tax for expenses of circuit court, see Counties, § 192. Clerks, see Clerks of Courts.

Contempt of court, see Contempt.

Judges, see Judges.

Jurisdiction of action on bond of clerk of court, see Clerks of Court, § 75.

Jurisdiction of criminal prosecution, see Criminal Law, § 97.

Justices' courts, see Justices of the Peace.

Province of court and jury, see Trial, §§ 190-194.

Removal of action from state court to United States court, see Removal of Causes.

Review of decisions, see Appeal and Error.

Trial by court without jury, see Trial, § 386.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 12. A Texas court of equity cannot render a decree restraining nonresident officers of a foreign insurance company from canceling the certificate of a resident of Texas.—*Royal Fraternal Union v. Lundy* (Tex. Civ. App.) 185.

§ 19. The failure of the petition, in proceedings to foreclose a chattel mortgage, to allege with certainty the present locality of the property, or that it was in the county, held not to prevent the jurisdiction of the court from attaching, in view of Rev. St. 1895, art. 1340.—*McDaniel v. Staples* (Tex. Civ. App.) 596.

§ 19. In foreclosure of a chattel mortgage, the existence of the lien, the value of the property, and the amount of the original debt, are the essentials to give the court jurisdiction, and not the present locality of the mortgaged property.—*McDaniel v. Staples* (Tex. Civ. App.) 596.

§ 24. Consent held not to give a court jurisdiction, where it has no jurisdiction of the subject-matter.—*Frank v. Frank* (Ark.) 640.

§ 27. The circuit court of a particular county, having jurisdiction to enforce an equitable lien for unpaid purchase money, could determine all other matters incidental to it.—*Norton Iron Works v. Moreland* (Ky.) 481.

the cause.—*McDaniel v. Staples* (Tex. Civ. App.) 596.

§ 37. Questions of the jurisdiction of the subject-matter may be raised at any stage of the case, in any court, either by court or counsel.—*Lohmeyer v. St. Louis Cordage Co.* (Mo.) 1108.

(A) CREATION AND CONSTITUTION, AND COURT OFFICERS.

Subject and title of statute relating to court stenographers, see Statutes, § 124.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.

(A) GROUNDS OF JURISDICTION IN GENERAL.

§ 121. An action on an accident policy for \$500 and attorney's fees and 12 per cent. damages held within the jurisdiction of the district court.—*Lane v. General Accident Ins. Co.* (Tex. Civ. App.) 324.

§ 122. That the proof showed that the value of the mortgaged chattels was less than \$200 would not deprive the county court of jurisdiction to foreclose a mortgage, where defendant did not allege and prove that the allegations of value were fraudulent and for the purpose of giving jurisdiction.—*McDaniel v. Staples* (Tex. Civ. App.) 596.

§ 122. In an action to foreclose a chattel mortgage, allegations that the property was secreted, or removed from the county, or sold, would not justify the court in assuming that the property had been entirely destroyed, so as to deprive it of jurisdiction.—*McDaniel v. Staples* (Tex. Civ. App.) 596.

IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 169. In an action to recover specific personality alleged to be worth \$1,000, the county court, having required its delivery to plaintiff, could subsequently give judgment against plaintiff for the value of the property on determining that such value exceeded its jurisdiction.—*Texas Land & Irrigation Co. v. Sanders* (Tex. Civ. App.) 558.

VI. COURTS OF APPELLATE JURISDICTION.

(B) COURTS OF PARTICULAR STATES.

§ 231. In action for share of cost of division fence built in 1907, Ky. St. 1903, § 1784, imposing a personal liability, applies, and not Act March 20, 1908, and a lien on real estate is not involved, and the Court of Appeals has no jurisdiction where judgment is for \$40.50.—*Jackson v. Holbrook* (Ky.) 415.

§ 231. The constitutionality of a statute having been finally adjudicated prior to the appeal, held, the Supreme Court will not take jurisdiction of the appeal because attacking the statute as unconstitutional.—*State v. Campbell* (Mo.) 1081.

§ 231. A suit to set aside a deed in the chain of title as fraudulent involves title to real estate within Const. art. 6, § 12 (Ann. St. 1906, p. 218).—*Thomas v. Scott* (Mo.) 1093.

§ 231. A proceeding to establish a lost deed under Rev. St. 1899, § 4565 (Ann. St. 1906, p. 2480), held to involve title to real estate within Const. art. 6, § 12 (Ann. St. 1906, p. 218).—*Thomas v. Scott* (Mo.) 1093.

§ 231. The constitutionality of the statute authorizing a verdict by nine jurors in civil cases having been settled, the question cannot

minating trial, as basis of prosecution for perjury, see Perjury, § 6.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

Dismissal as to one of parties jointly indicted as affecting competency as witness in prosecution of another, see Witnesses, § 114.

X. EVIDENCE.

In particular criminal prosecutions.

See Abduction, § 12; Assault and Battery, § 91; Bigamy, § 11; Homicide, § 178; Perjury, § 31; Rape, §§ 51-53; Robbery, § 24. For injuring or killing animals, see Animals, § 45. For obstruction of highway, see Highways, § 104. For wrongful removal or destruction of fence, see Fences, § 28.

(A) JUDICIAL NOTICE, PRESUMPTIONS, AND BURDEN OF PROOF.

§ 306. One inference or presumption cannot be based upon another.—State v. Jacobs (Mo. App.) 244.

(B) FACTS IN ISSUE AND RELEVANT TO ISSUES, AND RES GESTÆ.

§ 364. Rule respecting admissibility of res gestæ declarations by accused persons stated.—State v. Jacobs (Mo. App.) 244.

§ 364. Statements by accused on being arrested for theft *held* admissible as part of the res gestæ.—State v. Jacobs (Mo. App.) 244.

§ 364. In a prosecution for homicide, the defense being self-defense, testimony that decedent said, the day after the difficulty, that he struck at accused with a knife, but did not know whether he cut him, constituted no part of the res gestæ, and was inadmissible.—Thomas v. State (Tenn.) 1041.

§ 364. Statement of what was and what was not admissible as part of the res gestæ on a prosecution for assault, where the state claimed conspiracy between defendant and his son.—Vanhooser v. State (Tex. Cr. App.) 285.

§ 364. Where the breaking up of a dance caused the difficulty leading to an assault by defendant, evidence that he broke up the dance was admissible as part of the res gestæ.—Thompson v. State (Tex. Cr. App.) 536.

§ 364. Statements made by accused on reaching jail, about 30 minutes after the homicide, *held* inadmissible as res gestæ.—Pryse v. State (Tex. Cr. App.) 938.

§ 365. The state could show that, after shooting decedent, accused shot his wife, with whom accused claims decedent was criminally intimate, as part of the res gestæ.—Young v. State (Tex. Cr. App.) 276.

(C) OTHER OFFENSES, AND CHARACTER OF ACCUSED.

Testimony taken before examining magistrate on a charge of a different offense, see post, § 545.

§ 371. In a prosecution of a corporate officer for embezzlement, his letters admitting other offenses with reference to the corporation's affairs *held* irrelevant.—Bailey v. Commonwealth (Ky.) 140.

(D) BEST AND SECONDARY AND DEMONSTRATIVE EVIDENCE.

§ 400. Parol evidence of a former conviction, in a prosecution for maintaining a public nuisance, *held* inadmissible.—Miller v. Commonwealth (Ky.) 518.

ment made by accused had been lost and diligent search made thereof, testimony as to its contents was proper.—Pierce v. State (Tex. Cr. App.) 148.

§ 404. Exhibition of decedent's shirt to the jury *held* not error.—Dobbs v. State (Tex. Cr. App.) 923.

(F) ADMISSIONS, DECLARATIONS, AND HEARSAY.

§ 406. A written statement to a justice of the peace, signed by accused after being warned, was admissible against him, under Acts 30th Leg. (Laws 1907) p. 219, c. 118.—Pierce v. State (Tex. Cr. App.) 148.

§ 406. A voluntary statement before the grand jury, reduced to writing and signed by accused, was admissible against him.—Pierce v. State (Tex. Cr. App.) 148.

§ 419. In a rape prosecution, testimony *held* inadmissible as hearsay.—Holloway v. State (Tex. Cr. App.) 928.

(G) ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS.

§ 423. In a prosecution of one of several conspirators for murder, which was the object of the conspiracy, *held* competent to show every circumstance that tended to throw light upon their acts in furtherance of the common design.—Gambrell v. Commonwealth (Ky.) 476.

§ 423. In a homicide case, the state *held* entitled to show a purchase of ammunition by accused's father.—Dobbs v. State (Tex. Cr. App.) 921.

§ 424. In a homicide case, the state could show that after his arrest shotgun shells were found in accused's son's pocket, where the evidence tended to show a conspiracy between them.—Dobbs v. State (Tex. Cr. App.) 923.

(H) DOCUMENTARY EVIDENCE AND EXCLUSION OF PAROL EVIDENCE THEREBY.

§ 429. Under Shannon's Code, §§ 5573, 5576, 5580, 5583, 5588, a certificate issued by an internal revenue collector that a special tax stamp was issued to defendant *held* inadmissible in evidence, under Acts 1903, p. 1079, c. 355, § 1, in a prosecution for selling intoxicating liquor within four miles of a schoolhouse.—Bayless v. State (Tenn.) 1039.

(I) OPINION EVIDENCE.

§ 448. In a rape prosecution, where the evidence showed that accused wore a white hat at the time, testimony that witness remarked, when accused came to the preliminary examination, that prosecutrix would surely identify him, because he then wore the same white hat, was inadmissible.—Holloway v. State (Tex. Cr. App.) 928.

(K) CONFESSIONS.

§ 519. A confession made under duress *held* not entitled to consideration.—Sowers v. State (Tex. Cr. App.) 148.

§ 530. Under Code Cr. Proc. 1895, art. 790, as amended by Acts 30th Leg. p. 219, c. 113, § 1, a written confession must show on its face that accused was warned by the person to whom the same was made that it might be used against him, etc.—Young v. State (Tex. Cr. App.) 276.

§ 534. Under Cr. Code Prac. § 240, requiring the confession of an accused to be corroborated, one accused under Ky. St. 1903, § 1162a, of stealing chickens from an outbuilding cannot be convicted on his bare confession, where there is no corroborating evidence that there were chickens in the building.—Moseby v. Commonwealth (Ky.) 850.

jointly indicted for a severance had been granted, and he was placed on trial first, and a motion to quash as against the other accused had been overruled, the district attorney could dismiss the case as against such other accused after the jury had been impaneled to try the first.—*Harville v. State* (Tex. Cr. App.) 283.

§ 753. Where the evidence in a prosecution of a corporate officer for embezzlement was insufficient to justify a conviction, the court erred in refusing a peremptory instruction to find accused not guilty.—*Bailey v. Commonwealth* (Ky.) 140.

§§ 763, 764. An instruction requesting the jury to find whether defendant confessed, and whether the crime was committed, *held* not objectionable as on the weight of the evidence.—*Skaggs v. State* (Ark.) 346.

§§ 763, 764. An instruction in a murder trial *held* not erroneous, as on the weight of the evidence.—*Young v. State* (Tex. Cr. App.) 276.

§§ 763, 764. On a trial for homicide, an instruction *held* erroneous as on the weight of the evidence.—*Pannell v. State* (Tex. Cr. App.) 536.

§§ 763, 764. An instruction *held* not objectionable as being upon the weight of the evidence.—*Dobbs v. State* (Tex. Cr. App.) 921.

§§ 763, 764. An instruction *held* not erroneous, as being on the weight of the evidence.—*Dobbs v. State* (Tex. Cr. App.) 923.

(G) NECESSITY, REQUISITES, AND SUFFICIENCY OF INSTRUCTIONS.

In particular criminal prosecutions.

See Abduction, § 16; Burglary, § 46.
For carrying weapon, see Weapons, § 17.

§ 775. An instruction on alibi in prosecution for maliciously killing calf, *held* not objectionable.—*State v. Barton* (Mo.) 1111.

§ 778. An instruction in a prosecution for carrying weapon which places the burden on accused to prove beyond a reasonable doubt his defense is erroneous.—*Steel v. State* (Tex. Cr. App.) 15.

§ 778. Where the state introduced accused's statements as to the manner of the killing, there being no other evidence thereof, the court should instruct that the state must disprove accused's statements to obtain a conviction.—*Casey v. State* (Tex. Cr. App.) 534.

§ 782. A charge that, if the jury acquit defendant "altogether," they should find him not guilty, is not objectionable.—*Pryse v. State* (Tex. Cr. App.) 938.

§ 783. Where the jury could have considered testimony only for impeachment, the failure to so limit the testimony by charge *held* not error.—*Thompson v. State* (Tex. Cr. App.) 536.

§ 783. The court properly limited consideration of impeaching evidence to the credibility of the attacked witness.—*Dobbs v. State* (Tex. Cr. App.) 921.

§ 789. It was error to omit to direct an acquittal if the jury had reasonable doubt as to the existence of facts essential to manslaughter.—*Fuller v. State* (Tex. Cr. App.) 540.

§ 809. An instruction *held* not erroneous, as being confusing and misleading.—*Dobbs v. State* (Tex. Cr. App.) 923.

§ 811. An instruction on a trial for homicide *held* erroneous as eliminating the right of self-defense.—*Pannell v. State* (Tex. Cr. App.) 536.

aiding and abetting others in committing the crime.—*Commonwealth v. West* (Ky.) 76.

§ 814. Where accused showed that he killed decedent in self-defense, a charge submitting the issue of the rights of the parties in the premises *held* properly refused.—*State v. Smith* (Mo.) 1062.

§ 822. Instruction on trial for assault with intent to murder *held* not subject to the criticism, in view of another instruction, that it charged that the knife used was, as a matter of law, a deadly weapon.—*Prescott v. State* (Tex. Cr. App.) 530.

§ 822. Charge on a trial for assault with intent to murder *held* not, in view of other instructions, to place on defendant the burden to show the facts which would reduce the assault to an aggravated assault.—*Prescott v. State* (Tex. Cr. App.) 530.

§ 822. In a prosecution for theft, an instruction as to reasonable doubt *held* to sufficiently apply to the identical issue in connection with which it was given.—*Harrolson v. State* (Tex. Cr. App.) 544.

§ 822. An instruction, when considered with other instructions, *held* not erroneous, as shifting the burden of proof and as infringing the doctrine of reasonable doubt.—*Dobbs v. State* (Tex. Cr. App.) 923.

(H) REQUESTS FOR INSTRUCTIONS.

§ 829. That the substance of a requested instruction was covered by instructions given *held* enough.—*Grisson v. State* (Ark.) 1011.

§ 829. Requested charges covered by general charge *held* properly refused.—*Prescott v. State* (Tex. Cr. App.) 530.

§ 829. In a rape prosecution, a requested charge as to the effect of a mere request for sexual intercourse, without the use of force, *held* covered by the charge given.—*Holloway v. State* (Tex. Cr. App.) 928.

§ 834. A request to charge on circumstantial evidence in prosecution for malicious killing of calf, though not properly worded, *held* sufficient to entitle accused to a correct instruction on such subject.—*State v. Barton* (Mo.) 1111.

(K) VERDICT.

On prosecution of habitual criminals, see post, § 1204.

§ 881. The verdict in a criminal case must be reasonably definite and certain and responsive to the issues.—*State v. Grossman* (Mo.) 1074.

§ 881. A verdict on a trial for violating Rev. St. 1899, § 3011 (Ann. St. 1906, p. 1726), prohibiting liquor traffic on Sunday, *held* uncertain and not responsive to the issue.—*State v. Grossman* (Mo.) 1074.

§ 889. Under Code Cr. Proc. 1895, arts. 753, 754, relating to the correction of informal verdicts, where the jury found one guilty of murder in the first degree, but did not assess a legal punishment, the court properly instructed them to reconsider the verdict.—*Jones v. State* (Tex. Cr. App.) 761.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

Rulings on motion for new trial as subject of review, see post, § 1134.

§ 940. In a prosecution for homicide, newly discovered evidence of uncommunicated threats.

improper question.—Askew v. State (Tex. Cr. App.) 287.

§ 1119. Complaint as to a statement by the attorney for the commonwealth, in arguing a case which is not shown by the bill of exceptions, will not be considered on appeal.—Miller v. Commonwealth (Ky.) 518.

(F) DISMISSAL, HEARING, AND RE-HEARING.

§ 1131. An appeal from a conviction will be dismissed, where there was no sentence.—Robinson v. State (Tex. Cr. App.) 763.

(G) REVIEW.

§ 1134. In a bigamy prosecution, where accused's marriage was proved by other competent evidence, it was unnecessary to determine on appeal whether his wife's testimony was competent for that purpose.—Le Grand v. State (Ark.) 1028.

§ 1134. Under Cr. Code Prac. § 281, the Court of Appeals has no power to review the denial of a motion for a new trial in a criminal case.—Jenkins v. Commonwealth (Ky.) 846.

§ 1137. Where accused introduced incompetent statements of deceased that he attempted to cut accused, he may not object on appeal that equally incompetent testimony was admitted in rebuttal thereof.—Thomas v. State (Tenn.) 1041.

§ 1144. A conviction on a substituted indictment will be reversed, where the record fails to show that the substitution was by permission of the court.—Brooks v. State (Tex. Cr. App.) 920.

§ 1149. Exercise of discretion by a trial judge, on an application for a bill of particulars in a criminal case, is reviewable, and subject to correction, if abused.—Bailey v. Commonwealth (Ky.) 140.

§ 1156. The overruling of a motion for a new trial on the ground of the incompetency of a juror held not an abuse of the trial court's discretion.—State v. Smith (Mo.) 1062.

§ 1156. Under Code Cr. Proc. art. 819, denial of motion for new trial, made five days after trial and sentence, will not be reviewed.—Young v. State (Tex. Cr. App.) 16.

§ 1159. A conviction will not be reversed as contrary to the weight of the evidence, when there is any evidence to show accused's guilt.—Jenkins v. Commonwealth (Ky.) 846.

§ 1159. The jury may rely on the testimony of a witness, and the court on appeal cannot disturb the verdict on the ground that the witness was unworthy of belief because of the impeaching testimony.—Etly v. Commonwealth (Ky.) 896.

§ 1159. An appellate court will not set aside a conviction unless there is no substantial evidence of defendant's guilt.—State v. Scott (Mo.) 1069.

§ 1159. A conviction will not be set aside as against the evidence unless there is an entire failure of proof or the finding is the result of prejudice or mistake.—State v. Barton (Mo.) 1111.

§ 1159. A verdict on conflicting evidence will not be disturbed on appeal where there is substantial evidence to support it.—State v. McDowell (Mo.) 1113.

§ 1159. A conviction which there is substantial evidence to support will not be disturbed on appeal.—State v. George (Mo.) 1116.

§ 1159. On a criminal trial, where there is substantial testimony to support a verdict, it

§ 1160. Submitting to the jury, the question of the materiality of alleged perjured testimony held harmless.—Grissom v. State (Ark.) 1011.

§ 1169. In a bigamy prosecution, where accused's previous marriage was proved by competent evidence, the admission of incompetent evidence to prove the same fact was not prejudicial.—Le Grand v. State (Ark.) 1028.

§ 1169. In an abduction prosecution, the admission of court and penitentiary records showing that one of the same name as accused had been convicted of rape and had served sentence, without first identifying accused as the same person, held not reversible error.—State v. Baldwin (Mo.) 1123.

§ 1169. In an abduction prosecution, the admission of testimony by the girl's father that he did not consent to her going away with accused, even if error as being immaterial, was not reversible.—State v. Baldwin (Mo.) 1123.

§ 1169. Questions asked by the state of accused's mother as to her testimony in a former trial held not ground for reversal, where not answered, and accused thereafter introduced such testimony.—Dobbs v. State (Tex. Cr. App.) 921.

§ 1169. In a rape prosecution, prosecutrix's answer to a question held not reversible error.—Holloway v. State (Tex. Cr. App.) 928.

§ 1169. To prove defendant's failure to testify on his preliminary trial is reversible error, if proper exception is taken.—Pryse v. State (Tex. Cr. App.) 938.

§ 1170½. The admission of evidence to impeach a witness, though too remote, held not reversible error, where the witness' testimony was immaterial.—Lard v. State (Tex. Cr. App.) 762.

§ 1171. A confession of error by the Attorney General, on account of remarks of the prosecuting attorney, held unsustainable, where defendant's judicial confession justified a conviction of a graver offense than that of which he was found guilty.—Skaggs v. State (Ark.) 346.

§ 1171. Argument of the district attorney held reversible error.—Askew v. State (Tex. Cr. App.) 287.

§ 1172. Accused having testified fully as to the manner of the killing, so that the state's case did not rest entirely on statements of accused as to killing, the court's omission to charge that the state must disprove accused's statements to secure a conviction, if error, was not reversible.—Casey v. State (Tex. Cr. App.) 534.

§ 1172. As a general rule, whatever errors there are in the charge are eliminated by reason of the acquittal of the offense to which the charge pertains.—Pannell v. State (Tex. Cr. App.) 536.

§ 1172. As a general rule all errors in the charge pertaining to the offense of which accused is convicted are eliminated where the minimum punishment is assessed and where the facts conclusively show guilt of such offense.—Pannell v. State (Tex. Cr. App.) 536.

§ 1172. An error in the charge pertaining to the offense of which accused is convicted held reversible.—Pannell v. State (Tex. Cr. App.) 536.

§ 1175. In a prosecution for taking a female away from her father for purposes of concubinage, error in not requiring a finding that accused was not married to the girl was not reversible, where accused practically admitted that they were not married, and no issue was raised as to their marriage.—State v. Baldwin (Mo.) 1123.

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luted by oil flowing into it from a tank could recover for the pollution up to the time she could have cleaned it.—*Cincinnati, N. O. & T. P. Ry. Co. v. Gillispie* (Ky.) 89.

(C) INTEREST, COSTS, AND EXPENSES OF LITIGATION.

In action for wrongfully suing out writ of garnishment, see Garnishment, § 251.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 79. Provision in a contract of sale of standing trees for payment of \$1 per tree for scattering trees left standing at expiration of contract *held* enforceable as one for liquidated damages.—*Blackwood v. Liebke* (Ark.) 210.

V. EXEMPLARY DAMAGES.

For particular injuries.

See Conspiracy, § 20; Libel and Slander, § 120.

§ 91. The case of injury from driving into a telephone pole in the side of a road *held* not one for punitive damages.—*Bevis v. Vanceburg Telephone Co.* (Ky.) 811.

VI. MEASURE OF DAMAGES.

For particular injuries.

Eviction of tenant renting on shares, see Landlord and Tenant, § 331.

For delay in delivering telegram, see Telegraphs and Telephones, §§ 67, 68.

Wrongful dispossession of tenant, see Landlord and Tenant, § 318.

Wrongful execution, see Execution, § 472.

Wrongful expulsion from membership in beneficial association, see Beneficial Associations, § 10.

(A) INJURIES TO THE PERSON.

§ 95. Grounds of compensation to an injured employé stated.—*Cincinnati, N. O. & T. P. Ry. Co. v. Fortner* (Ky.) 847.

§ 101. Under Rev. St. 1899, § 4335 (Ann. St. 1906, p. 2378), a married woman suing for personal injuries cannot recover for hospital fees and medicines, where it does not appear how she became liable for them.—*Engelman v. Metropolitan St. Ry. Co.* (Mo. App.) 700.

(B) INJURIES TO PROPERTY.

Obstruction of surface water, see Waters and Water Courses, § 125.

§ 109. It is only when injury to real property is permanent that the damages therefor are measured by the depreciation in the market value of the property.—*Heilbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 979.

(C) BREACH OF CONTRACT.

§ 124. Where plaintiff was delayed in setting piling by defendant's delay in furnishing the piles and was prevented from setting them on another portion, he was entitled to recover for lost profits as to the latter and for lost time and expense as to the former.—*Williams, Kohler & Barrier v. Yates* (Ky.) 503.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 131. A verdict of \$2,500 in a personal injury action against a telephone company *held* not excessive.—*Heiberger v. Missouri & Kansas Telephone Co.* (Mo. App.) 730.

§ 132. A recovery of \$4,500 for an injury to the forefinger of the left hand resulting in its permanent stiffening *held* excessive.—*Georgetown Water, Gas, Electric & Power Co. v. Forwood* (Ky.) 112.

§ 132. A verdict of \$12,000 for injury to a brakeman *held* not excessive.—*Louisville & N. R. Co. v. Schroeder* (Ky.) 874.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(A) PLEADING.

Conclusions in pleading, see Pleading, § 8.
Trial amendment, see Pleading, § 245.

§ 142. Damages sustained by the shortening of plaintiff's leg as the result of a fracture caused by defendant's alleged negligence, *held* special, and necessary to be pleaded.—*Fleddermann v. St. Louis Transit Co.* (Mo. App.) 1143.

§ 142. An allegation of plaintiff's injury *held* sufficient to entitle plaintiff to recover special damages for the shortening of plaintiff's leg due to a fracture of the hip.—*Fleddermann v. St. Louis Transit Co.* (Mo. App.) 1143.

§ 143. Allegation of petition as to loss of time *held* to be at least ambiguous, and so not to be considered as asserting a claim to special damages.—*Central Kentucky Traction Co. v. Chapman* (Ky.) 438.

§ 159. Loss of time from personal injury *held* a special damage, which must be pleaded.—*Central Kentucky Traction Co. v. Chapman* (Ky.) 438.

§ 159. Though permanent impairment of earning capacity from personal injury is an element of general damages, *held* it ought to be pleaded.—*Central Kentucky Traction Co. v. Chapman* (Ky.) 438.

§ 159. Plaintiff *held* entitled to recover for loss of earnings after his employment in which he was engaged when injured was terminated up to the time of the trial under an averment that he had or would lose them.—*Smith v. St. Louis Transit Co.* (Mo. App.) 216.

§ 159. Loss of earnings are special damages which must be specially pleaded and proved, in order to be recoverable in an action for personal injuries.—*Cole v. Metropolitan St. Ry. Co.* (Mo. App.) 684.

§ 159. An item of special damages not pleaded in a suit against a carrier for loss of freight *held* not recoverable.—*Pacific Express Co. v. Jones* (Tex. Civ. App.) 952.

§ 162. In an action for personal injuries, a recovery for loss of time *held* proper under the pleadings and evidence.—*Cole v. Metropolitan St. Ry. Co.* (Mo. App.) 684.

(C) PROCEEDINGS FOR ASSESSMENT.

§ 206. It was not error to refuse to require one suing for personal injury to undergo examination by defendant's physicians.—*Taylor v. White* (Tex. Civ. App.) 554.

§ 208. Evidence *held* to justify submission of the issue of loss of earnings resulting from plaintiff's injury to the jury.—*Smith v. St. Louis Transit Co.* (Mo. App.) 216.

§ 208. Evidence *held* to justify a submission of the issue of the permanency of plaintiff's injury to the jury.—*Williamson v. St. Louis & M. R. R. Co.* (Mo. App.) 239.

§ 215. Evidence of gross neglect in backing a train onto a brakeman *held* to present a question of punitive damages for the jury.—*Louisville & N. R. Co. v. Schroeder* (Ky.) 874.

Attempting to influence persons summoned on jury as contempt of court, see Contempt, § 14.

EMINENT DOMAIN.

Public improvements by municipalities, see Municipal Corporations, §§ 269-567.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 10. The right to condemn property for a public use can be conferred on a private corporation, but if the condemnation is not for a public use, the right cannot be conferred either upon a private or public corporation.—*Alfred Phosphate Co. v. Duck River Phosphate Co.* (Tenn.) 410.

§ 13. Const. art. 1, § 21, prohibiting the taking of property for public use without just compensation, inhibits the taking of property for private use, and requires that it be taken for the use of the public, whose rights must be secured by law and not merely be dependent on the consent of the owner, and it is not sufficient that the exercise of the right will be for the general benefit or advantage of the public.—*Alfred Phosphate Co. v. Duck River Phosphate Co.* (Tenn.) 410.

§ 13. The condemnation of a right of way of a private railroad by a phosphate mining and manufacturing corporation, organized under Acts 1875, p. 247, c. 142, § 11 (Shannon's Code, § 2333), authorizing such corporations to condemn land, held not for a public use, so that the statute authorizing such condemnation was invalid.—*Alfred Phosphate Co. v. Duck River Phosphate Co.* (Tenn.) 410.

§ 58. The right of way only of an existing private railroad cannot be condemned without condemning the entire road.—*Alfred Phosphate Co. v. Duck River Phosphate Co.* (Tenn.) 410.

II. COMPENSATION.

(A) NECESSITY AND SUFFICIENCY IN GENERAL.

§ 69. Private property cannot be taken or damaged for public use without compensation.—*Heilbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 610, 979.

§ 70. The purpose of the constitutional provision prohibiting the damaging or destroying of private property for a public use without compensation was to place public, or quasi public, corporations upon the same basis with private persons as to liability for such injuries.—*Heilbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 610, 979.

(B) TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION.

§ 85. If a road located on a railroad's right of way was not a public highway, the railroad could destroy it for its own purposes, if it did so in a lawful manner, without being liable to adjacent owners.—*Heilbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 610, 979.

§ 87. In proceedings to condemn land, damages to personal property or the expense of moving it are not proper elements of damage.—*Kansas City Southern Ry. Co. v. Anderson* (Ark.) 1030.

§ 90. Owner of property adjacent to a railroad cut held not entitled to recover compensation for depreciation in value of his property

§ 90. To constitute a damaging of private property within the constitutional provision prohibiting the damaging of private property for public use without compensation, there must be an interference with its free use and enjoyment, resulting in some physical inconvenience, discomfort, or detriment.—*Heilbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 610, 979.

§ 90. The rule that private property cannot be taken or damaged for public use without compensation has been extended to give the owner of land adjacent to a railroad damages incident to the proximity of the railroad to his premises, though they are not actually invaded.—*Heilbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 610, 979.

§ 90. A property owner is not bound to keep his premises attractive, or to refrain from making them unattractive or offensive to the aesthetic sense of his neighbors, so long as his use thereof does not interfere with their use of their own property.—*Heilbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 610, 979.

§ 90. Where damage to real property is permanent, so that the depreciation in its market value constitutes the measure of damages, recovery may be had for prospective as well as present injuries.—*Heilbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 979.

§ 90. Where injuries to a public highway were not permanent, but were capable of being remedied by the wrongdoer or others interested in the highway, abutting owners could not recover for prospective injuries to the property, based upon the depreciation in its market value.—*Heilbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 979.

§ 119. A street railway spur track held not to entitle an abutter to recover for injury resulting from its proper construction.—*Donner v. Metropolitan St. Ry. Co.* (Mo. App.) 669.

(C) MEASURE AND AMOUNT.

§ 133. A statement that, if the improvements on certain lots sought to be condemned were fixtures, they must also be condemned, held proper.—*Kansas City Southern Ry. Co. v. Anderson* (Ark.) 1030.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§ 262. An instruction based on uncontradicted evidence in a condemnation proceeding authorizing an allowance for land, buildings, and machinery held not prejudicial to plaintiff.—*Kansas City Southern Ry. Co. v. Anderson* (Ark.) 1030.

§ 262. In a condemnation proceeding, a statement that it required effort and negotiation to sell real estate at its market value held without prejudice.—*Kansas City Southern Ry. Co. v. Anderson* (Ark.) 1030.

EMPIRICISM.

See Physicians and Surgeons, § 2.

EMPLOYÉS.

See Master and Servant.

ENCROACHMENT.

On highways, see Highways, §§ 155, 164.

acquire an adverse title to that which the ancestor conveyed.—*Wm. D. Cleveland & Sons v. Smith* (Tex. Civ. App.) 547.

III. EQUITABLE ESTOPPEL.

Of particular classes of persons or persons in particular relations.

Assignee of mortgage, see Mortgages, § 275.

To assert or deny particular facts, rights, claims, or liabilities.

Against bank to show nature of indorsement of note, see Bills and Notes, § 242.

Against buyer to sue for breach of contract of sale, see Sales, § 407.

Against surety, see Principal and Surety, § 129.

Liability of foreign corporation on note, see Corporations, § 659.

Liability on corporate stock subscriptions, see Corporations, § 84.

Liability on insurance policy, see Insurance, § 559.

Membership in mutual benefit insurance association, see Insurance, § 724.

Right to avoid or forfeit insurance policy, see Insurance, §§ 378-392.

(A) NATURE AND ESSENTIALS IN GENERAL.

§ 55. Conduct of a party's agent held not to estop it from contending for a true interpretation of a contract.—*Bader v. Chicago Mill & Lumber Co.* (Mo. App.) 1154.

(B) GROUNDS OF ESTOPPEL.

§ 65. The court held entitled to invoke a certain equitable maxim *ex mero motu*.—*Creamer v. Bivert* (Mo.) 1118.

§ 92. Where a lienor under a trust deed took credit for a part of the proceeds of the trustee's sale, he was estopped from denying the validity of the trust deed and the regularity of the foreclosure.—*Grooms v. Mullett* (Mo. App.) 683.

§ 93. Parties held not estopped by silence to complain that a dam was an unlawful obstruction of a stream.—*Ireland v. Bowman & Cockrell* (Ky.) 56.

§ 95. Defendant held not estopped to claim under an assignment of certain life insurance as against a co-surety on a note.—*Little v. Berry* (Ky.) 902.

(C) PERSONS AFFECTED.

Membership in mutual benefit insurance association, see Insurance, § 724.

(E) PLEADING, EVIDENCE, TRIAL, AND REVIEW.

In action on insurance policy, see Insurance, § 640.

EVIDENCE.

See Witnesses.

Applicability of instructions to evidence, see Trial, §§ 251-253.

Questions of fact for jury, see Trial, §§ 136-143.

Reception at trial, see Criminal Law, §§ 662-687; Trial, §§ 33-105.

Vested rights in rules of, see Constitutional Law, § 109.

As to particular facts or issues.

See Adverse Possession, §§ 13, 112, 113; Boundaries, §§ 33-46; Death, § 4; Deeds, §§ 193-211; Fraudulent Conveyances, §§ 295, 300; Release, § 57.

Character of indorsement of note, see Bills and Notes, § 242.

negligent use of street, see Municipal Corporations, § 706.

Defense of statute of limitations, see Limitation of Actions, § 196.

Existence of agency, see Principal and Agent, § 22.

Forgery of deed, see Deeds, § 193.

Gift, see Gifts, § 49.

Mental anguish from delay in delivery of telegram, see Telegraphs and Telephones, § 66.

Mental capacity of grantor of deed, see Deeds, § 211.

Motive in homicide, see Homicide, § 166.

Negligence in use of street or highway, see Municipal Corporations, § 706.

Payment of chattel mortgage, see Chattel Mortgages, § 246.

Property conveyed, see Deeds, § 118.

Proximate cause of injury to person on or near street car tracks, see Street Railroads, § 114.

Rate of speed of street car, see Street Railroads, § 114.

Relation of landlord and tenant, see Landlord and Tenant, § 18.

Threats, see Homicide, §§ 167, 190.

Undue influence in procuring execution of deed, see Deeds, § 196.

Undue influence in procuring execution of will, see Wills, §§ 163, 164, 165, 166.

Waiver of vendor's lien, see Vendor and Purchaser, § 281.

In actions by or against particular classes of persons.

See Carriers, § 228; Corporations, § 269; Landlord and Tenant, § 318; Street Railroads, § 114.

Joint debtors, see Contribution, § 9.

In particular civil actions or proceedings.

See Cancellation of Instruments, § 47; Divorce, §§ 127, 130; Libel and Slander, §§ 103, 106; Negligence, §§ 121-135; Partition, § 63; Trespass to Try Title, §§ 33-41; Trover and Conversion, § 39.

By tenant against landlord for injuries from defects in premises, see Landlord and Tenant, § 169.

For breach of contract, see Contracts, § 349.

For breach of contract to devise or bequeath, see Wills, § 68.

For compensation of broker, see Brokers, §§ 85, 86.

For contribution, see Contribution, § 9.

For death of passenger, see Carriers, § 318.

For delay in delivery of telegram, see Telegraphs and Telephones, § 66.

For delay in transportation of shipment, see Carriers, § 104.

For fraud in procuring compromise of claim under life insurance policy, see Insurance, § 579.

For injuries caused by operation of railroad, see Railroads, § 347.

For injuries caused by operation of street railroad, see Street Railroads, § 114.

For injuries from obstruction of navigable stream, see Navigable Waters, § 26.

For injuries to live stock in transportation, see Carriers, § 228.

For injuries to passenger, see Carriers, § 317.

For injuries to trespasser by servant, see Master and Servant, § 330.

For price of goods sold, see Sales, § 358.

For wrongful dispossession of tenant, see Landlord and Tenant, § 318.

For wrongful expulsion from beneficial association, see Beneficial Associations, § 20.

On insurance contract, see Insurance, § 819.

On insurance policy, see Insurance, § 646.

On liquor dealers' bond, see Intoxicating Liquors, § 309.

To abate nuisance, see Nuisance, § 33.

duction of the original.—McDonald v. Hanks (Tex. Civ. App.) 604.

§ 186. Where two copies of a letter are made at the same time, and one is sent and the other retained, the one sent becomes the original and the other the copy.—McDonald v. Hanks (Tex. Civ. App.) 604.

§ 187. The sufficiency of the proof offered as a predicate for the admission of an alleged lost deed is within the judicial discretion of the trial court under all the circumstances of the particular case.—McDonald v. Hanks (Tex. Civ. App.) 604.

VII. ADMISSIONS.

As evidence of adverse possession, see Adverse Possession, § 114.

(A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§ 220. Statements made in the presence of a party, without contradiction by him, *held* not to be construed as an admission by him of a fact referred to.—Hansen v. Williams (Tex. Civ. App.) 312.

(B) BY PARTIES OR OTHERS INTERESTED IN EVENT.

§ 226. In an action to set aside a will for undue influence, evidence of declarations by one legatee, since deceased, is not admissible to affect the interest of the other legatees, where no collusion is shown to have existed.—Helsley v. Moss (Tex. Civ. App.) 599.

(D) BY AGENTS OR OTHER REPRESENTATIVES.

§ 241. Statements of the agent, made at the time of the transaction, or as soon thereafter as to come within the rule of the res gestae, are admissible.—Gulf, C. & S. F. Ry. Co. v. Cunningham (Tex. Civ. App.) 767.

§ 244. Declarations of an employé of a railroad company, made in the performance of his duties, *held* binding on the company.—Gulf, C. & S. F. Ry. Co. v. Cunningham (Tex. Civ. App.) 767.

(E) PROOF AND EFFECT.

§ 258. Where there is evidence from which the jury may find agency, the declarations of the agent, made during the agency, in regard to the transaction connected therewith, are admissible.—Gulf, C. & S. F. Ry. Co. v. Cunningham (Tex. Civ. App.) 767.

§ 258. A principal *held* not entitled to complain of admission in evidence of declarations of the agent made during the agency in regard to the transaction connected therewith.—Gulf, C. & S. F. Ry. Co. v. Cunningham (Tex. Civ. App.) 767.

VIII. DECLARATIONS.

(A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§ 271. In a suit to recover loans claimed to have been made by decedent, testimony *held* inadmissible as self-serving declarations.—Jackson Baptist Church v. Combs' Ex'r (Ky.) 119.

IX. HEARSAY.

§ 317. Certain evidence in action for divorce *held* competent only for the purpose of contradicting a witness.—Coles v. Coles (Ky.) 417.

§ 317. Actual possession by a tenant to establish adverse possession cannot be shown by the declaration of the tenant acknowledging the tenancy.—Dunn v. Taylor (Tex.) 265.

ment as to what one of defendant's agents said to decedent on employing him *held* properly excluded.—Boehrens v. Brice (Tex. Civ. App.) 782.

§ 318. In libel for charging plaintiff with smuggling, the report of the government officer who investigated the case was inadmissible as evidence of the facts stated therein, being hearsay.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

X. DOCUMENTARY EVIDENCE.

Admission of defectively acknowledged instrument, see Acknowledgment, § 47.

Reception of at trial, see Trial, § 51.

(C) PRIVATE WRITINGS AND PUBLICATIONS.

§ 354. Certain entries in a pocket memorandum book *held* not admissible as entries in a book of accounts.—Little v. Berry (Ky.) 90.

§ 355. Certificates of sale by commission merchants, attached to a deposition, *held* admissible, though not verified as correct, in view of other evidence as to the facts stated.—Missouri, K. & T. Ry. Co. v. Hopkins (Tex. Civ. App.) 306.

§ 364. In an action for death, mortality table showing decedent's life expectancy at the time he died, *held* admissible.—Huber v. Texas & P. Ry. Co. (Tex. Civ. App.) 984.

(D) PRODUCTION, AUTHENTICATION AND EFFECT.

§ 366. A commissioner's deed bearing an indorsement of the court's approval *held* admissible without a copy of the order of approval.—Conley v. Breathitt Coal, Iron & Lumber Co. (Ky.) 504.

§ 372. Recitals of a deed 26 years old were admissible, along with other circumstances, to establish defendants' chain of title.—McMahon v. McDonald (Tex. Civ. App.) 322.

§ 372. Execution of a power of attorney under which a deed more than 30 years old had been executed *held* to be presumed without proof.—McDonald v. Hanks (Tex. Civ. App.) 604.

§ 372. A county clerk's certificate of the record of a deed in question *held* admissible to show the prior existence and record of the deed.—McDonald v. Hanks (Tex. Civ. App.) 604.

§ 372. Rule stated as to admission of ancient instruments in evidence without proof of execution.—Morgan v. Tutt (Tex. Civ. App.) 958.

§ 372. A bond for title with a transfer indorsed thereon *held* not admissible in evidence as an ancient instrument.—Morgan v. Tutt (Tex. Civ. App.) 958.

§ 372. One offering in evidence an ancient instrument without proof of execution has the burden of explaining any suspicious change in the instrument.—Morgan v. Tutt (Tex. Civ. App.) 958.

§ 378. On an issue as to the execution and delivery of an alleged lost deed, letters showing plaintiff's endeavor to discover the deed *held* admissible without proof of the signatures of the writers.—McDonald v. Hanks (Tex. Civ. App.) 604.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.

§ 397. If an element of a transaction is mentioned or covered by a writing, it is admissible.

original negligent act and the subsequent injury, so as to relieve defendant from liability.—*Pittsburg Reduction Co. v. Horton* (Ark.) 647

debts where the pleadings alleged that the debts were greater than the value of the estate, though there was no reference or report as to the necessity of sale.—*Union Trust & Savings Co. v. Marshall's Adm'rs* (Ky.) 73.

§ 349. The record in proceedings by an executor to sell the estate, not affirmatively showing that infant defendants were not summoned and did not appear, it will be presumed, on collateral proceedings, they were properly before the court.—*Dennis v. Alves* (Ky.) 483.

§ 349. Where all the persons interested in an estate were made parties, the court had jurisdiction, so that a judgment in proceedings by an executor to sell the estate for payment of debts was not void, even though erroneous.—*Dennis v. Alves* (Ky.) 483.

§ 356. In a suit by administrators for settlement, which was consolidated with a creditors' suit to have certain alleged preferences declared an assignment for the benefit of creditors, certain lienholders being made parties, a sale of the land could be made, under Civ. Code Prac. § 692, relating to actions to enforce liens, though such lienholders had not filed their answers and set up their liens.—*Union Trust & Savings Co. v. Marshall's Adm'rs* (Ky.) 73.

§ 356. In a suit by administrators to sell land to pay debts, consolidated with a creditors' suit to have preferential mortgages declared an assignment for the benefit of creditors, the land held properly sold before determining the rights of creditors and lienholders.—*Union Trust & Savings Co. v. Marshall's Adm'rs* (Ky.) 73.

EXEMPLARY DAMAGES.

See Damages, § 91.

EXEMPTIONS.

See Homestead.

From inheritance tax, see Taxation, § 873.

From taxation in general, see Taxation, § 242.

Implied repeal of statute, see Statutes, § 159.

Restraining prosecution of action in foreign jurisdiction brought by creditor for purpose of evading exemption laws, see Injunction, § 33.

I. NATURE AND EXTENT.

(D) LIABILITIES ENFORCEABLE AGAINST EXEMPT PROPERTY.

§ 76. The hardships imposed by Rev. St. 1899, § 4327a, enacted in 1903 (Laws 1903, p. 240 [Ann. St. 1906, p. 2376]), upon one remarrying after a divorce and award of alimony in requiring him to support two families, held immaterial on a judicial construction of the section.—*Anderson v. Norvell-Shapleigh Hardware Co.* (Mo. App.) 733.

§ 76. Rev. St. 1899, § 4327a, enacted in 1903 (Laws 1903, p. 240 [Ann. St. 1906, p. 2376]), held to take away the exemption right granted by section 3162 (Ann. St. 1906, p. 1797) as against an execution for alimony.—*Anderson v. Norvell-Shapleigh Hardware Co.* (Mo. App.) 733.

EXHIBITS.

Annexed to pleading, see Pleading, § 311.

EXPERT TESTIMONY.

In civil actions, see Evidence, §§ 471-543.

In criminal prosecutions, see Criminal Law, § 448.

EXPLOSIVES.

Criminal responsibility for placing dynamite or other explosives in waters of state for purpose of killing fish, see Fish, § 9.

EXPRESS CONTRACTS.

See Contracts, § 3.

EXPULSION.

Of member of beneficial association, see Beneficial Associations, §§ 10, 12, 20.

EXTORTION.

§ 4. Extortion defined.—*State v. Cooper* (Tenn.) 1048.

§ 4. For a justice of the peace to demand and receive fees prior to the time they are due constitutes extortion, under Shannon's Code §§ 6352, 6353, 6714.—*State v. Cooper* (Tenn.) 1048.

§ 4. For a justice of the peace to demand and receive fees before they are due constitutes extortion at common law.—*State v. Cooper* (Tenn.) 1048.

EXTRADITION.

Release of accused on habeas corpus, see Habeas Corpus, § 30.

II. INTERSTATE.

§ 24. Where a demand for extradition is accompanied by appropriate proceedings, the executive of the state on which the demand is made has no discretion to refuse it.—*Ex parte Coleman* (Tex. Cr. App.) 17.

§ 30. Petitioner held a fugitive from justice, where he removed from Alabama, where the offense was committed, though he remained there a considerable time, to the knowledge of the authorities, and then removed to Georgia, and then to Texas.—*Ex parte Coleman* (Tex. Cr. App.) 17.

§ 32. Where extradition proceedings were based on a sufficient affidavit, a defective indictment, furnished by the authorities of the demanding state to the sheriff having accused in custody pending habeas corpus proceedings, held immaterial.—*Ex parte Coleman* (Tex. Cr. App.) 17.

§ 32. An indictment for homicide, which was sufficient under the laws of the demanding state, though it did not allege the time or venue of the offense, held not objectionable on that ground in the extradition proceedings.—*Ex parte Coleman* (Tex. Cr. App.) 17.

§ 36. A recital in a Governor's warrant that an alleged fugitive from justice was charged by indictment, instead of by affidavit, as shown by the extradition papers, held an immaterial clerical error.—*Ex parte Coleman* (Tex. Cr. App.) 17.

FACTORS.

See Brokers; Principal and Agent.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) ACTS CONSTITUTING FALSE IMPRISONMENT AND LIABILITY THEREFOR.

§ 15. A railway company held not liable for the arrest of plaintiffs, who, on insisting on being entitled to pass through a station gate,

Charge of them.—Chicago, R. I. & P. Ry. Co. v. Nelson (Ark.) 44; Same v. Buchanan, Id.

FALSE PRETENSES.

§ 23. Defendant and B. held both guilty of swindling as principals.—Medders v. State (Tex. Cr. App.) 270.

§ 36. In a prosecution for swindling, the indictment held sufficient.—Medders v. State (Tex. Cr. App.) 270.

§ 38. In a prosecution for obtaining money from a bank by false pretenses, it was not material that the money was placed to the credit of accused's companion and by them checked out, instead of being originally paid to them.—Medders v. State (Tex. Cr. App.) 270.

FALSE SWEARING.

See Perjury.

FAST DRIVING.

On streets, liability for injuries, see Municipal Corporations, § 706.

FEDERAL COURTS.

See Courts, § 273.

FEES.

Extortion, see Extortion.

Of particular classes of officers or other persons. See Clerks of Courts, § 32.

County attorney, see District and Prosecuting Attorneys, § 5.

FEE SIMPLE ESTATE.

Creation by deed, see Deeds, § 124.

FELLOW SERVANTS.

See Master and Servant, §§ 160-201.

FENCES.

Appellate jurisdiction of court of appeals, in action to compel contribution to cost of division fence, see Courts, § 231.

§ 28. Allegation of ownership in a prosecution for breaking and injuring a fence held sufficient, in view of Sayles' Ann. Civ. St. 1897, art. 2227, and Code Cr. Proc. 1895, art. 445.—Pate v. State (Tex. Cr. App.) 757.

§ 28. Evidence in a prosecution for breaking and injuring a fence held to show lack of consent of the owners.—Pate v. State (Tex. Cr. App.) 757.

FIDUCIARY RELATIONS.

Affecting validity of deed, see Deeds, § 72.

FILING.

Bill of exceptions, see Exceptions, Bill of, §§ 36-54.

Criminal information or complaint, see Indictment and Information, § 45.

Indictment or presentment, see Indictment and Information, § 14.

Statement of case or facts for purpose of review, see Appeal and Error, § 504.

FINAL JUDGMENT.

Appealability, see Appeal and Error, § 71.

Review on appeal or writ or error, see Appeal and Error.

FIRES.

Caused by operation of railroad, see Railroads, §§ 457-482.

FISH.

§ 9. Rev. St. 1899, §§ 7456, 7464 (Ann. St. 1906, pp. 3593, 3595), prohibiting the placing of dynamite in waters of the state whereby fish may be killed, and the killing or taking of fish by such means, held not repealed by the Walmsley Game Law, Laws 1905, p. 163, § 29 (Ann. St. 1906, § 7500-29).—State v. Hodges (Mo.) 1072.

FIXTURES.

§ 7. Buildings and machinery erected on land and used for planing mill held fixtures.—Kansas City Southern Ry. Co. v. Anderson (Ark.) 1030.

FLAGMEN.

Rules of railroad companies for protection of employes, see Master and Servant, § 145.

FORCIBLE DEFILEMENT.

See Rape.

FORCIBLE ENTRY AND DETAINER.

Computation of time for filing traverse, see Time, § 10.

FORECLOSURE.

Of mortgage, see Chattel Mortgages, §§ 269-283; Mortgages, §§ 376, 398-548.

FOREIGN CORPORATIONS.

See Corporations, §§ 634-668.

FOREIGN RECEIVERSHIP.

See Receivers, § 210.

FOREIGN WILLS.

Probate or record, see Wills, § 245.

FORFEITURES.

For nonpayment of purchase price of land, see Vendor and Purchaser, §§ 78, 95.

Of bond of seller of text-books, see Schools and School Districts, § 81.

Of homestead, see Homestead, § 168.

Of insurance, see Insurance, §§ 328-368.

Of lease, see Landlord and Tenant, §§ 111, 112.

FORGERY.

Rights of private parties as affected by forgery of deed, see Deeds, § 198.

FORMER ADJUDICATION.

See Judgment, §§ 570, 632, 654, 682.

FORMS OF ACTION.

See Action, § 131; Ejectment; Replevin; Trespass, §§ 25-68; Trover and Conversion.

FORNICATION.

See Incest.

For cases in Dec. Dig. & Amer. Digs. 1907 to date & Indexes see same topic & section (§) NUMBER

phones, § 203.
To operate telephone, see Telegraphs and Telephones, § 7.

§ 1. A telephone franchise granted by a city is in the nature of a contract for the performance of a public service.—*Louisville Home Telephone Co. v. City of Louisville (Ky.)* 855.

FRAUD.

See False Pretenses; Fraudulent Conveyances. Invalidating written instrument as evidence, see Evidence, § 434.

By particular classes of persons, or persons in particular relations.

Corporate officers or agents, see Corporations, § 423.

Insurance agents, see Insurance, § 93.

Insurance companies, see Insurance, § 579.

In particular classes of conveyances, contracts, transactions, or proceedings.

See Deeds, § 70; Insurance, §§ 256, 283; Sales, § 38.

Compromise of claim under life insurance policy, see Insurance, § 579.

Contracts in general, see Contracts, § 94.

Particular remedies.

See Equity, § 13.

In sale of land, see Vendor and Purchaser, § 33.

FRAUDULENT CONVEYANCES.

By mortgagor of chattels, see Chattel Mortgages, §§ 217, 228.

Transfers by insolvent corporation, see Corporations, § 542.

I. TRANSFERS AND TRANSACTIONS INVALID.

(D) INDEBTEDNESS, INSOLVENCY, AND INTENT OF GRANTOR.

§ 66. A person *held* not to have been a creditor of a grantor, as having a cause of action against him for malicious prosecution when he conveyed property to his wife.—*Rosen v. Levy (Tenn.)* 1042.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

(A) ORIGINAL PARTIES.

§ 174. A grantor who conveyed to defeat collection of a judgment *held* not entitled to relief against the conveyance in equity.—*Creamer v. Bivert (Mo.)* 1118.

§ 174. The grantee of premises conveyed to defeat the collection of a judgment will be denied affirmative relief in a suit by grantor to set aside the deed.—*Creamer v. Bivert (Mo.)* 1118.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(A) PERSONS ENTITLED TO ASSERT INVALIDITY.

§ 208. A voluntary conveyance, free from fraud in fact, is void only as to existing creditors of the grantor.—*Rosen v. Levy (Tenn.)* 1042.

(C) RIGHT OF ACTION TO SET ASIDE TRANSFER, AND DEFENSES.

§ 241. Under Ky. St. 1903, § 1907a, *held*, that a judgment creditor, without obtaining a return of nulla bona, may bring suit to set aside a fraudulent conveyance.—*Cress v. Belknap Hardware & Mfg. Co. (Ky.)* 93.

of a claim against the husband.—*Rosen v. Levy (Tenn.)* 1042.

§ 300. Evidence *held* to support a finding that a deed by a father to his son to land theretofore conveyed by the father to another was fraudulent, and without real consideration.—*Cawood v. Howard (Ky.)* 109.

§ 300. In a suit to subject property standing in the name of another to a judgment against H., evidence *held* insufficient to show that any part of the price of the property had been paid by H.—*Howell v. Union Grocery Co. (Ky.)* 912.

FREIGHT.

Franchise tax on corporation engaged in freight carrying, see Taxation, § 117.

GARNISHMENT.

See Attachment; Execution.

V. LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE.

§ 105. A garnishment of property merely substituted plaintiff pro tanto to the rights of defendant in the property.—*Moore & Bridgeman v. United States Fidelity & Guaranty Co. (Tex. Civ. App.)* 947.

§ 111. A garnishee, after service upon him holds property of the defendant in his possession as a receiver or officer of the court, and cannot thereafter sell it or change its form so as to place an additional burden upon it, though authorized to do so by defendant.—*Moore & Bridgeman v. United States Fidelity & Guaranty Co. (Tex. Civ. App.)* 947.

§ 113. Where a garnishee was under contract with defendant to prepare rice for market and dispose of it, the garnishment of the rice did not suspend the garnishee's obligations under the contract, but it could proceed to perform the contract.—*Moore & Bridgeman v. United States Fidelity & Guaranty Co. (Tex. Civ. App.)* 947.

X. LIABILITIES ON BONDS OR UNDERTAKINGS.

§ 244. The surety on a garnishment bond is liable for the actual damages proximately resulting from the wrongful suing out of the writ.—*Moore & Bridgeman v. United States Fidelity & Guaranty Co. (Tex. Civ. App.)* 947.

§ 244. A surety on a garnishment bond *held* not liable for the depreciation in value of the property because of the garnishee's failure to prepare it for market and dispose of it under his contract with defendant, believing he could not do so after the garnishment.—*Moore & Bridgeman v. United States Fidelity & Guaranty Co. (Tex. Civ. App.)* 947.

XI. WRONGFUL GARNISHMENT.

§ 251. "Where, by the wrongful suing out of a writ of garnishment, money of defendant is wrongfully detained in the possession of the garnishee, defendant may recover from plaintiff as actual damages 6 per cent. interest on the money during the period it is unlawfully held by such garnishment proceedings."—*Moore & Bridgeman v. United States Fidelity & Guaranty Co. (Tex. Civ. App.)* 947.

GIFTS.

To wife, see Husband and Wife, § 116.

Transfer taxes, see Taxation, §§ 856-873.

§ 7. The use by the public, without objection, of an uninclosed portion of a railway's right of way in a manner that did not interfere with its use by the railroad did not make the way so used a public highway by prescription.—Heilbron v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 610, 979.

(D) TITLE TO FEE AND RIGHTS OF ABUTTING OWNERS.

Compensation of abutting owners under law of eminent domain, see Eminent Domain, § 90.

§ 85. The only rights which abutting owners have in the public highway, for the deprivation of which they would have a cause of action, would be the right to use it for ingress and egress to and from their property.—Heilbron v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 979.

§ 87. An abutting owner may recover for damages special to him, resulting from an obstruction in, or injury to, a public highway.—Heilbron v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 610, 979.

§ 87. If a railroad company, by excavating on its right of way near a public highway, rendered the highway unsafe for travel by excavating too close to it, abutting property owners could compel the company to restore the highway to a safe condition.—Heilbron v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 979.

V. REGULATION AND USE FOR TRAVEL.

(A) OBSTRUCTIONS AND ENCROACHMENTS.

§ 155. A private person cannot maintain an action for damages for the obstruction or destruction of a public highway, unless he has sustained some special injury different in kind and degree from that resulting to the public.—Heilbron v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 979.

§ 164. Evidence held insufficient to support a conviction of willfully obstructing a public road.—Farrier v. State (Tex. Cr. App.) 763.

HOMESTEAD.

See Exemptions.

Election between homestead and dower, see Dower, § 59.

I. NATURE, ACQUISITION, AND EXTENT.

(D) PROPERTY CONSTITUTING HOMESTEAD.

§ 60. Under Const. art. 16, § 51, held that, to constitute rural land a homestead, it must be used for some one purpose of a home.—Autry v. Reasor (Tex.) 748.

§ 80. Owner of homestead may sell the same and reinvest the proceeds in another homestead, which will be exempt to the same extent as would the homestead sold.—Baker v. Kash (Ky.) 820.

§ 80. A debtor cannot sell his homestead, retain or reinvest the money, and after several years buy other land and assert a homestead as against debts created before the later purchase.—Baker v. Kash (Ky.) 820.

(E) LIABILITIES ENFORCEABLE AGAINST HOMESTEAD.

§ 103. A judgment lien does not attach to the homestead of a judgment debtor.—Savage v. Cowan (Tex. Civ. App.) 319.

OR HEIRS.

§ 142. Where a widow elects to take dower, and it is of greater value than \$1,000, she must make provision for the infants; but, if her dower is worth less than \$1,000, the infant is given a homestead of \$1,000, which must include the dower assigned to the widow, after which the remainder of the property is to be apportioned among the children, including the infants.—Phillips v. Williams (Ky.) 908; Williams v. Phillips, Id.

§ 142. The widow's election to take dower or to abandon the homestead cannot defeat the infant's homestead right in the property.—Phillips v. Williams (Ky.) 908; Williams v. Phillips, Id.

§ 145. Where a widow elects to take homestead in the lands of her deceased husband, she abandons the same by an attempted sale thereof.—Phillips v. Williams (Ky.) 908; Williams v. Phillips, Id.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

Conveyance by widow as abandonment of rights, see ante, § 145.

§ 168. The renting of a portion of a rural homestead deprives the rented part of its homestead character.—Autry v. Reasor (Tex.) 748.

HOMICIDE.

Arrest of accused, see Arrest, § 65.

I. THE HOMICIDE.

§ 5. One cannot be convicted of a homicide unless his act caused decedent's death.—Noble v. State (Tex. Cr. App.) 281.

III. MANSLAUGHTER.

§ 39. A killing under the circumstances stated held to constitute manslaughter.—Casey v. State (Tex. Cr. App.) 534.

§ 39. Facts assumed held to constitute manslaughter.—Winn v. State (Tex. Cr. App.) 918.

§ 39. To reduce a homicide to manslaughter the statute requires the existence of passion engendered by provocation at the time of the difficulty, and not the result of a former provocation.—Franks v. State (Tex. Cr. App.) 941.

§ 40. One relying upon defendant's insulting conduct must show that the killing happened immediately upon the giving of the insults, or as soon as accused met decedent after being informed of his conduct.—Holcomb v. State (Tex. Cr. App.) 754.

§ 47. Facts stated held to show no higher offense than manslaughter.—Young v. State (Tex. Cr. App.) 276.

§ 49. One accused of homicide could rely upon decedent's insults to accused's wife, communicated to accused just before the homicide, to show that the killing was only manslaughter.—Holcomb v. State (Tex. Cr. App.) 754.

§ 49. Manslaughter defined.—Holcomb v. State (Tex. Cr. App.) 754.

IV. ASSAULT WITH INTENT TO KILL.

Prejudicial error in instruction, see post, § 338.

§ 84. An assault accompanied with the specific intent to kill is an assault with intent to murder, if malice is present.—Olds v. State (Tex. Cr. App.) 272.

§ 95. One assaulting prosecutrix held guilty of aggravated assault, though the weapon used was a deadly weapon and the assault was made

other charge given.—Franks v. State (Tex. Cr. App.) 941.

§ 291. On a trial for homicide, the court *held* required, under the evidence, to charge the substance of Pen. Code 1895, arts. 651, 652, defining homicide, followed by a charge as to the effect of the death of decedent, caused by negligence or improper medical treatment.—Noble v. State (Tex. Cr. App.) 281.

§ 295. An instruction that, in determining whether there was adequate cause, the jury could look to all provocations, was not erroneous for failing to enumerate the antecedent provocations.—Young v. State (Tex. Cr. App.) 276.

§ 295. An instruction on manslaughter failing to define adequate cause in the language of Pen. Code 1895, art. 702, *held* erroneous.—Lee v. State (Tex. Cr. App.) 301.

§ 295. It was improper to submit an issue as to provocation given one accused of murder by one other than decedent, where there was no proof thereof.—Fuller v. State (Tex. Cr. App.) 540.

§ 295. Instruction as to evidence of insults to defendant's wife *held* erroneous.—Holcomb v. State (Tex. Cr. App.) 754.

§ 295. An instruction on manslaughter *held* not erroneous, as limiting the jury, in determining provocation or adequate cause, to occurrences at and immediately before the difficulty.—Dobbs v. State (Tex. Cr. App.) 923.

§ 295. In a murder case, a charge on manslaughter *held* as favorable as accused was entitled to under the facts.—Franks v. State (Tex. Cr. App.) 941.

§ 300. Charge, on a trial for assault with intent to murder, on the issue of provoking the difficulty *held* not limited, in its application of the law of self-defense, to an actual attack on defendant.—Prescott v. State (Tex. Cr. App.) 530.

§ 300. Charge on trial for assault with intent to murder *held* not subject to the objection that it limited the right of self-defense to an actual attack by prosecuting witness upon defendant.—Prescott v. State (Tex. Cr. App.) 530.

§ 300. Instruction, on a trial for assault with intent to murder, on the issue of provoking the difficulty *held* not to shift the burden of proof to defendant.—Prescott v. State (Tex. Cr. App.) 530.

§ 300. Where the evidence showed that deceased made an actual attack on accused with threats to kill, a charge on self-defense based on the theory of an actual attack, etc., was proper.—Casey v. State (Tex. Cr. App.) 534.

§ 300. An instruction on a trial for homicide as to threats on the question of self-defense *held* erroneous.—Pannell v. State (Tex. Cr. App.) 536.

§ 300. In a trial for homicide committed while decedent was ejecting, accused from decedent's home, *held* improper to fail to submit the law applicable if the ejection was unwarranted.—Holcomb v. State (Tex. Cr. App.) 754.

§ 300. Evidence in a homicide case *held* not to warrant incorporation in the charge of the substance of Pen. Code 1895, art. 713, relating to threats.—Dobbs v. State (Tex. Cr. App.) 923.

§ 300. Where accused and his son were charged as principals, the son having done the shooting, an instruction on self-defense *held* not erroneous, as infringing the doctrine of apparent danger and as omitting to direct the jury to

—Franks v. State (Tex. Cr. App.) 941.

§ 309. Where the evidence tended to show that the killing was in self-defense, an instruction authorizing a conviction for manslaughter was improper.—Casey v. State (Tex. Cr. App.) 534.

§ 309. Where the evidence showed that accused killed deceased because of a threatened attack which placed him in no real danger, a charge on manslaughter based on the theory of a real attack was error.—Casey v. State (Tex. Cr. App.) 534.

§ 309. It is not permissible for the court to authorize a conviction for manslaughter on facts justifying the killing.—Pannell v. State (Tex. Cr. App.) 536.

§ 309. On a trial for homicide, instructions on manslaughter and self-defense *held* erroneous as bringing about a conviction of manslaughter on facts authorizing an acquittal.—Pannell v. State (Tex. Cr. App.) 536.

§ 310. An instruction, on a trial for assault with intent to murder, *held* not prejudicial to accused.—Olds v. State (Tex. Cr. App.) 272.

§ 310. On a trial for assault with intent to murder, a charge *held* properly refused because not presenting the issue of aggravated assault.—Olds v. State (Tex. Cr. App.) 272.

X. APPEAL AND ERROR.

§ 338. Under the evidence, on a trial for assault with intent to murder, *held* that defendant could not complain of an instruction that the knife was, as a matter of law, a deadly weapon.—Prescott v. State (Tex. Cr. App.) 530.

§ 340. Where the jury in convicting of manslaughter assessed the lowest punishment, all errors in the charge were eliminated, unless the charge on manslaughter induced the jury not to acquit on the ground of self-defense.—Pannell v. State (Tex. Cr. App.) 536.

§ 340. A conviction of manslaughter will not be reversed for error in charging on homicide in the first and second degree.—Pryse v. State (Tex. Cr. App.) 988.

HOSPITALS.

Liability of railroad for injuries to servant treated in hospital, see Master and Servant, § 300.

HOUSEBREAKING.

See Burglary.

HUSBAND AND WIFE.

See Bigamy; Divorce; Dower; Marriage.

Adverse possession under deed from husband and wife and void as to wife, see Adverse Possession, § 112.

Competency as witnesses, see Witnesses, § 52. Conclusiveness of probate of will of wife, see Wills, § 428.

Rights of survivor, see Executors and Administrators, §§ 175-182; Homestead, §§ 142-145.

I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

Invalidity of deed as to wife by failure to file for record within statutory period, see Deeds, § 88.

§ 10. Marriage at common law constituted an absolute gift to the husband of the wife's personal property.—Williford v. Phelan (Tenn.) 365.

accused of homicide, see Homicide, § 168.

IDENTITY.

Recitals in deeds as to identity of parties, see Deeds, § 207.

ILLEGITIMATE CHILDREN.

See Bastards.

IMPEACHMENT.

Of record, see Appeal and Error, § 664.
Of witness, see Witnesses, §§ 329-414.

IMPLIED CONTRACTS.

See Contribution; Work and Labor.

IMPRISONMENT.

See Arrest; Bail; False Imprisonment.
Habeas corpus, see Habeas Corpus.

IMPROVEMENTS.

Allowance or recovery of compensation, see Trespass to Try Title, §§ 56, 59.
Licns, see Mechanics' Liens.
Public improvements, see Municipal Corporations, §§ 269-567.

§ 4. Defendant in trespass to try title *held* a purchaser in good faith, as regards the right to allowance for improvements.—Fain v. Nelms (Tex. Civ. App.) 1002.

§ 4. A receipt given a purchaser of land *held* a sufficient writing to warrant him in believing he had secured the land bargained for as regards the right to allowance for improvements.—Fain v. Nelms (Tex. Civ. App.) 1002.

§ 4. One making improvements on adjoining land under mistake of a surveyor *held* entitled to allowance for improvements.—Fain v. Nelms (Tex. Civ. App.) 1002.

§ 4. To entitle one to allowance for improvements, *held*, he must show how much the value of the land is enhanced thereby.—Fain v. Nelms (Tex. Civ. App.) 1002.

INADVERTENCE.

Ground for new trial, see New Trial, § 91.

INCEST.

Competency of wife as witness, against husband, see Witnesses, § 54.

§ 14. A statement, by a witness in a prosecution for incest with accused's wife's daughter by a former husband, that he understood the former husband was dead, *held* inadmissible.—Harville v. State (Tex. Cr. App.) 283.

INCOMPETENT PERSONS.

See Insane Persons.

INCORPORATION.

See Corporations.

INDEBTEDNESS.

Of fraudulent grantor, see Fraudulent Conveyances, § 66.

INDEMNITY.

See Principal and Surety.

See *Landlord and Tenant* contract, while not binding against the landlord, was admissible, in an action by the tenant against the landlord, to show the farmer's damages.—Feland v. Berry (Ky.) 423.

INDEMNITY INSURANCE.

See Insurance, § 430.

INDICTMENT AND INFORMATION.

Defects in, as ground for release of accused on habeas corpus, see Habeas Corpus, § 30.
Sufficiency of, to support extradition proceedings, see Extradition, § 32.

For particular offenses.

See Abduction, § 5; Embezzlement, 28; False Pretenses, §§ 36-38; Nuisance, § 91; Perjury, § 29; Robbery, § 18.

Against liquor laws, see Intoxicating Liquors, § 213.

II. FINDING AND FILING OF INDICTMENT OR PRESENTMENT.

§ 14. Record entries of an order permitting substitution of a lost indictment may be amended *nunc pro tunc*, even at a subsequent term.—Brooks v. State (Tex. Cr. App.) 920.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

Sufficiency of recognizance, taken pursuant to a defective information, to require accused to appear and answer a new information, see Bail, § 62.

§ 45. The filing of a new affidavit, after the granting of a new trial after conviction, constitutes a new case.—Martin v. State (Tex. Cr. App.) 274.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

Sufficiency of indictment for abduction, see Abduction, § 5.

§ 63. Indictment for maintaining a public nuisance must be supported by allegations of fact showing how the offense was committed.—Louisville & N. R. Co. v. Commonwealth (Ky.) 517.

§ 119. If an indictment pleads sufficient facts to constitute a complete offense, other charges, not sufficiently pleaded to stand alone, may be disregarded as surplusage.—Bailey v. Commonwealth (Ky.) 140.

§ 120. Under Cr. Code Prac. § 124, an allegation in an indictment for embezzlement as to the effects and property of a corporation alleged to have been embezzled, not specifically described, should be treated as surplusage.—Bailey v. Commonwealth (Ky.) 140.

§ 121. Where an indictment for embezzlement did not specify the particular transaction that would be relied on, accused's remedy was by application for a bill of particulars.—Bailey v. Commonwealth (Ky.) 140.

§ 121. The commonwealth in a criminal case, when required to furnish a bill of particulars, need not state the circumstances with absolute precision, nor specify exact dates, but should not file a bill of particulars so loose as to constitute a dragnet.—Bailey v. Commonwealth (Ky.) 140.

§ 121. Whether a bill of particulars will be ordered in a criminal case rests in the sound judicial discretion of the trial judge.—Bailey v. Commonwealth (Ky.) 140.

§ 47.
On appeal or writ of error, see Appeal and Error, §§ 1127-1194.
To foreclose chattel mortgages, see Chattel Mortgages, § 283.

In criminal prosecutions.

See Criminal Law, § 979.

Review.

See Appeal and Error.

Review on certiorari, see Certiorari, § 16.

I. NATURE AND ESSENTIALS IN GENERAL.

Insufficiency of pleadings as ground for objection to confirmation of judicial sale, see Judicial Sales, § 31.

Judgment of justice of the peace, see Justices of the Peace, § 122.

§ 17. That, in an action by the prosecuting attorney against a town and an individual to compel the removal of an obstruction in a street, the town was not legally served with process, and judgment was erroneously entered against it, *held* not to require the disturbing of the judgment against the individual.—State v. Franklin (Mo. App.) 652.

§ 17. No personal judgment can be rendered against a nonresident defendant, served without the state, upon his failure to appear and answer, unless he owns property within the state.—Boehrens v. Brice (Tex. Civ. App.) 782.

IV. BY DEFAULT.

Authority of guardian to let judgment go by default, see Guardian and Ward, § 133.

(A) REQUISITES AND VALIDITY.

§ 101. A cause of action set up for the first time in the reply, which was a departure from that alleged in the petition, cannot sustain a default judgment thereon.—Spiess' Adm'x v. Bartley (Ky.) 127.

(B) OPENING OR SETTING ASIDE DEFAULT.

§ 143. The trial court *held* to have acted within its discretion in setting aside a default judgment.—Knupp v. Miller (Mo. App.) 725.

§ 143. Facts *held* not to show that a party against whom a default judgment was entered was misled as the result of accident or mistake.—Kansas City Life Ins. Co. v. Warbington (Tex. Civ. App.) 988.

§ 153. During the term at which a default judgment is rendered the court may for good cause shown, or, on its own motion for cause, set aside the judgment and grant defendant a reasonable time to plead.—Knupp v. Miller (Mo. App.) 725.

VI. ON TRIAL OF ISSUES.

Necessity for motion in arrest for purpose of review, see Appeal and Error, § 238.

(A) RENDITION, FORM, AND REQUISITES IN GENERAL.

§ 199. Under Civ. Code Prac. § 386, the court *held* required to give judgment for insurer in an action to set aside a compromise of a life insurance claim on the ground of the fraud of insurer, notwithstanding a verdict for plaintiff.—Western & Southern Life Ins. Co. v. Quinn (Ky.) 456.

§ 226. The judgment in actions involving real estate should so describe the land, that it may be identified by the parties or the officer

(C) CONFORMITY TO PROCESS, PLEADINGS, PROOFS, AND VERDICT OR FINDINGS.

In action of trespass to try title, see Trespass to Try Title, § 47.

§ 251. Judgment cannot be entered on an issue not made by the pleadings.—Ireland v. Bowman & Cockrell (Ky.) 56.

§ 252. In trespass to try title to land, upon judgment for defendant, plaintiff *held* not entitled to complain that the boundaries of a part of the land not claimed by defendant were not adjudicated; he not having asked that relief in his pleadings.—De Roach v. Clardy (Tex. Civ. App.) 22.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 303. A judgment in an action for the recovery of real estate *held* properly amended, so as to contain a description of the land in controversy.—Latham v. Lindsay (Ky.) 878.

§ 315. An amendment of a judgment *nunc pro tunc* must be based on matter of record.—Pulitzer Pub. Co. v. Allen (Mo. App.) 1159.

§ 323. Notice must be given to the adverse party of an application to amend a judgment *nunc pro tunc*, unless he cannot be aggrieved by the amendment.—Pulitzer Pub. Co. v. Allen (Mo. App.) 1159.

§ 324. The expression "Dis. by deft. App'l" entered by the circuit court on its docket on dismissing a case appealed from a justice, was insufficient to support a subsequent amendment without notice, to show that the appeal, and not the cause, was dismissed.—Pulitzer Pub. Co. v. Allen (Mo. App.) 1159.

§ 331. On collateral attack, an order amending a judgment *nunc pro tunc* must be sustained unless the court was without power to make it, but on a direct attack the sufficiency of the evidence to show error may be inquired into.—Pulitzer Pub. Co. v. Allen (Mo. App.) 1159.

IX. OPENING OR VACATING.

Grounds for opening default judgment, see ante, § 143.

X. EQUITABLE RELIEF.

(A) NATURE OF REMEDY AND GROUNDS.

§ 407. The remedy for the error in computing interest accrued on a demand or otherwise, so that the judgment is rendered for an excessive sum, is by appeal or certiorari, and not by injunction.—Kansas City Life Ins. Co. v. Warbington (Tex. Civ. App.) 988.

§ 407. As against a merely erroneous judgment, relief by injunction cannot be had where remedy by appeal or certiorari is available.—Kansas City Life Ins. Co. v. Warbington (Tex. Civ. App.) 988.

XI. COLLATERAL ATTACK.

On order amending judgment *nunc pro tunc*, see ante, § 331.

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(C) PROCEEDINGS.

§ 519. In an action on a judgment a defense that the party against whom the judgment was rendered was not before the court is a direct attack on the record.—Ballou v. Skidmore (Ky.) 441.

§ 154. A lessor *held* entitled to restrain use of the premises for a moving picture show or any other unauthorized purpose.—*Dycus v. Traders' Bank & Trust Co.* (Tex. Civ. App.) 329.

(D) REPAIRS, INSURANCE, AND IMPROVEMENTS.

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(E) INJURIES FROM DANGEROUS OR DEFECTIVE CONDITION.

§ 162. A landlord retaining control of a building not leased *held* bound to use reasonable diligence to keep such part in safe condition for the tenant.—*Marcheck v. Klute* (Mo. App.) 654.

§ 162. A landlord owes no greater duty to the tenant's children to keep premises in reasonably safe condition than to the tenant himself.—*Marcheck v. Klute* (Mo. App.) 654.

§ 164. A landlord *held* to have retained control over the unoccupied part of a stable loft in which leased rooms were located, so that he was bound to keep that part used as a passageway by the tenants in reasonably safe condition.—*Marcheck v. Klute* (Mo. App.) 654.

§ 164. A chute in the unoccupied part of a stable loft *held* not so near the passageway to rooms leased to plaintiff as to render the passageway dangerous, so as to make the landlord liable for injuries by falling through the chute.—*Marcheck v. Klute* (Mo. App.) 654.

§ 164. An action for personal injuries resulting from a breach of the landlord's covenant to repair is allowed when the injury was contemplated by the parties on executing the covenant, or when the landlord omitted to perform his agreement after he knew that its performance was essential to the safety of the tenant and his family.—*Marcheck v. Klute* (Mo. App.) 654.

§ 164. The rule that a landlord's covenant to repair will not support an action for personal injuries for his failure to repair is applicable only by analogy to a landlord's agreement to guard the entrance of a chute in the unoccupied part of a stable loft in which the leased rooms were situated, as the stipulation was not to repair the leased premises or an appurtenance thereto.—*Marcheck v. Klute* (Mo. App.) 654.

§ 164. Where a landlord agreed to properly guard the entrance to a hay chute in the unoccupied part of a stable loft when he rented plaintiff rooms therein in order to protect the tenant's children, a child of the tenant could recover for injuries resulting from the landlord's failure to make such repairs; the rule that a landlord's covenant to repair will not support an action for personal injuries for failure to repair having no application.—*Marcheck v. Klute* (Mo. App.) 654.

§ 164. As a general rule, a lessor's covenant to repair will not support an action for personal injuries resulting from his failure to repair; such injuries being deemed too remote to have been contemplated by the parties.—*Marcheck v. Klute* (Mo. App.) 654.

§ 165. A landlord *held* not liable for injuries to his tenant's children by falling through a chute in the unoccupied part of the loft in which the leased rooms were situated; the child having a mere license to play in that part of the loft.—*Marcheck v. Klute* (Mo. App.) 654.

§ 169. In an action by a tenant for the death of his child by falling through a chute in the

plaintiff.—*Marcheck v. Klute* (Mo. App.) 654.

§ 169. In order to entitle a tenant to recover for injuries received because of the landlord's breach of his agreement to protect a dangerous place near the leased premises, he should allege such promise and the landlord's breach in his petition.—*Marcheck v. Klute* (Mo. App.) 654.

(F) EVICTION.

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VIII. RENT AND ADVANCES.

(A) RIGHTS AND LIABILITIES.

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(B) ACTIONS.

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IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

§ 277. Any acts of the lessor, unequivocally manifesting his intention to claim a forfeiture for breach of condition and to demand possession, will be equivalent to a re-entry.—*Baxter v. Heimann* (Mo. App.) 1152.

§ 291. Under Civ. Code Prac. § 464, prescribing the measure of recovery on a traverse bond in forcible detainer under section 463, a recovery of rents on a traverse bond filed by a tenant *held* confined to the time that the traversee is kept out of possession.—*Columbia Trust Co. v. Reccius* (Ky.) 895.

§ 291. Damages recoverable under Civ. Code Prac. § 464, prescribing the measure of recovery on a traverse bond filed in forcible detainer under section 463, *held* determined.—*Columbia Trust Co. v. Reccius* (Ky.) 895.

§ 318. One who wrongfully procures a warrant of restitution to issue, and has a constable execute the writ, is responsible to the person injured for the damages sustained thereby.—*Roettger v. Riefkin* (Ky.) 88.

§ 318. In an action by tenants against two lessors for damages resulting from wrongful execution of a writ of possession, evidence *held* sufficient to go to the jury as to both of defendants.—*Roettger v. Riefkin* (Ky.) 88.

§ 318. In an action by tenants for wrongful dispossession under forcible entry proceedings, evidence as to plaintiffs having been theretofore evicted by other landlords from rented premises *held* incompetent.—*Roettger v. Riefkin* (Ky.) 88.

§ 318. Where defendant landlord wrongfully procured a warrant of restitution to be executed, the measure of recovery was the damage to plaintiff's property by reason of the acts complained of.—*Roettger v. Reifkin* (Ky.) 902.

X. RENTING ON SHARES.

§ 322. A landlord's cropping contract *held* to require her to furnish materials for a tobacco barn on the ground, so that her failure to do so in time rendered her liable for a loss sustained thereby to the tenant's share of the tobacco crop.—*Feland v. Berry* (Ky.) 425.

§ 331. Where a cropping contract provided for a division of the expense of maintaining the families of both parties, plaintiff w:^s entitled to recover compensation for increased expenses, caused by defendant's son thereafter becoming

§ 54. The truth of the defamatory matter is a complete defense in libel.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 56. Though the existence of probable cause for believing matters contained in a libelous article to be true may mitigate the damage, it will not justify the publication.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

IV. ACTIONS.

(A) RIGHT OF ACTION AND DEFENSES.

§ 74. In libel, where a requested notice signed by defendant was not published, but in its place was published another defamatory notice signed by defendant's name, but which he did not cause to be published, he was not liable for the publication of the second notice, and an instruction to the effect that he ratified it by failing to retract it *held* properly refused.—Horton v. Jackson (Ark.) 45.

(B) PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING.

Pleading conclusions of law, see Pleading, § 8.

§ 83. Though malice may be inferred from other matters pleaded, the rules of good pleading require a special allegation of malice in actions of libel.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 86. The propriety and functions of an innuendo in libel stated.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 89. If a publication in a newspaper tends to injure plaintiff's reputation and expose her to public hatred, contempt, or ridicule, or impeach her honesty, it is unnecessary to allege in the petition financial injury therefrom.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 89. In libel for charging plaintiff with smuggling, *held* unnecessary to allege that the publication tended to expose her to disgrace, etc., or to cause the belief that she was guilty of smuggling.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 89. In libel for charging plaintiff with smuggling, it was unnecessary to aver the character or extent of the mental suffering caused by the publication, or even the suffering therefrom; it being sufficient to aver the damage sustained thereby.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 100. The truth of the publication in libel must be pleaded by defendant to be available (Acts 1901, p. 30, c. 26), making the truth of the statement a defense to libel, not having affected the rule requiring such defense to be specially pleaded.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

(C) EVIDENCE.

Hearsay evidence, see Evidence, § 318.

§ 103. In libel for charging plaintiff with smuggling, testimony as to the authority of custom officers in searching and seizing goods *held* irrelevant.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 103. In libel for charging that plaintiff imported goods without paying the custom duties thereon, the report of the government officers who investigated the case, not being commented on in the alleged libelous article, was irrelevant and inadmissible.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

United San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

(D) DAMAGES.

§ 119. In libel for charging plaintiff with smuggling, the measure of damages stated.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 120. In libel for charging plaintiff with smuggling, exemplary damages *held* not recoverable.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

(E) TRIAL, JUDGMENT, AND REVIEW.

Applicability of instructions to case, see Trial §§ 251, 252.

Assumptions by judge as to facts in instructions, see Trial, § 192.

Refusal of erroneous request for instructions, see Trial, § 261.

Refusal of requests for instructions already substantially given, see Trial, § 260.

§ 124. A charge in libel that if the article published was calculated to impeach plaintiff's good name, etc., used the words "good name" as equivalent to reputation, in which sense the words have always been used.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 124. In libel an instruction *held* not to authorize recovery for financial loss.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 124. In libel for charging plaintiff with smuggling, an instruction requiring a finding for defendant if the statements complained of were made upon probable cause *held* properly refused.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 124. In libel, where the trial court did not submit an instruction as to the effect of probable cause for the publication of the libelous article, an instruction as to what could be considered in determining the existence of probable cause *held* properly refused, there being nothing to which it could apply.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

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§ 7. An ordinance *held* not void on the ground that it gives municipal authorities discretionary power.—Kissinger v. Hay (Tex. Civ. App.) 1005.

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§ 3. Evidence held to show that a contract for the sale of standing timber was executed by the owner.—McCoy v. Fraley (Ky.) 444.

§ 3. A sale of standing timber, fixing no time for the removal thereof, passes an equitable interest in the real estate.—McCoy v. Fraley (Ky.) 444.

§ 3. Where the vendor of standing timber died before the trees were measured, counted, and marked, the chancellor properly directed his commissioner to go on the land, and ascertain the number of trees which passed to the purchaser under the contract.—McCoy v. Fraley (Ky.) 444.

§ 3. A purchaser of standing timber who has left the tops and debris so as to damage the land held liable to the owner.—Bates v. Burt & Brabb Lumber Co. (Ky.) 820.

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§ 10. Mandamus cannot be maintained, unless there is a legal right in the applicant, and the corresponding duty imposed on the respondent.—Louisville Home Telephone Co. v. City of Louisville (Ky.) 855.

§ 23. A private person, who shows a direct and special interest in himself, may apply for mandamus to enforce a public duty.—Louisville Home Telephone Co. v. City of Louisville (Ky.) 855.

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§ 23. An application by private individuals held insufficient to show in them such private right as entitled them to mandamus to compel the sale of a telephone franchise.—Louisville Home Telephone Co. v. City of Louisville (Ky.) 855.

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III. JURISDICTION, PROCEEDINGS, AND RELIEF.

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§ 148. Private individuals held to be proper relators, in behalf of the public, to apply for a writ of mandamus to compel the sale of a telephone franchise as directed by ordinance.—Louisville Home Telephone Co. v. City of Louisville (Ky.) 855.

§ 154. An objection that relators, in a mandamus proceeding for the public did not proceed in the name of the commonwealth may be aviated by amendment.—Louisville Home Telephone Co. v. City of Louisville (Ky.) 855.

§ 164. A plea, in mandamus to compel the Auditor of state to issue a warrant to pay a

the rear, the fact that one of the engines of the leading train was leaky *held* not the proximate cause of the injury.—*Louisville & N. R. Co. v. Keiffer* (Ky.) 433.

(C) METHODS OF WORK, RULES, AND ORDERS.

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§ 130. That a business might have been carried on in a less dangerous manner is immaterial, where the servant has been sufficiently instructed.—*Mitchell v. Comanche Cotton Oil Co.* (Tex. Civ. App.) 158.

§ 137. In an action for injuries to a railway employe, the breaking of a knuckle on a double-header train *held* not actionable simply because the train was run as a double-header.—*Louisville & N. R. Co. v. Keiffer* (Ky.) 433.

§ 137. To make a railroad company liable for injury to a brakeman from movement of a train, *held*, the movement must be shown to have been with unnecessary force and not of a usual character.—*Matthew's Adm'r v. Louisville & N. R. Co.* (Ky.) 459.

§ 137. Statement of duty of railroad as to lookout on train backed in a town by a place where another train was taking water.—*Louisville & N. R. Co. v. Schroader* (Ky.) 874.

§ 145. Rule of a railroad as to lookout on a train "pushed" by an engine *held* to apply, the engine being behind the cars, whether it is going backward or forward.—*Louisville & N. R. Co. v. Schroader* (Ky.) 874.

§ 149. The fact that a foreman of railroad section hands ordered one of them to break a bolt holding a rail, which was part of their regular work, *held* not to render the master liable for an injury to another section hand from the breaking.—*St. Louis, I. M. & S. Ry. Co. v. Jamison* (Ark.) 41.

§ 149. Railroad section hands whose principal duty was to remove old rails, often necessitating the breaking of the bolts joining them, *held* presumed to know how to do the breaking and that it was not the foreman's duty in ordering a bolt broken to direct the method of doing it.—*St. Louis, I. M. & S. Ry. Co. v. Jamison* (Ark.) 41.

§ 149. An employe injured while attempting to carry a machine pursuant to the order of the foreman *held* entitled to recover for the injury sustained.—*Louisville & N. R. Co. v. Mahan* (Ky.) 886.

(D) WARNING AND INSTRUCTING SERVANT.

§ 153. A master need not warn a servant, though an infant, of ordinary risks and dangers which are known to the servant.—*Mitchell v. Comanche Cotton Oil Co.* (Tex. Civ. App.) 158.

§ 156. A master may assume that a servant understands risks incident to his employment, but must warn him concerning those not incident to his employment.—*Brandon v. Texarkana & Ft. Smith Ry. Co.* (Tex. Civ. App.) 968.

§ 157. Where the master warned and instructed a servant when he was first employed, he need not repeat the warning.—*Mitchell v. Comanche Cotton Oil Co.* (Tex. Civ. App.) 158.

(E) FELLOW SERVANTS.

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§ 160. The common-law rule exempting a master from liability for injuries to his serv-

ant by a fellow servant's negligence, prevailing at the place where the injury occurred and the cause of actions arose, governs, though the rule has been changed by statute at the forum.—*Louisville & N. R. Co. v. Keiffer* (Ky.) 433.

§ 177. Evidence *held* not to show negligence of an engineer in obeying a signal of one brakeman, while another was giving a contrary signal.—*Matthew's Adm'r v. Louisville & N. R. Co.* (Ky.) 459.

§ 177. A master is not liable for injuries to a servant caused by the negligence of a fellow servant.—*Faulkner v. Texas & N. O. Ry. Co.* (Tex. Civ. App.) 765.

§ 198. Railroad section hands engaged in removing an old track are fellow servants, and the master is not liable for an injury to one of them if caused by the negligence of another.—*St. Louis, I. M. & S. Ry. Co. v. Jamison* (Ark.) 41.

§ 198. Negligence of a brakeman injuring another brakeman *held* that of a fellow servant.—*Matthew's Adm'r v. Louisville & N. R. Co.* (Ky.) 459.

§ 201. A master is liable for an injury to a servant caused by the concurrent negligence of a vice principal and a fellow servant.—*Marcum v. Three States Lumber Co.* (Ark.) 357.

(F) RISKS ASSUMED BY SERVANT.

§ 213. A section hand *held* to have assumed the risk of injury from the breaking of bolts in removing old rails.—*St. Louis, I. M. & S. Ry. Co. v. Jamison* (Ark.) 41.

§ 217. A railroad employe assumes such risks as are ordinarily incident to the service he engages to perform, and such others, including negligence of the company's servants chargeable to it, as he knows of or must necessarily have known of in the ordinary discharge of his duties.—*Texas & N. O. R. Co. v. Jackson* (Tex. Civ. App.) 628.

§ 217. In an injury action by a servant against the master, where it was not shown that the servant knew or should have known that the appliance which caused the injury was defective, there was no evidence to sustain the defense of assumed risk.—*Texas & N. O. R. Co. v. Jackson* (Tex. Civ. App.) 628.

§ 218. Where an infant servant has been properly instructed and warned, his minority usually ceases to be a factor of the master's liability.—*Mitchell v. Comanche Cotton Oil Co.* (Tex. Civ. App.) 158.

§ 221. A servant working with a defective appliance after the master's promise to repair can recover for an injury sustained therefrom within a reasonable time after the promise.—*Marcum v. Three States Lumber Co.* (Ark.) 357.

§ 225. A servant assumes risks incident to the service he contracts to perform, but not those of a service not embraced within the scope of his contract.—*Brandon v. Texarkana & Ft. Smith Ry. Co.* (Tex. Civ. App.) 968.

(G) CONTRIBUTORY NEGLIGENCE OF SERVANT.

§ 227. The rule that the reciprocal rights and duties of the parties are governed by the law of the place where the tort occurred *held* applicable to the relation of master and servant.—*Louisville & N. R. Co. v. Keiffer* (Ky.) 433.

§ 227. Employe *held* not entitled to recover for negligence, if also guilty of negligence, without which the accident would not have occurred.—*Cincinnati, N. O. & T. P. Ry. Co. v. Fortner* (Ky.) 847.

§ 229. An employe *held* bound to exercise ordinary care for his own protection.—*Cincinnati, N. O. & T. P. Ry. Co. v. Fortner* (Ky.) 847.

§ 301. A railroad company operating over leased tracks *held* not liable for the failure of a crossing watchman, in the sole control of the lessor road, to shut down gates or give necessary warning of danger.—*Wills v. Atchison, T. & S. F. Ry. Co.* (Mo. App.) 713.

§ 301. That one was a deputy sheriff does not show that his act in injuring a trespasser was official.—*Texas & N. O. R. Co. v. Parsons* (Tex.) 914.

§ 301. That one was a railway watchman does not show that his act in injuring a trespasser was that of a servant.—*Texas & N. O. R. Co. v. Parsons* (Tex.) 914.

§ 301. In an action against a railway company for injury to a trespasser inflicted by a deputy sheriff and watchman, whether the latter's acts were official or those of a servant must be determined by all the circumstances and evidence.—*Texas & N. O. R. Co. v. Parsons* (Tex.) 914.

§ 301. That in shooting at one who approached him a railway watchman believed him to be a companion of trespassers the watchman was conducting off the premises does not alter his relation to the company as affecting its liability to one of the trespassers who was struck by the bullet.—*Texas & N. O. R. Co. v. Parsons* (Tex.) 914.

§ 302. A master is liable for the acts of his servant only when the servant acts within the scope of his authority.—*Robards v. P. Bannon Sewer Pipe Co.* (Ky.) 429.

§ 302. The mere employment of a watchman to guard property did not authorize him to shoot a trespasser who was running away from the premises.—*Robards v. P. Bannon Sewer Pipe Co.* (Ky.) 429.

§ 302. A master *held* liable for an unjustifiable injury to a third person by his servant acting in the general scope of his employment, though he disregarded the master's private instructions.—*Robards v. P. Bannon Sewer Pipe Co.* (Ky.) 429.

§ 302. Where it is doubtful whether a servant injuring a third person was acting within the general scope of his authority, the doubt will be resolved against the master because he set the servant in motion.—*Robards v. P. Bannon Sewer Pipe Co.* (Ky.) 429.

§ 302. The terms "course of employment" and "scope of authority" *held* not susceptible of accurate definition.—*Robards v. P. Bannon Sewer Pipe Co.* (Ky.) 429.

§ 304. A railway watchman who was conducting trespassers out of railway yards owed them the duty to not injure them through negligent or reckless use of his revolver.—*Texas & N. O. R. Co. v. Parsons* (Tex.) 914.

(C) ACTIONS.

§ 330. Evidence, in an action against a railway company for injury to a trespasser, *held* to show that the person who inflicted it was employed by the company as a watchman, and was acting in that capacity when he shot plaintiff.—*Texas & N. O. R. Co. v. Parsons* (Tex.) 914.

§ 330. Evidence *held* to sustain a judgment against a railway company for injury to a trespasser shot by a watchman employed by the company.—*Texas & N. O. R. Co. v. Parsons* (Tex.) 914.

§ 332. If the master employs a watchman and authorizes him to use firearms in his discretion, and he shoots a third person near the premises, he is not as a matter of law acting without the scope of his employment.—*Robards v. P. Bannon Sewer Pipe Co.* (Ky.) 429.

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§ 58. Under Gen. St. 1888, c. 70, art. 1, § 1, relating to mechanics' liens on property held under an executory contract of sale, lessee *held* not to own a lot under an executory contract, so that a lien for materials furnished would not follow the lot on the termination of the lease.—*Luigart v. Lexington Turf Club* (Ky.) 814.

§ 63. Under Local & Private Laws 1871, c. 1073, applicable to Fayette county and relating to mechanics' liens upon land owned by a married woman, one furnishing materials under a contract with the lessee of a married woman *held* not entitled to a lien upon the leased land.—*Luigart v. Lexington Turf Club* (Ky.) 814.

§ 63. A materialman was not entitled to a lien under Gen. St. 1888, c. 70, art. 1, § 1, creating a lien to materialmen upon real property if the material was furnished by contract without or consent in writing of, the owner, where the work was done under a contract with a lessee with the owner's knowledge, and verbal consent.—*Luigart v. Lexington Turf Club* (Ky.) 814.

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§ 764. A municipality must keep cross-walks, where they pass over gutters, in reasonably safe condition in the light of the plan adopted.—Gallagher v. City of Tipton (Mo. App.) 674.

§ 767. Municipalities can maintain their streets with the center elevated and gutters or drains on the sides to carry away surface water.—Gallagher v. City of Tipton (Mo. App.) 674.

§ 768. While a city is not liable for injury resulting from a danger inherent in the plan adopted respecting its streets and cross-walks, it is liable for negligent construction or maintenance under the plan.—Gallagher v. City of Tipton (Mo. App.) 674.

§ 783. That a trench in a city street which had been filled by the city was filled the same as all such holes in streets were filled would not relieve the city from liability for an injury occasioned thereby.—Heberling v. City of Warrensburg (Mo. App.) 673.

§ 821. Whether a city was negligent respecting a cross-walk over a gutter *held*, under the evidence, a jury question in an action for injury to a pedestrian who stepped from it at night.—Gallagher v. City of Tipton (Mo. App.) 674.

§ 821. Whether a pedestrian, who was injured by stepping off a cross-walk into a gutter at night, was guilty of contributory negligence, *held* under the evidence a jury question.—Gallagher v. City of Tipton (Mo. App.) 674.

§ 822. In the circumstances, *held* improper to authorize recovery by one suing a city for injury caused by stepping off a cross-walk into the gutter at night, if a guard on the walk was necessary.—Gallagher v. City of Tipton (Mo. App.) 674.

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XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) POWER TO INCUR INDEBTEDNESS AND EXPENDITURES.

§ 871. An ordinance modifying the terms of an existing telephone franchise *held* not invalid as a release of an indebtedness or liability to the city, in violation of Const. § 52.—Louisville Home Telephone Co. v. City of Louisville (Ky.) 855.

(B) ADMINISTRATION IN GENERAL, APPROPRIATIONS, WARRANTS, AND PAYMENT.

§ 890. An ordinance appropriating money, *held*, under St. Louis City Charter, art. 5, § 14 (Ann. St. 1906, p. 4839), not to include expenses of a special committee appointed by a resolution of the house of delegates.—State ex rel. Gavigan v. Dierkes (Mo.) 1077.

(D) TAXES AND OTHER REVENUE, AND APPLICATION THEREOF.

Appropriation for expenses incurred by committee appointed to investigate tax returns, see Municipal Corporations, § 800. Mandamus to compel levy, see Mandamus, § 112.

§ 974. The house of delegates of the city of St. Louis, one of the two houses composing its

Dierkes (Mo.) 1077.

§ 988. Under St. 1903, § 2969, a city of the first class, which recovered judgment against a water company for school taxes previously assessed in consideration of its free supplying water, *held* not liable on judgment, where the court allowed it the value of the water service, which more than extinguished the judgment.—Louisville School Board v. City of Louisville (Ky.) 883.

(E) RIGHTS AND REMEDIES OF TAXPAYERS.

Mandamus to compel advertisement and sale of telephone franchise as directed by ordinance, see Mandamus, §§ 23, 148.

MURDER.

See Homicide.

MUTUAL AID SOCIETIES.

See Beneficial Associations.

MUTUAL BENEFIT INSURANCE

See Insurance, §§ 687-825.

NAMES.

Recitals in deeds as to identity of parties, see Deeds, § 207.

NAVIGABLE WATERS.

See Waters and Water Courses.

River as part of enclosure of land *held* adversely, see Adverse Possession, § 19.

I. RIGHTS OF PUBLIC.

Judicial notice of navigability, see Evidence, § 10.

§ 1. A stream may be navigable for the purpose of floating timber, though not navigable for boats.—Ireland v. Bowman & Cockrell (Ky.) 56.

§ 19. One who is rightfully using navigable waters is not liable for damages resulting from necessary obstructions in such use.—Orange Lumber Co. v. Thompson (Tex. Civ. App.) 56.

§ 21. A lumber company has no right to obstruct navigable waters by booms across them.—Orange Lumber Co. v. Thompson (Tex. Civ. App.) 503.

§ 22. No right to maintain a dam which materially interferes with the floating of timber can be acquired by the maintenance of a dam which is not such an interference.—Ireland v. Bowman & Cockrell (Ky.) 56.

§ 22. Right to maintain a dam by prescription *held* to extend only to the height at which maintained for the prescriptive period.—Ireland v. Bowman & Cockrell (Ky.) 56.

§ 22. Degree of care required of telephone company maintaining a line over a navigable river declared.—Heiberger v. Missouri & Kansas Telephone Co. (Mo. App.) 730.

§ 26. In an action against a telephone company for injuries sustained by the boat which plaintiff was riding running against submerged telephone wire, whether the telephone company was negligent *held* for the jury.—Heiberger v. Missouri & Kansas Telephone Co. (Mo. App.) 730.

circumstances from which it may be inferred.—*St. Louis, I. M. & S. Ry. Co. v. Gilbreath* (Ark.) 200.

(C) TRIAL, JUDGMENT, AND REVIEW.

Giving undue prominence to particular issue, see Trial, § 244.

§ 136. The question of negligence *vel non* is primarily a question of fact, and becomes one of law only when the facts are undisputed and only one conclusion can be drawn therefrom.—*San Antonio Traction Co. v. Levysen* (Tex. Civ. App.) 569.

§ 136. Rule respecting submission of issues of negligence cases stated.—*Boehrens v. Brice* (Tex. Civ. App.) 782.

§ 140. Where there is room for a difference of opinion between reasonable men as to what is the proximate cause of an injury, the question is for the jury, but otherwise it is for the court.—*Louisville & N. R. Co. v. Keiffer* (Ky.) 433.

§ 141. An instruction on negligence, preventing recovery if plaintiff was not in the exercise of ordinary care for her safety, *held* erroneous.—*Bevis v. Vanceburg Telephone Co.* (Ky.) 811.

NEWLY DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see New Trial, §§ 103, 108, 151.

Ground for new trial in criminal prosecution, see Criminal Law, §§ 940-942.

NEWSPAPERS.

Designation of newspaper in which to publish notice of order for local option election, see Intoxicating Liquors, § 33.

NEW TRIAL.

In criminal prosecutions, see Criminal Law, §§ 940-971.

Necessity of motion for purpose of review, see Appeal and Error, §§ 281-302.

Review of discretionary rulings on motion for, see Appeal and Error, § 977.

Review of rulings on motion for as dependent on record on appeal or writ of error, see Appeal and Error, § 502.

II. GROUNDS.

(G) SURPRISE, ACCIDENT, INADVERTENCE, OR MISTAKE.

§ 90. Defendants *held* not surprised by plaintiff's testimony that he had sustained "flatfoot" as the result of the injury.—*Lorts & Frey Planing Mill Co. v. Weil* (Ky.) 474.

§ 91. In the circumstances, *held* an abuse of discretion to allow plaintiffs a new trial to offer evidence omitted through mistake or oversight of counsel.—*Parker v. Britton* (Mo. App.) 259.

§ 91. Rule respecting granting motions for new trial stated.—*Parker v. Britton* (Mo. App.) 259.

(H) NEWLY DISCOVERED EVIDENCE.

§ 103. Plaintiff *held* not entitled to a new trial on the ground of newly discovered evidence.—*Savage v. Cowan* (Tex. Civ. App.) 319.

§ 108. A motion for a new trial on the ground of newly discovered evidence *held* properly denied.—*Paducah Ice Co. v. H. E. Hall & Co.* (Ky.) 104.

§ 108. To entitle a party to a new trial on the ground of newly discovered evidence, the

evidence must be of a permanent and unerring character so as to preponderate greatly.—*Paducah Ice Co. v. H. E. Hall & Co.* (Ky.) 104.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 110. A new trial may be allowed on a ground not assigned therefor.—*Parker v. Britton* (Mo. App.) 259.

§ 151. Newly discovered evidence *held* insufficient to justify a new trial.—*Lorts & Frey Planing Mill Co. v. Weil* (Ky.) 474.

NEXT FRIEND.

Of insane person, see Insane Persons, § 94.

NEXT OF KIN.

See Descent and Distribution.

NONSUIT.

Before trial, see Dismissal and Nonsuit.

NOTICE.

Review of ruling on motion to amend notice of appeal from justice court as dependent on presentation in lower court of grounds of review, see Appeal and Error, § 271.

As affecting particular classes of persons.

See Carriers, §§ 47, 104, 105, 135, 218; Principal and Agent, § 177.

Purchasers of land, see Vendor and Purchaser, § 231.

As affecting particular rights, duties, and liabilities.

Liability of carrier for delay in transporting freight as dependent on notice of special damages, see Carriers, §§ 104, 105.

Liability of carrier for loss of or injury to livestock as affected by notice of loss, see Carriers, § 218.

Liability of carrier for special damages for loss of freight because of failure to notify owner of loss, see Carriers, § 135.

Of particular facts, acts, or proceedings not judicial.

Delay in transportation or delivery of live stock, see Carriers, § 218.

Forfeiture of lease, see Landlord and Tenant, § 112.

Increase in tax assessment, see Taxation, § 482.

Loss insured against, see Insurance, § 559.

Loss of freight, liability of carrier for special damages because of failure to notify owner of loss, see Carriers, § 135.

Loss of or injury to live stock, see Carriers, § 218.

Nonpayment or protest of bill or note, see Bills and Notes, § 394.

Special damages for delay in transporting freight, see Carriers, §§ 104, 105.

Termination of lease, see Landlord and Tenant, § 103.

Unrecorded mortgage, see Mortgages, § 176.

Of particular judicial proceedings.

See *Lis Pendens*.

Amendment of judgment, see Judgment, § 323.

§ 1. The fact that a person could learn of a thing is not equivalent to knowledge, especially where the facts alleged do not show that there was anything to put him upon notice.—*McFarland's Adm'r v. Louisville & N. R. Co.* (Ky.) 82.

NUISANCE.

Liability of trustee for maintenance of, see Trusts, § 235.

Municipal ordinances, see Licenses, § 7; Municipal Corporations, §§ 121, 592-626, 680, 871, 890.

PARENT AND CHILD.

See Bastards; Guardian and Ward.

Care required of railroads as to children, see Railroads, § 378.

Fraudulent conveyances between, see Fraudulent Conveyances, § 300.

Insurable interest in lives of each other, see Insurance, § 116.

Right of child to recover against estate of parent for services rendered, see Executors and Administrators, § 221.

§ 3. A parent must support a helpless adult child, if able to do so.—Crain v. Mallone (Ky.) 67.

§ 3. If a parent is poor, and the estate of his infant children more able to justly bear the expense, *held*, that the parent may recover therefrom for their support.—Funk's Guardian v. Funk (Ky.) 419.

§ 15. Rights and duties of one standing in loco parentis are the same as those of the parent.—Saunders v. Alvido & Laserre (Tex. Civ. App.) 992.

PAROL EVIDENCE.

In civil actions, see Evidence, §§ 397-434.

In criminal prosecutions, see Criminal Law, § 429.

PARTIES.

Admissions as evidence, see Evidence, § 226.

Character ground of jurisdiction, see Appeal and Error, § 38.

Competency as witnesses, see Witnesses, § 114.

Domicile or residence as affecting venue, see Venue, §§ 21, 26.

Interpleading, see Interpleader.

Persons entitled to cancel deed, see Cancellation of Instruments, § 27.

Persons entitled to raise constitutional questions, see Constitutional Law, § 43.

Weight of testimony of party, see Evidence, § 595.

In actions by or against particular classes of persons.

See Municipal Corporations, § 697.

In particular actions or proceedings.

See Creditors' Suit, § 28; Partition, § 46; Replevin, § 22.

Foreclosure, see Mortgages, § 439.

For obstruction of highway, see Highways, § 155.

For removal of obstruction in street, see Municipal Corporations, § 697.

For wrongful execution, see Execution, § 469.

To enforce railroad liens, see Railroads, § 186.

To set aside satisfaction of judgment on bond of seller of text-books, see Schools and School Districts, § 81.

Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.

Collateral attack on judgment, see Judgment, § 519.

Persons concluded by judgment, see Judgment, § 682.

Review as to parties, and parties to proceedings in appellate courts.

Parties on appeal or writ of error, see Appeal and Error, §§ 136-151.

Persons entitled to allege error, see Appeal and Error, § 877.

Joint interest, see Joint Adventures.

II. DEFENDANTS.

(A) PERSONS WHO MAY OR MUST BE SUED.

Parties in suit to enforce railroad lien, see Railroads, § 186.

III. NEW PARTIES AND CHANGE OF PARTIES.

New parties in partition, see Partition, § 46.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 75. In a suit by administrators for settlement of an estate, a party objecting on the ground of defect of parties should state the name of the missing defendant.—Union Trust & Savings Co. v. Marshall's Adm'rs (Ky.) 73.

PARTITION.

Authority of attorney, see Attorney and Client, § 71.

II. ACTIONS FOR PARTITION.

(B) PROCEEDINGS AND RELIEF.

Instructions assuming existence of facts, see Trial, § 191.

§ 46. Where in partition it becomes apparent that there are part owners of the property sought to be partitioned, who are not parties to the suit, the trial must be suspended until they are brought before the court.—Hess v. Webb (Tex. Civ. App.) 618.

§ 51. Where in partition the names and residences of all the heirs of the deceased ancestor cannot be given, resort may be had to the statute authorizing service by publication on unknown heirs.—Hess v. Webb (Tex. Civ. App.) 618.

§ 63. Plaintiffs suing in partition for the entire interests as heirs of the deceased ancestor *held* required to show that they are the only heirs of the ancestor.—Hess v. Webb (Tex. Civ. App.) 618.

§ 70. Whether the persons named in petition for partition as the only heirs of the deceased ancestor were the only heirs *held* for the judgment.—Hess v. Webb (Tex. Civ. App.) 618.

§ 75. A judgment in partition should award the shares of certain of the heirs as shown by the evidence, and the judgment against defendant relying solely on limitations should stand though the court erred in proceeding to do so a partition without having all of the parties in interest before it.—Hess v. Webb (Tex. Civ. App.) 618.

§ 75. Where in partition it did not appear that plaintiffs were the only heirs of the deceased ancestor, it was error to permit them to recover any more than their respective interests in the premises.—Hess v. Webb (Tex. Civ. App.) 618.

PARTNERSHIP.

See Joint Adventures.

Instructions on weight of evidence in action for contribution, see Trial, § 194.

Liability as partners, of stockholders of foreign corporations failing to comply with conditions relative to doing business in state, see Corporations, § 653.

I. THE RELATION.

(A) CREATION AND REQUISITES.

Pleading existence as a conclusion, see Pleading, § 8.

Applicability of instructions to evidence, see Trial, § 252.
 Assessment of damages, see Damages, §§ 206-216.
 Competency of juror, see Jury, § 97.
 Damage, general or special, see Damages, § 5.
 Excessive damages, see Damages, § 132.
 Harmless error in argument and conduct of counsel, see Appeal and Error, § 1060.
 Inconsistent statements by witness, see Witnesses, § 383.
 Measure of damages, see Damages, §§ 95, 101.
 Pleading damages, see Damages, §§ 142-162.

PERSONAL PROPERTY.

Of married woman, see Husband and Wife, § 10.

PETITION.

For local option election, see Intoxicating Liquors, § 32.
 In pleading, see Pleading, §§ 49-67.
 In proceedings to restrain enforcement of justice's judgment, see Justices of the Peace, § 128.

PHOSPHATE COMPANIES.

Condemnation of property by, see Eminent Domain, § 13.

PHYSICIANS AND SURGEONS.

Mandamus to compel issuance of certificate, see Mandamus, § 168.

§ 2. Acts 1904, p. 100, c. 34, regulating the practice of medicine, *held* to require an applicant for examination for certificate to practice to show a diploma from a medical college, or that he was engaged in the practice of medicine continuously from February 24, 1884, until his application.—Webster v. State Board of Health of Kentucky (Ky.) 415.

§ 2. Acts 1904, p. 100, c. 34, regulating the practice of medicine, *held* a valid exercise of the police power of the state.—Webster v. State Board of Health of Kentucky (Ky.) 415.

§ 2. The act of 1893 (Laws 1891-92-93, p. 748, c. 179), relative to empiricism, which forms a part of Ky. St. 1903, c. 85, entitled "Medicine and Surgery," is repealed by Acts 1904, p. 100, c. 34.—Webster v. State Board of Health of Kentucky (Ky.) 415.

PLATS.

Description of boundaries, see Boundaries, § 10.
 Of government survey of public lands, see Public Lands, § 25.

PLEA.

In civil actions, see Pleading, §§ 139-149.

PLEADING.

Applicability of instructions to pleadings, see Trial, §§ 251-253.
 Conformity of judgment to pleadings, see Judgment, §§ 251, 252.
 To sustain default judgment, see Judgment, § 101.

Allegations as to particular facts, acts, or transactions.

See Adverse Possession, § 110; Damages, §§ 142-162; Judgment, § 949.

Estoppel of insured to claim under life policy, see Insurance, § 640.

Negligence in use of street or highway, see Municipal Corporations, § 706.

mise, see Insurance, § 579.

In actions by or against particular classes of persons.

See Carriers, § 314.

In particular actions or proceedings.

See Contempt, § 58; Ejectment, § 64; Libel and Slander, §§ 83-100; Negligence, § 119; Replevin, § 58; Torts, § 26; Trespass, § 40; Trespass to Try Title, §§ 33, 35.

For breach of contract, see Contracts, § 346.

For failure to deliver shipment, see Carriers, § 103.

For flooding caused by insufficient drain in city, see Municipal Corporations, § 845.

For injuries from fire caused by operation of railroad, see Railroads, § 478.

For injuries from obstruction of navigable waters, see Navigable Waters, § 26.

For injuries to passengers, see Carriers, § 314.

For injuries to tenant from defects in leased premises, see Landlord and Tenant, § 169.

For loss of or injuries to shipment of live stock, see Carriers, § 227.

For obstruction of surface water, see Waters and Water Courses, § 126.

Indictment or criminal information or complaint, see Indictment and Information.

On insurance policy, see Insurance, § 640.

On liquor dealers' bond, see Intoxicating Liquors, § 306.

To compel foreclosure of mortgage, see Mortgages, § 418.

To enforce insurance assessment, see Insurance, § 197.

To foreclose special tax bill, see Municipal Corporations, § 567.

To restrain enforcement of justice's judgment, see Justices of the Peace, § 128.

To restrain forfeiture of lease, see Landlord and Tenant, § 111.

To set aside compromise of claim under insurance policy, see Insurance, § 579.

To test reasonableness of rates, see Carriers, § 18.

To try tax title, see Taxation, § 809.

Review of decisions and pleading in appellate courts.

Amendment on appeal from justice's court, see Justices of the Peace, § 174.

Harmless error in rulings on, see Appeal and Error, §§ 1039-1042.

Review of discretionary rulings, see Appeal and Error, § 959.

Review of rulings on as dependent on cross assignment of errors, see Appeal and Error, §§ 719, 747.

Review of rulings on as dependent on presentation in lower court of grounds of review, see Appeal and Error, § 193.

Review of rulings on as dependent on record on appeal or writ of error, see Appeal and Error, § 518.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 8. An allegation in a counterclaim that defendant was damaged in a stated sum *held* a mere conclusion.—Connor v. National Roofing & Supply Co. (Ky.) 122.

§ 8. Allegations in action by a co-operative insurance association to recover a delinquent assessment and enforce its lien *held* insufficient to state a cause of action.—Farmers' Home Ins. Co. v. Carey (Ky.) 841.

§ 8. An answer *held* to sufficiently plead contributory negligence.—Sissel v. St. Louis & S. F. R. Co. (Mo.) 1104.

§ 237. Under Civ. Code Prac. § 134, the allowance of an amendment to the petition to make it conform to the proof *held* proper.—Paducah Ice Co. v. H. E. Hall & Co. (Ky.) 104.

§ 245. A trial amendment of a petition in a personal injury case *held* within the discretion of the court.—Louisville & N. R. Co. v. Brown (Ky.) 465.

§ 246. It is error to refuse to allow an amended petition containing matter germane to the cause of action set out in the original petition, offered before the filing of the answer.—Alexander v. Gardner (Ky.) 906.

§ 248. Complainants, having sued to cancel certain notes given for the price of a machine, *held* entitled to file an amended petition, claiming damages for breach of warranty, without additional process.—Pennebaker Bros. v. Bell City Mfg. Co. (Ky.) 829.

§ 248. An amended petition in an action for rent under a written lease *held* not the statement of a new cause of action.—Clarkson v. Lee (Mo. App.) 724.

§ 248. A trial amendment, which in effect only alleged a new reason or ground why plaintiff's right to recover first alleged in his original petition should prevail, was not a new cause of action.—Adams-Burke-Simmons Co. v. Johnson (Tex. Civ. App.) 176.

§ 252. Where, though evidence might have been admissible under the original petition, that petition having been abandoned by amendment, and the evidence being irrelevant under the amended petition, it was properly excluded.—Symmes v. Rose (Ky.) 97.

§ 252. By amending his petition, plaintiff *held* to have abandoned the ground of his suit asserted in the original petition.—Symmes v. Rose (Ky.) 97.

§ 252. An allegation in an amended complaint not objected to as pleading a new cause of action *held* not a waiver of a claim for loss of earnings prior to the date it was filed.—Smith v. St. Louis Transit Co. (Mo. App.) 216.

§ 254. Where an amended and substituted petition is filed in lieu of the original petition and its amendment, *held*, that a purpose is indicated to rely upon the amended and substituted petition as alone stating the cause of action, and whether it is demurrable depends upon its allegations alone.—Robards v. P. Bannon Sewer Pipe Co. (Ky.) 429.

VIII. PROPERT, OYER, AND EXHIBITS.

§ 311. An exhibit referred to therein will not aid a defective pleading.—Sumner v. Griffin (Ky.) 422.

XI. MOTIONS.

§ 360. If two inconsistent causes of action were asserted in the same petition, or one of them was asserted by amendment, the trial court should require plaintiff to elect on which he would stand.—Symmes v. Rose (Ky.) 97.

XII. ISSUES, PROOF, AND VARIANCE.

In particular actions or proceedings.

See Trespass to Try Title, § 35.
For compensation of brokers, see Brokers, § 82.
For injuries from obstruction of navigable waters, see Navigable Waters, § 26.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT.

§ 406. A cross-petition, setting up an independent cause of action against persons not parties to the original suit, is not a misjoinder of actions, objection to which would be waived

by filing an answer.—Mattingly v. Everade (Ky.) 447.

§ 406. In an action against a life insurance company to recover the amount of a premium note delivered to defendant's agent, general allegations of fraud in the complaint were sufficient, in the absence of a special exception.—Mutual Reserve Life Ins. Co. v. Seidel (Tex. Civ. App.) 945.

§ 408. An objection that the petition in an action for breach of contract shows on its face that the contract is illegal goes to the substance of the petition, and may be made at any stage of the proceedings.—Redland Fruit Co. v. Sargent (Tex. Civ. App.) 330.

§ 417. Where, upon a demurrer to the petition being sustained, plaintiff amended, and went to trial on his amended petition, he cannot complain, on appeal, of error in sustaining the demurrer, or assert that the original petition was his real cause of action.—Symmes v. Rose (Ky.) 97.

§ 433. A petition not objected to before trial *held* sufficient to sustain a judgment for damages for injuries to a minor servant required to operate a machine contrary to the statute.—Peters v. Gille (Mo. App.) 706.

PLEDGES.

Of corporate stock, see Corporations, § 123.
Priorities of widow's right to yearly allowance over lien of pledge, see Executors and Administrators, § 182.

§ 11. A mere promise by a debtor that he will hold certain property exclusively liable to a particular debt without delivery of it of any kind *held* not to constitute a pledge of such property.—Little v. Berry (Ky.) 102.

§ 25. The general doctrine is that the removal of a note secured by collateral security does not release the collateral.—Morehead v. Citizens' Deposit Bank (Ky.) 501.

§ 30. Mere delay of plaintiff in enforcing collateral securities given it by defendant *held* not to relieve defendant of liability.—Loeb v. German Nat. Bank (Ark.) 1017.

POLICE POWER.

Of municipality, see Municipal Corporations, § 592-626.

Regulating practice of medicine, see Physicians and Surgeons, § 2.

POLICY.

Of insurance, see Insurance.

POLITICAL RIGHTS.

Suffrage, see Elections.

POLLUTION.

Of water course, see Waters and Water Courses, § 76.

POOL.

Criminal prosecution for selling pooled goods without the pool agent's consent, jurisdiction dependent on locality of offense, see Criminal Law, § 97.

POPULATION.

Judicial notice, see Evidence, § 12.

POSSESSION.

See Adverse Possession.

In suit to quiet title, see Quieting Title, § 12.
Of demised premises, see Landlord and Tenant, §§ 134, 277-318.

PRINCIPAL AND SURETY.

See Bonds; Indemnity.

Maker of accommodation note as surety, see Bills and Notes, § 122.

Sureties on bonds in judicial proceedings.

See Bail; Garnishment, § 244.

Traverse bonds in forcible detainer proceedings, see Landlord and Tenant, § 291.

(A) BETWEEN INDIVIDUALS.

Parol evidence of relation, see Evidence, § 423.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

Computation of interest as against surety, see Interest, § 39.

§ 82. Where a bond securing a building contract is executed subsequent thereto, *held* that a stipulation in the bond modifies a stipulation in the contract so far as inconsistent, and the bond controls so far as the surety is concerned.—*Hax-Smith Furniture Co. v. Toll* (Mo. App.) 650.

III. DISCHARGE OF SURETY.

§ 100. Building specifications and bond considered, and changes, made by the owner and contractor voluntarily, *held* not to discharge the surety on the bond.—*Hax-Smith Furniture Co. v. Toll* (Mo. App.) 650.

§ 105. A surety of a note *held* released from liability on the payee accepting from the maker a renewal note in consideration of the payment of interest in advance.—*Morehead v. Citizens' Deposit Bank* (Ky.) 501.

§ 117. A contractor's surety *held* not discharged because the owner made payments to the contractor before the building was completed and the contractor abandoned his contract.—*Litchi v. Gottlieb* (Mo. App.) 1134.

§ 129. The fact that an attorney of a surety on a note offered to pay the note under the mistaken belief that the surety was liable, when, as a matter of fact, he had been released, did not estop the surety from defending on the ground that he had been released.—*Morehead v. Citizens' Deposit Bank* (Ky.) 501.

§ 129. Evidence *held* not to estop the surety on a note from relying on his release from liability because of the payee accepting from the maker a renewal note in consideration of the payment of interest in advance.—*Morehead v. Citizens' Deposit Bank* (Ky.) 501.

IV. REMEDIES OF CREDITORS.

Revival of judgment against surety, see Judgment, § 866.

PRIORITIES.

Of counties over other creditors, see Counties, § 130½.

Of lien for insurance assessment, see Insurance, § 197.

Of mortgages, see Mortgages, §§ 151-186.

Of municipality as against other creditors, see Municipal Corporations, § 255½.

PRIVATE NUISANCE.

See Nuisance, §§ 4-50.

PRIVATE ROADS.

Rights of way, see Easements.

PRIVILEGE.

Of married women, see Husband and Wife, §§ 85, 86.

Of witness as to testimony, see Witnesses, § 306.

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see Libel and Slander, §§ 48-56.

PROBATE.

Of will, see Wills, §§ 229-434.

PROCEDURE.

See cross-references under Practice.

PROCESS.

Effect of appearance, see Appearance.

In actions against particular classes of persons.
Foreign corporations, see Corporations, § 668.

In particular actions or proceedings.

See Divorce, § 79.

Particular forms of writs or other process.

See Arrest; Execution; Garnishment; Injunction; Mandamus; Replevin; Sequestration.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

Form of process in justice court, see Justices of the Peace, § 80.

II. SERVICE.

(A) PERSONAL SERVICE IN GENERAL.

Service of process on nonresident as insufficient to sustain judgment, see Judgment, § 17.

(C) PUBLICATION OR OTHER NOTICE.

To unknown heirs in partition, see Partition, § 51.

IV. ABUSE OF PROCESS.

Remedy at law for malicious abuse of process as affecting right to injunction, see Injunction, § 33.

PROHIBITION.

Of traffic in intoxicating liquors, see Intoxicating Liquors.

PROOF.

Of death, see Death, § 4.

Of loss insured against, see Insurance, § 539.

Taking additional proofs on appeal, see Appeal and Error, § 891.

PROPERTY.

Commission of homicide in defense of property, see Homicide, § 124.

Constitutional guaranties of rights of property, see Constitutional Law, §§ 92, 109, 298.

Covered by insurance policy, see Insurance, § 163.

Estates, see Estates.

Of particular classes of persons.

See Corporations, § 312.

Married women, see Husband and Wife, § 10.

Particular species of property.

See Animals; Fixtures; Franchises; Improvements; Mines and Minerals.

Standing timber, see Logs and Logging.

Transfers and other matters affecting title.

See Adverse Possession.

Dedication to public use, see Dedication.

Insurance of intoxicating liquors as property, see Insurance, § 126.

Taking for public use, see Eminent Domain.

Distinguished from action to restrain trespass, see Trespass, § 40.
Taking additional proofs on appeal, see Appeal and Error, § 891.

I. RIGHT OF ACTION AND DEFENSES.

§ 7. Where a deed is delivered, its mere record alone *held* to give no cause of action to quiet title.—*Creamer v. Bivert* (Mo.) 1118.

§ 10. In a suit to quiet title, plaintiff must succeed, if at all, on the strength of her own title.—*Little v. Williams* (Ark.) 340.

§ 12. That plaintiff is not in possession of the land does not prevent him from suing to have a deed adjudged to be a mortgage, to cancel a deed by the grantee to a third party, and to quiet plaintiff's title.—*Tucker v. Witherbee* (Ky.) 123.

§ 12. Under St. 1903, § 11, plaintiff in an action to quiet title *held* required to prove actual possession when he sued.—*Dupoyster v. Dunn* (Ky.) 880.

§ 14. Kirby's Dig. §§ 661-675, authorizing confirmation of tax titles, provided two years' taxes shall have been paid, *held* not to apply to adversary suits to litigate conflicting titles and quiet the superior one, so as to require an allegation of plaintiff's payment of such taxes.—*Knauff v. National Cooperage & Woodenware Co.* (Ark.) 28.

II. PROCEEDINGS AND RELIEF.

Construction of stipulations, see Stipulations, § 14.

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§ 394. In an action against a railroad company for injuries to a person on the track, a general allegation of negligence in the petition *held* sufficient.—Louisville & N. R. Co. v. Dalton (Ky.) 842.

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§ 400. In an action for death, evidence *held* to justify submission to the jury only of the questions whether the accident occurred at a pike crossing, and, if so, whether defendant's servants exercised ordinary care, whether it occurred on the track at a point other than a crossing, and whether decedent was negligent.—Cincinnati, N. O. & T. P. Ry. Co. v. Earls' Adm'r (Ky.) 854.

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which a street car is operated, though it be the part of the street used by the railroad company.—San Antonio Traction Co. v. Levyson (Tex. Civ. App.) 569.

§ 93. It is the duty of those operating street cars, when fog or rain and snow obscure the view, to proceed cautiously, so as to insure the safety of others on a public thoroughfare, and to warn them of danger.—Engelman v. Metropolitan St. Ry. Co. (Mo. App.) 700.

§ 93. Where a street railway company had provided a bench for waiting passengers, its operators were bound to regard the act of a prospective passenger crossing from one corner to the other as a signal to stop that he might take passage.—San Antonio Traction Co. v. Levyson (Tex. Civ. App.) 569.

§ 93. A street railway company must exercise ordinary care to prevent injuring those on the street or crossing its tracks to take passage.—San Antonio Traction Co. v. Levyson (Tex. Civ. App.) 569.

§ 98. While a traveler on a street car track is not a trespasser, he must exercise care commensurate with the danger of his position, and if he can, by looking, see the approach of a car, and fails to look, and is struck, his negligence precludes his recovery.—Engelman v. Metropolitan St. Ry. Co. (Mo. App.) 700.

§ 102. A street railway company held liable for injuries to pedestrian occasioned by the negligence of the motorman operating the car at a dangerous rate of speed, thereby preventing him from avoiding the accident by the exercise of ordinary care.—Louisville Ry. Co. v. Buckner's Adm'r (Ky.) 90.

§ 103. The negligence of a person injured in a collision with a street car held not to defeat a recovery on the ground of the failure of the motorman to perform his humanitarian duty.—Cole v. Metropolitan St. Ry. Co. (Mo. App.) 684.

§ 103. If those in charge of a street car discovered, or should by the exercise of ordinary care have discovered, plaintiff's peril while driving a wagon on the track in time to have avoided a collision, and did not do so, plaintiff's negligence in failing to look back for an approaching car would not preclude his recovery.—Funk v. Metropolitan St. Ry. Co. (Mo. App.) 694.

§ 114. In an action against a street railway company for the death of a person struck by a car, evidence held to support a finding of negligence by defendant.—Louisville Ry. Co. v. Buckner's Adm'r (Ky.) 90.

§ 114. Weight of the evidence in an action for death of a pedestrian struck by a street car held to show that the car was moving at an unusual and dangerous speed.—Louisville Ry. Co. v. Byer's Adm'r (Ky.) 463.

§ 114. Evidence held to tend to show that a motorman did not maintain a lookout before his car struck a pedestrian.—Louisville Ry. Co. v. Byer's Adm'r (Ky.) 463.

§ 114. In an action against a street railway company for injuries in a collision with a car, the ownership of the car may be shown by reasonable inferences drawn from the facts of the case.—Frisby v. St. Louis Transit Co. (Mo.) 1059.

§ 114. In an action against a street railway company for injuries in a collision with a car, evidence held not to establish defendant's ownership of the car essential to a recovery.—Frisby v. St. Louis Transit Co. (Mo.) 1059.

§ 114. In an action against a street railway company for injuries in a street car collision, the evidence must support the allegations as to defendant's ownership and operation of the car and road at the time of the accident.—Frisby v. St. Louis Transit Co. (Mo.) 1059.

§ 114. Evidence held to warrant a finding that defendant's motorman was negligent in failing to keep a lookout for people on and at the intersection of streets where intestate was struck and killed.—San Antonio Traction Co. v. Levyson (Tex. Civ. App.) 569.

§ 114. In an action for death of a pedestrian in a collision with a street car at a street intersection, evidence held to warrant a finding that the motorman's negligence in failing to keep a proper lookout was the proximate cause of the death.—San Antonio Traction Co. v. Levyson (Tex. Civ. App.) 569.

§ 117. In an action for injuries in a street car collision, the refusal to direct a verdict for defendant held proper under the evidence.—Cole v. Metropolitan St. Ry. Co. (Mo. App.) 684.

§ 117. Whether defendant's motorman in charge of a street car which collided with plaintiff's vehicle made proper efforts to avoid the collision after he saw, or could by the exercise of ordinary care have seen, plaintiff's peril, held, under the facts, to be for the jury.—Funk v. Metropolitan St. Ry. Co. (Mo. App.) 694.

§ 117. In an action for injuries to a traveler on a street car track, questions as to plaintiff's exercise of due care and the speed of the car held for the jury.—Engelman v. Metropolitan St. Ry. Co. (Mo. App.) 700.

§ 117. In an action for injuries to the driver of a wagon in a collision with a street car, evidence held to require submission of defendant's negligence and plaintiff's contributory negligence to the jury.—Fleddermann v. St. Louis Transit Co. (Mo. App.) 1143.

§ 117. In an action for death of a pedestrian by being run over by a street car, decedent held not negligent as a matter of law.—San Antonio Traction Co. v. Levyson (Tex. Civ. App.) 569.

§ 117. Deceased held not necessarily negligent, as a matter of law, because he stepped immediately in front of a moving street car.—San Antonio Traction Co. v. Levyson (Tex. Civ. App.) 569.

§ 118. In an action for injury to a pedestrian struck by a street car, held proper to instruct that the motorman was bound to maintain a lookout in approaching the crossing, whether there was evidence of his failure to keep a lookout or not.—Louisville Ry. Co. v. Byer's Adm'r (Ky.) 463.

§ 118. In an action for death of a pedestrian struck by a street car, refusal of an instruction held prejudicial error.—Louisville Ry. Co. v. Byer's Adm'r (Ky.) 463.

§ 118. A charge, permitting recovery for injuries inflicted by a street car if those operating it failed to use due care in giving "proper" warning of its approach, held not erroneous because of the use of the word "proper".—Engelman v. Metropolitan St. Ry. Co. (Mo. App.) 700.

§ 118. A charge predicated on certain allegations of the petition held not erroneous because not applicable to other averments.—Engelman v. Metropolitan St. Ry. Co. (Mo. App.) 700.

§ 118. An instruction held not objectionable as requiring a street railway motorman to keep a lookout for a particular person, nor as assuming that there was evidence that deceased was walking along the track at the time he was struck.—San Antonio Traction Co. v. Levyson (Tex. Civ. App.) 569.

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§ 202. For the purpose of taxation, vessels may acquire an actual situs, and the place of enrollment and registration is not controlling, if the actual situs is elsewhere.—City of Galveston v. J. M. Guffey Petroleum Co. (Tex. Civ. App.) 585.

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(B) ASSESSORS AND PROCEEDINGS FOR ASSESSMENT.

§ 317. A valid assessment is essential to the validity of a tax.—Sullivan v. Bitter (Tex. Civ. App.) 193.

(C) MODE OF ASSESSMENT IN GENERAL.

§ 331. Insurance companies, not being required to file tax schedules required of other corporations by Kirby's Dig. § 6936, are required to file the schedule specified by sections 6906, 6910.—Dallas County v. Banks (Ark.) 37.

§ 335. An assessment of land held not invalid because of the owner's noncompliance with the statute as to listing.—Ward v. Wentz (Ky.) 892; Commonwealth v. Same, Id.

(E) ASSESSMENT ROLLS OR BOOKS.

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§ 408. An assessment of property for taxes involves a listing of the property to be taxed and an estimation of the sums to guide the apportionment.—Sullivan v. Bitter (Tex. Civ. App.) 193.

§ 446. Tax books and the delinquent list prior to the taxes becoming delinquent held not to constitute a judgment and execution against the taxpayer.—Cincinnati, N. O. & T. P. R. Co. v. Hamilton County (Tenn.) 361.

(G) REVIEW, CORRECTION, OR SETTING ASIDE OF ASSESSMENT.

§ 467. Under Kirby's Dig. § 7004, a board of equalization was authorized to add the value of stock, owned by petitioner in insurance companies, to his personal assessment, if the stock was taxable against him.—Dallas County v. Banks (Ark.) 37.

§ 467. There having been a valid assessment of land, held, it cannot be assessed for the same year as omitted property.—Ward v. Wentz (Ky.) 892; Commonwealth v. Same, Id.

§ 467. Under Rev. St. 1895, tit. 104, c. 3, the commissioners' court sitting as a board of equalization has no power to assess property for taxes.—Sullivan v. Bitter (Tex. Civ. App.) 193.

§ 467. In the absence of statutory authority, a board of equalization cannot assess property not listed and valued by the assessor.—Sullivan v. Bitter (Tex. Civ. App.) 193.

§ 467. Under Rev. St. 1895, art. 5124, as amended by Acts 1907, p. 459, c. 11, board of equalization has not power to add property not previously assessed or to strike property embraced in the rolls.—Sullivan v. Bitter (Tex. Civ. App.) 193.

§ 482. Notice of raise in assessment by the board of supervisors held required to be given as provided by Ky. St. 1903, § 4122, to give them jurisdiction.—Ward v. Wentz (Ky.) 892; Commonwealth v. Same, Id.

§ 482. Mere knowledge by owner of land, without appearance, of raise in assessment by the board of supervisors, held not to dispense with the notice which the statute requires them to give.—Ward v. Wentz (Ky.) 892; Commonwealth v. Same, Id.

VII. RECOVERY OF TAXES PAID.

§ 538. Payment of illegal taxes before they became delinquent held voluntary, so that no recovery could be had thereof.—Cincinnati, N. O. & T. P. R. Co. v. Hamilton County (Tenn.) 361.

§ 538. Payment of taxes to be involuntary, so as to authorize a recovery thereof, must be made on compulsion to prevent the immediate seizure of the taxpayer's goods or the arrest of his person.—Cincinnati, N. O. & T. P. R. Co. v. Hamilton County (Tenn.) 361.

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§ 856. The power to tax held incident to the legislative power, and not required to be given by the Constitution.—Booth's Ex'r v. Commonwealth (Ky.) 61; Allen's Ex'r's v. McElroy (Ky.) 66; Barrett v. Continental Realty Co., Id.

§ 856. The right to take property by inheritance or bequest held not an absolute right of property, so that it may be subject to a tax as an incident.—Booth's Ex'r v. Commonwealth (Ky.) 61; Allen's Ex'r's v. McElroy (Ky.) 66; Barrett v. Continental Realty Co., Id.

§ 859. An inheritance tax held not one on property, within Const. § 171, requiring uniformity and equality of taxation of property.—Booth's Ex'r v. Commonwealth (Ky.) 61; Allen's Ex'r's v. McElroy (Ky.) 66; Barrett v. Continental Realty Co., Id.

§ 859. Revenue Act 1906 (Acts 1906, p. 240, c. 22) art. 19, § 1, imposing an inheritance tax, held to satisfy any requirement as to uniformity (Const. § 181).—Booth's Ex'r v. Commonwealth (Ky.) 61; Allen's Ex'r's v. McElroy (Ky.) 66; Barrett v. Continental Realty Co., Id.

§ 873. Revenue Act 1906 (Acts 1906, p. 240, c. 22) art. 19, § 1, construed as to exemption from the inheritance tax.—Booth's Ex'r v. Commonwealth (Ky.) 61; Allen's Ex'r's v. McElroy (Ky.) 66; Barrett v. Continental Realty Co., Id.

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§ 7. A franchise to operate a telephone system is not necessary, but one may construct and operate telephone lines on any street subject to municipal regulation.—*Bishop v. Riddle* (Tex. Civ. App.) 151.

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§ 38. That a telegraph company accepted and transmitted a death message implied an obligation to make prompt delivery.—*Western Union Telegraph Co. v. Moran* (Tex. Civ. App.) 625.

§ 38. That a person whose name was signed to a death message by his agent was in another state held not to prevent the addressee from recovering for a delay in its delivery.—*Western Union Telegraph Co. v. Moran* (Tex. Civ. App.) 625.

§ 53. In an action to recover damages for failure to promptly transmit a telegram to plaintiff's brother, the failure to transmit promptly held not the proximate cause of the brother's failure to arrive by a particular train.—*Landry v. Western Union Tel. Co.* (Tex.) 10.

§ 56. Nature of the right of action for delay in delivering a telegram stated.—*Western Union Telegraph Co. v. Potts* (Tenn.) 789.

§ 56. Action for delay in delivering a telegram may be brought by one whose name appears in the message as the beneficiary thereof, though he be neither sender nor addressee, or in the name of an undisclosed principal of the sender.—*Western Union Telegraph Co. v. Potts* (Tenn.) 789.

§ 59. An action for breach of a telegraph company's statutory duty to promptly deliver a message is in effect one for negligence.—*Western Union Telegraph Co. v. Potts* (Tenn.) 789.

§ 60. In an action for damages for failure to deliver a telegram announcing the serious illness of plaintiff's daughter, whereby she was

prevented from being with her daughter at the latter's death, there is a presumption of mental anguish, and it need not be affirmatively proved.—*Western Union Tel. Co. v. Blair* (Tex. Civ. App.) 164.

§ 66. Evidence held admissible in an action for delay in delivering a death message based on the addressee being prevented from delaying the burial by a reply telegram.—*Western Union Telegraph Co. v. Moran* (Tex. Civ. App.) 625.

§ 66. Evidence held to show that, if a death message had been received without delay, the addressee would have telegraphed the sender to delay burial.—*Western Union Telegraph Co. v. Moran* (Tex. Civ. App.) 625.

§ 67. Measure of damages for wrongful delay in delivering death messages stated.—*Western Union Telegraph Co. v. Potts* (Tenn.) 789.

§ 67. A telegraph company may learn the grounds on which it may base an estimate of, or anticipate, damages resulting from a failure to properly deliver a message, either from facts communicated to its agents dehors the message or from the face of the message itself.—*Western Union Telegraph Co. v. Potts* (Tenn.) 789.

§ 68. Damages for failure to deliver a telegram announcing death of a relative cannot be recovered, unless the relationship between the parties is that of parent and child, husband and wife, sister and brother, or grandparent and grandchild.—*Lee v. Western Union Tel. Co.* (Ky.) 55.

§ 68. Mental anguish is an element of damage recoverable for delay in delivering a social telegram.—*Western Union Telegraph Co. v. Potts* (Tenn.) 789.

§ 68. Measure of recovery of the undisclosed principal of both the sender and the addressee of a death message stated.—*Western Union Telegraph Co. v. Potts* (Tenn.) 789.

§ 73. In an action for damages for a failure to deliver a telegram announcing the serious illness of plaintiff's daughter, whereby she was prevented from being with her daughter at the latter's death, evidence held at most to raise a question for the jury whether plaintiff did suffer mental anguish.—*Western Union Tel. Co. v. Blair* (Tex. Civ. App.) 164.

§ 74. Allegations in an action for delay in delivering a death message preventing the addressee from attending the funeral, held to authorize submission of an issue whether if she had sent a reply message the burial would have been postponed.—*Western Union Telegraph Co. v. Moran* (Tex. Civ. App.) 625.

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§ 3. Where one of co-tenants conveyed her undivided one-half interest to a railroad, the latter became a tenant in common with her.—*Helbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 610, 979.

§ 3. One holding the title of one of the heirs of a deceased ancestor is a tenant in common with the other heirs, and is not a mere trespasser so as to authorize some of the heirs to recover from him.—*Hess v. Webb* (Tex. Civ. App.) 618.

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§ 15. Under the facts, *held*, a tenant in common acquired title by adverse possession against a co-tenant.—*Frey v. Myers* (Tex. Civ. App.) 592.

§ 15. A purchaser of an interest of an heir in a tract of land of a deceased ancestor *held* not to hold the possession adversely to the other heirs, unless notice was brought home that he claimed the entire tract.—*Hess v. Webb* (Tex. Civ. App.) 618.

§ 28. A tenant in common *held* accountable for rents to co-tenants ousted by her.—*Starks v. Kirchgraber* (Mo. App.) 1149.

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§ 39. No one could complain of the exclusive use of the joint property by one tenant in common, except his co-tenant.—*Heilbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 610, 979.

§ 40. A railroad being co-tenant of a part of land, the other co-tenant could not dedicate any part thereof as a highway without the railroad's consent.—*Heilbron v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 610, 979.

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Performance of contract, see Contracts, § 214.

§ 10. Under Civ. Code Prac. § 461, providing that, if the party against whom the inquisition is found in a case of forcible detainer fails to file a traverse on or before the third day after the finding of the inquest, the judge or justice shall on request issue execution, Sunday must be excluded in computing the three days.—*Roetger v. Riefkin* (Ky.) 88.

TITLE.

Color of title, see Adverse Possession.

Jurisdiction of questions involving title to real property, see Courts, § 231.

Removal of cloud, see Quieting Title.

Tax titles, see Taxation, § 809.

Particular matters affecting title.

See Adverse Possession, § 106; Dedication, § 48.

Estoppel to assert title, see Estoppel, § 44.

Foreign will as passing title to realty, see Wills, § 245.

Probate of nonresident's will, see Wills, § 494.

Particular species of property or rights.

Fee of highway, see Highways, §§ 35, 87.

Title necessary to maintain particular actions.

See Trespass to Try Title, § 6.

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Liabilities of particular classes of persons.

See Landlord and Tenant, § 331; Municipal Corporations, §§ 757-845.

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Particular torts.

See Conspiracy, §§ 20, 21; False Imprisonment, § 15; Libel and Slander; Negligence; Nuisance; Trespass; Trover and Conversion.

Civil damages from sale of liquors, see Intoxicating Liquors, §§ 283-317.

Eviction of tenant renting on shares, see Landlord and Tenant, § 331.

Remedies for torts.

See Trespass; Trover and Conversion, § 39.

Measure of damages, see Damages, §§ 95, 100, 109.

§ 56. One *held* entitled to allowance for improvements in good faith without deduction for timber taken from the land and put in the improvements.—*Fain v. Nelms* (Tex. Civ. App.) 1002.

§ 59. In an action to recover real estate, certain proof *held* some evidence that the value of the land was actually enhanced by reason of improvements to the amount as found by the court, as authorized by Rev. St. 1895, art. 5278, subd. 1.—*Haney v. Gartin* (Tex. Civ. App.) 166.

TRIAL.

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See Continuance.

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See Carriers, §§ 136, 230, 321; Landlord and Tenant, § 318; Railroads, §§ 282, 350.

Trial of particular civil actions or proceedings.

See Conspiracy, § 21; Libel and Slander, § 124; Negligence, §§ 136-141; Partition, § 70; Replevin, § 93; Trespass, § 68; Trespass to Try Title, § 44.

For breach of contract, see Contracts, § 353.

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For injuries from obstruction of navigable stream, see Navigable Waters, § 26.

For injuries to live stock in transportation, see Carriers, § 230.

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See Abduction, § 16; Criminal Law, §§ 594-614, 634-889; Homicide, §§ 271-310; Rape, § 59.

For carrying weapon, see Weapons, § 17.

For offenses against liquor laws, see Intoxicating Liquors, § 238.

II. DOCKETS, LISTS, AND CALENDARS.

§ 11. The answer in replevin *held* not to present a matter of purely equitable cognizance, so as to entitle defendant to a transfer to equity.—*Ayer & Lord Tie Co. v. Greer* (Ark.) 209.

§ 11. The answer in an action on notes *held* to state no cause for an equitable accounting, so

Harmless error in rulings relating to right to open and close, see Appeal and Error, § 1046.

§ 25. An answer *held* to be an affirmative denial of the allegations of the petition leaving the burden of proof on plaintiff, and giving him the right to close the argument.—*Stringfield v. Louisville Ry. Co.* (Ky.) 513.

§ 25. Defendant, in an action on a note, *held* not entitled to open and close as an absolute right.—*Oexner v. Loehr* (Mo. App.) 727.

§ 25. Rule as to the right to open and close stated.—*Oexner v. Loehr* (Mo. App.) 727.

§ 25. Plaintiff's title being admitted, and the only issue left being that of improvements, *held*, that defendants had the burden of proof, and so, under *Sayles' Ann. Civ. St. 1897, art. 126*, the right to open and conclude the argument.—*Fain v. Nelms* (Tex. Civ. App.) 1002.

IV. RECEPTION OF EVIDENCE

(A) INTRODUCTION, OFFER, AND ADMISSION OF EVIDENCE IN GENERAL.

§ 33. Since state courts take judicial notice of the laws of the United States, the testimony of federal officers, such as revenue agents, is not admissible to prove such laws.—*San Antonio Light Pub. Co. v. Lewy*, (Tex. Civ. App.) 574.

§ 35. Admissions for purpose of the suit by the attorneys of record *held* conclusive.—*Frey v. Myers* (Tex. Civ. App.) 592.

§ 41. Allowing one witness to stay in court while others were excluded *held* to be in the discretion of the trial court.—*Matthew's Adm'r v. Louisville & N. R. Co.* (Ky.) 459.

§ 51. A tax bill admitted subject to objection, and not afterwards excluded, must be treated as in evidence.—*German-American Bank v. Manning* (Mo. App.) 251.

(B) ORDER OF PROOF, REBUTTAL, AND REOPENING CASE.

§ 62. In an action for injuries to a passenger by derailment caused by a defective track, evidence of defective ties 100 yards from the place of the accident *held* admissible in rebuttal.—*Houston & T. C. R. Co. v. Cheatham* (Tex. Civ. App.) 777.

(C) OBJECTIONS, MOTIONS TO STRIKE OUT, AND EXCEPTIONS.

§ 84. An objection to evidence which is rather to its sufficiency than to its admissibility does not raise a question of the admissibility thereof.—*Gulf, C. & S. F. Ry. Co. v. Cunningham* (Tex. Civ. App.) 767.

§ 105. Admission of incompetent evidence *held* waived where no objection was interposed or exception saved.—*Heiberger v. Missouri & Kansas Telephone Co.* (Mo. App.) 730.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

Review of opening statement of counsel as dependent on preservation in bill of exceptions, see Appeal and Error, § 638.

§ 109. The opening statement of counsel for defendant in an action against a street railway company for injuries in a collision with a car *held*, when preserved in the record, sufficient to carry the issue of ownership of the car to the jury.—*Frisby v. St. Louis Transit Co.* (Mo.) 1059.

dence was conflicting.—St. Louis, I. M. & S. Ry. Co. v. Boshear (Tex.) 6.

§ 191. In an action for a broker's commission, an instruction *held* properly refused because assuming a fact in dispute.—Hansen v. Williams (Tex. Civ. App.) 312.

§ 191. Sayles' Ann. Civ. St. 1897, art. 1317, prohibiting instructions on the weight of the evidence, is mandatory.—Orange Lumber Co. v. Thompson (Tex. Civ. App.) 563.

§ 191. An instruction in partition *held* erroneous as assuming that plaintiffs were the only heirs of the deceased ancestor.—Hess v. Webb (Tex. Civ. App.) 618.

§ 192. Failure to assume as true an undisputed fact is not error, where the charge does not authorize a finding against the complaining party if the fact is not found.—Parham v. Ft. Worth & D. C. Ry. Co. (Tex. Civ. App.) 154.

§ 192. In an action to specifically perform a contract, an instruction was not erroneous for assuming that a contract was made, where that fact was undisputed.—Alexander v. Brilliant (Tex. Civ. App.) 184.

§ 192. Where the undisputed evidence showed that the alleged libelous article was published by defendant as alleged, and its publication was not denied, the court could assume in its charge that defendant published the article.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 194. A charge *held* not to be on the weight of evidence.—Missouri, K. & T. Ry. Co. of Texas v. House (Tex. Civ. App.) 154.

§ 194. A requested instruction, in an action for conversion, *held* on weight of evidence.—Crouch Hardware Co. v. Walker (Tex. Civ. App.) 163.

§ 194. An instruction, assuming the navigability of certain waters in a suit for obstructing them, *held* incorrect.—Orange Lumber Co. v. Thompson (Tex. Civ. App.) 563.

§ 194. In an action for contribution between partners, an instruction *held* erroneous as on the weight of the evidence.—Doty v. Moore (Tex. Civ. App.) 955.

§ 194. In an action between partners for contribution, an instruction that if the jury found that a division agreement had been made, etc., they should find for defendants, *held* erroneous as on the weight of the evidence.—Doty v. Moore (Tex. Civ. App.) 955.

§ 194. An instruction, in an action to recover notes and mortgages assigned by decedent to her son and by him to plaintiff, defended by decedent's other children on the ground of fraud, *held* erroneous as a charge upon the weight of the evidence, and as giving undue prominence to certain evidence.—McKay v. Peterson (Tex. Civ. App.) 981.

(B) NECESSITY AND SUBJECT-MATTER.

§ 207. Failure to limit certain evidence to its impeaching effect *held* error, which was accentuated by a limitation placed on the witness' subsequent statements that the former transaction never occurred.—Georgia Home Ins. Co. v. Kelley (Ky.) 882.

(C) FORM, REQUISITES, AND SUFFICIENCY.

§ 235. An instruction in an action on a note *held* properly refused as commenting on the evidence.—International Bank v. Enderle (Mo. App.) 262.

§ 235. An instruction that certain facts constituted a "prima case" of negligence *held* not objectionable because of clerical error.—St. Louis Southwestern Ry. Co. of Texas v. Wilbanks (Tex. Civ. App.) 318.

§ 244. An instruction, in an action to recover notes and mortgages assigned by decedent to her son and by him to plaintiff, defended on the ground of the son's fraud, *held* erroneous as emphasizing the circumstances relied upon by defendants.—McKay v. Peterson (Tex. Civ. App.) 981.

§ 244. Instructions *held* erroneous as giving too much prominence to the issue of contributory negligence.—Huber v. Texas & P. Ry. Co. (Tex. Civ. App.) 984.

(D) APPLICABILITY TO PLEADINGS AND EVIDENCE.

§ 251. In an action for injuries to a servant, the court's failure to instruct for defendant B. because of plaintiff's failure to connect him with the accident *held* not error.—Lorts & Frey Planing Mill Co. v. Weil (Ky.) 474.

§ 251. An instruction, in a personal injury action, submitting a hypothesis not authorized by the petition, *held* properly refused.—Atchison v. City of St. Joseph (Mo. App.) 679.

§ 251. In an action for failure to promptly transmit a telegram to plaintiff's brother S., there being no allegations that another brother would have come to plaintiff had the message been delivered, or of any damage from the failure of any one to come except S., it was error to submit the issue of damages for the failure of her other brother to come.—Landry v. Western Union Tel. Co. (Tex.) 10.

§ 251. In libel for charging plaintiff with smuggling, the truth of the alleged libelous article not having been pleaded, a charge submitting whether plaintiff was guilty of the offense of smuggling was properly refused.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 251. Defendant, not having pleaded the truth of the alleged libelous matter, cannot complain that the court did not instruct upon the truth of the publication as a defense.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

§ 251. Instructions, based on a theory not deducible from the petition, are properly refused.—Fordtran v. Stowers (Tex. Civ. App.) 631.

§ 251. Charge in an action on a retail liquor dealer's bond *held* erroneous as presenting a defense not made by the answer.—Farenthold v. Tell (Tex. Civ. App.) 635.

§ 251. Where, in an action on a retail liquor dealer's bond, the charge presented a defense not made by the answer, upon which the verdict for the defense might have been founded, a reversal is required.—Farenthold v. Tell (Tex. Civ. App.) 635.

§ 251. Where, in an action on a retail liquor dealer's bond, the answer did not present the defense of good faith, *held*, that a charge thereon could not be sustained, even if evidence of a sale in good faith was admitted without objection.—Farenthold v. Tell (Tex. Civ. App.) 635.

§ 251. In an action against a carrier for injury to goods in transit, an instruction as to inherent defects in the goods shipped was properly refused, where defendant did not raise that issue in its pleading or proof.—International & G. N. R. Co. v. Welbourne (Tex. Civ. App.) 780.

§ 252. In an action for injuries to plaintiff at a public crossing *held* improper to submit an issue as to whether it appeared that plaintiff would see or hear the train in time to avoid injury.—Little Rock & M. Ry. Co. v. Russell (Ark.) 1021.

§ 252. In an action for the death of a person struck by a car, an instruction *held* prejudicial because submitting an issue not supported by the evidence.—Louisville Ry. Co. v. Buckner's Adm'r (Ky.) 90.

struck by a train, *held* not cured by another instruction.—Burton's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co. (Ky.) 442.

§ 296. In an action on a note, refusal of an instruction substantially covered *held* not reversible error.—International Bank v. Enderle (Mo. App.) 262.

§ 296. The error of including financial injury as one of the results of the publication in defining libel, in an action for injury to the reputation alone, was harmless, where the court only submitted such matters contained in its definition of libel as were pleaded and proved, and instructed that in estimating plaintiff's damages they should not consider any financial injury suffered by her.—San Antonio Light Pub. Co. v. Lewy (Tex. Civ. App.) 574.

IX. VERDICT.

(A) GENERAL VERDICT.

§ 331. A verdict *held* free from ambiguity.—Beaumont Rice Mills v. Campbell (Tex. Civ. App.) 971.

§ 333. In an action on a note and on a guaranty of its payment, a general verdict for plaintiff was not insufficient for not stating the amount of recovery, where the amount was not in dispute.—Bell v. Old (Ark.) 1023.

§ 345. Where the verdict in an action of claim and delivery fails to award the property alleged to be in defendant's possession, he should move to have the jury make a more complete verdict, and he cannot wait until the jury is dismissed, and then avail himself of the error.—Gambrell v. Gambrell (Ky.) 885.

X. TRIAL BY COURT.

(A) HEARING AND DETERMINATION OF CAUSE.

§ 386. A request for a declaration of law that an alteration of a tax bill was not material *held* an application for a declaration on an issue of fact.—German-American Bank v. Manning (Mo. App.) 251.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

§ 412. A party waives the conditions precedent to the admissibility of secondary evidence by the adverse party by itself introducing similar secondary evidence.—Mullins v. Columbia County Bank (Ark.) 206.

TROVER AND CONVERSION.

Conversion of mortgaged chattels, see Chattel Mortgages, §§ 176, 228.

II. ACTIONS.

(A) RIGHT OF ACTION AND DEFENSES.

Waiver of tort so as to sue in assumpsit, see Action, § 28.

(C) EVIDENCE.

§ 39. The admission of certain evidence by plaintiff in trover *held* not error, as her other testimony tended to show that the value given of the property converted was the cash market value.—Crouch Hardware Co. v. Walker (Tex. Civ. App.) 163.

(E) TRIAL, JUDGMENT, AND REVIEW.

Instructions on weight and sufficiency of evidence, see Trial, § 194.

Reversal of judgment for failure of findings to show value of property converted, see Appeal and Error, § 1177.

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TRUSTS.

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I. CREATION, EXISTENCE, AND VALIDITY.

(A) EXPRESS TRUSTS.

§ 61. A trust *held* not a simple or dry trust which could be limited or ended by the beneficiaries.—Nunn v. Peak (Ky.) 493.

(B) RESULTING TRUSTS.

Vendor in executory contract for sale of land as trustee for vendee, see Vendor and Purchaser, § 54.

IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§ 189. Trustee *held* to have power to sell premises prior to life tenant's death.—Riffe v. Liddell's Trustee (Ky.) 106.

§ 191. A trust deed *held* to vest power of sale in the trustee and his appointees only.—United States Trust Co. v. Poutch (Ky.) 107.

§ 195. Under a trust deed and an agreement for the establishment of a townsite, the trustee *held* entitled to sell tracts by acre.—Harr v. Fordyce (Ark.) 1033.

§ 203. A purchaser of trust property who is not connected with the trust, and who deals with the trustee at arms' length, in the absence of fraudulent collusion, may buy as cheap as he can, unless the difference between the actual value and the price paid is so great as to raise the presumption of fraud.—Nunn v. Peak (Ky.) 493.

§ 217. Under Ky. St. 1903, § 4706, a trustee cannot invest trust funds in bank stock unless the bank has been in operation for more than 10 years.—Robertson v. Robertson's Trustee (Ky.) 138.

§ 218. In the absence of a statute a trustee investing trust funds in bank stock is liable for the loss sustained by the depreciation of the stock.—Robertson v. Robertson's Trustee (Ky.) 138.

§ 235. Trustees *held* liable as such for maintenance of public nuisance.—Ireland v. Bowen & Cockrell (Ky.) 56.

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Service of process by publication on unknown heirs in partition, see Partition, § 51.

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of his purchased title.—Thompson v. Bowen (Ark.) 26.

§ 231. Facts held to charge defendants with notice of a deed to the land from F. to S.—McDonald v. Hanks (Tex. Civ. App.) 604.

§ 233. The question whether a subsequent purchaser was a bona fide purchaser of property conveyed by a prior unrecorded deed held not to arise.—Davidson v. Jenkins (Ky.) 901.

§ 238. A subsequent purchaser with notice, acquiring title from a former purchaser for value and without notice, succeeds to all the rights of his grantor.—Thomason v. Berwick (Tex. Civ. App.) 567.

§ 242. The burden is on the party asserting equitable title against a legal title to show that at the time the legal title was acquired the purchaser had notice of the equity sought to be asserted against it.—Louisiana & T. Lumber Co. v. Dupuy (Tex. Civ. App.) 973.

VI. REMEDIES OF VENDOR.

(A) LIEN AND RECOVERY OF LAND.

Priority between vendor's lien and mortgage, see Mortgages, § 151.

§ 253. Where land and chattels are sold for a gross amount, the reservation of a vendor's lien for the entire amount binds the land for the amount of the notes, with interest and attorney's fees provided for therein.—Honaker v. Jones (Tex.) 748.

§ 254. A vendor who has delivered possession has an equitable lien upon the land for the unpaid purchase money, though he has taken no distinct agreement or separate security for it, and though the deed recites full payment.—Springman v. Hawkins (Tex. Civ. App.) 966.

§ 257. A deed reserving a vendor's lien has the effect of a mortgage, and renders the transaction executory.—Honaker v. Jones (Tex.) 748.

§ 261. The legal title, on the death of a vendor, expressly reserving a lien, held to vest in his heir in trust for the holder of the purchase-money note and for the purchaser on his paying the note.—Atteberry v. Burnett (Tex.) 528.

§ 266. Waiver of a vendor's equitable lien is not shown merely because the clause in the form used providing for the retention of a lien was eliminated in drawing the deed.—Springman v. Hawkins (Tex. Civ. App.) 966.

§ 281. In a suit to enforce a vendor's equitable lien, the burden is on the purchaser to show waiver of the lien.—Springman v. Hawkins (Tex. Civ. App.) 966.

§ 285. Particular judgment enforcing an equitable lien for unpaid purchase money held proper.—Norton Iron Works v. Moreland (Ky.) 481.

VII. REMEDIES OF PURCHASER.

(A) RECOVERY OF PURCHASE MONEY PAID.

§ 337. Under a contract of sale of land, the sum advanced as a part of the purchase price held a lien on the land to secure its repayment, if good title could not be made.—Delano v. Saylor (Ky.) 888.

§ 341. Evidence in action by purchasers of land to recover the part paid of the price because good title could not be made held not to show fraud or mistake in the execution of the contract.—Delano v. Saylor (Ky.) 888.

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§ 4. An action of assumpsit for cutting and removing timber is a transitory one, and is governed by Civ. Code Prac. §§ 78, 79, providing for the venue of transitory actions.—Asher v. Cornett (Ky.) 131.

II. DOMICILE OR RESIDENCE OF PARTIES.

§ 21. The court held without jurisdiction of the person of defendant in an action in assumpsit.—Asher v. Cornett (Ky.) 131.

§ 26. That an attorney to whom part of a claim was assigned for his services in collecting the claim was a resident did not prevent suit in another state, where the original creditor resided.—Greer v. Cook (Ark.) 1009.

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power of a married woman to dispose of her property by will.—Williford v. Phelan (Tenn.) 365.

§ 29. Independently of assent of the husband, a married woman may dispose of her separate property by will.—Williford v. Phelan (Tenn.) 365.

§ 30. At common law a married woman could make a will of property not yet reduced to the husband's possession with the husband's assent to the particular will.—Williford v. Phelan (Tenn.) 365.

III. CONTRACTS TO DEVISE OR BEQUEATH.

§ 58. A contract to devise one-half of decedent's estate to the other party's wife in consideration of support *held* valid.—McAllister's Adm'r v. Bronaugh (Ky.) 821.

§ 68. Instruction in an action for breach of a contract to devise one-half of decedent's estate to the other party's wife in consideration of support *held* to fairly present the only issue.—McAllister's Adm'r v. Bronaugh (Ky.) 821.

§ 68. Evidence in an action for breach of contract to make a will *held* to establish the contract sued upon.—McAllister's Adm'r v. Bronaugh (Ky.) 821.

IV. REQUISITES AND VALIDITY.

(F) MISTAKE, UNDUE INFLUENCE, AND FRAUD.

Declarations by legatee as evidence against co-legatees, see Evidence, § 226.

§ 163. That a daughter of testatrix did not receive as much through the will as she thought she should raises no presumption of undue influence.—Helsley v. Moss (Tex. Civ. App.) 599.

§ 164. In an action to set aside a will, testimony as to a transaction between plaintiff and testatrix 15 years before the will was executed and 18 years before the death of testatrix *held* inadmissible as being too remote.—Helsley v. Moss (Tex. Civ. App.) 599.

§ 164. In an action to set aside a will, testimony that the husband of testatrix was a very determined man *held* immaterial, in the absence of evidence tending to show that he had exercised undue influence on testatrix.—Helsley v. Moss (Tex. Civ. App.) 599.

§ 165. In an action to annul a will for mental incapacity and undue influence, testimony *held* properly excluded as not within the issues.—Helsley v. Moss (Tex. Civ. App.) 599.

§ 165. In an action to set aside a will for mental incompetency and undue influence on the part of the husband of testatrix, statements made by him nine years before the execution of the will *held* too remote to be admissible.—Helsley v. Moss (Tex. Civ. App.) 599.

§ 165. In an action to set aside a will, evidence that testatrix said that, if she ever made a will, each of her children should share alike, and that she would never leave out one of her children, was properly excluded.—Helsley v. Moss (Tex. Civ. App.) 599.

§ 165. In an action to set aside a will for mental incapacity and undue influence, testimony as to declarations by testatrix prior to making the will *held* inadmissible.—Helsley v. Moss (Tex. Civ. App.) 599.

§ 166. To show undue influence, the evidence must be direct, or the circumstances showing it must be of a reasonably satisfactory and convincing character.—Helsley v. Moss (Tex. Civ. App.) 599.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

(B) ACTIONS TO ESTABLISH OR DETERMINE VALIDITY IN GENERAL.

§ 229. Purchasers from an heir of a testator may resist the probate of his will, being "persons interested," within Ky. St. 1903, §§ 4856-4861.—Foster v. Jordan (Ky.) 490.

(D) PROBATE OR RECORD OF FOREIGN WILLS.

§ 245. Under Rev. St. 1895, arts. 5353, 5355, a foreign will, disposing of real estate in Texas, *held* to confer the title on the devisee on the death of the testator; and its probate in a sister state and record in Texas are but legal formalities to evidence that right.—Haney v. Gartin (Tex. Civ. App.) 166.

(E) JURISDICTION, LIMITATIONS, AND LACHES.

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(M) OPERATION AND EFFECT.

§ 428. Probate of a wife's will *held* not to preclude the husband in a proceeding against him by the wife's administrator with the will annexed from denying her right to dispose by will of personal property belonging to him by right of the marriage or defeat his right to administer her estate.—Williford v. Phelan (Tenn.) 365.

§ 428. A husband *held* entitled to ignore a will of his deceased wife attempting to dispose of personal property not her separate estate.—Williford v. Phelan (Tenn.) 365.

§ 434. The probate of a nonresident's will in the state of his domicile, *held* to have no legal effect on the title to his land in Kentucky.—Foster v. Jordan (Ky.) 490.

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(A) GENERAL RULES.

§ 467. Will *held* to contain a valid restriction against alienation for a specified period, though the property devised was subject to the payment of devisees' debts, under St. 1903, §§ 1581, 2355.—Girdler v. Girdler (Ky.) 835.

(B) DESIGNATION OF DEVISEES AND LEGATEES AND THEIR RESPECTIVE SHARES.

§ 502. Provision in a will that any note owing testator by any of his "kin" should be canceled and the amount given to such "relative," *held* not to include the husband of testator's niece.—Boyd v. Perkins (Ky.) 95.

(D) DESCRIPTION OF PROPERTY.

§ 500. A will *held* to sufficiently describe the real estate owned by testator.—Haney v. Gartin (Tex. Civ. App.) 166.

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§ 600. Effect of a devise charged with a nephew's maintenance, etc., stated.—Knight v. Collins (Ky.) 131.

§ 620. An estate created by will *held* to continue for life, provided only the property was not disposed of by another devisee.—West v. McDonald (Ky.) 872.

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Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	110	711	111	111	24	176	111	69	280	111	95	415	111	30	524	111	545
59	110	705	130	111	29	208	110	1078	309	111	79	437	110	1084	540	111	560
73	111	18	132	110	696	215	110	1072	331	111	52	445	110	1086	551	111	472
80	110	1082	138	110	729	224	110	1067	359	110	1062	472	111	7	562	111	579
88	110	709	150	110	1067	244	110	697	377	110	1076	481	111	8	578	111	589
95	110	699	170	110	695	248	111	44	386	111	14	484	111	475	589	111	583
101	110	1079	173	110	695	275	110	1074	398	111	10	506	111	574	611	111	511

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Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	94	443	99	95	628	216	95	694	312	95	675	393	93	1096	490
5	94	338	104	91	1150	222	94	111	318	95	663	400	93	1099	492
22	91	597	106	95	547	224	94	205	321	100	989	407	92	1068	495
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42	93	225	133	93	1014	241	94	347	340	94	173	431	94	428	515
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47	93	220	147	94	454	252	95	688	346	94	115	441	93	531	520
49	93	1003	152	93	480	254	95	632	348	94	131	442	94	365	524
52	93	221	154	93	189	256	93	477	354	93	479	450	94	145	528
55	93	222	163	93	481	258	92	1040	355	93	496	455	94	104	532
60	93	1024	167	94	439	260	93	476	360	92	1021	460	94	107	536
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69	93	215	183	93	1080	270	93	1093	366	93	1077	465	93	1102	543
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33	97	710	139	98	213	224	99	163	340	98	431	428	98	889	513
42	97	1066	141	99	123	229	97	708	344	98	898	431	98	1063	517
43	97	337	144	97	541	232	97	712	352	98	929	432	98	904	523
47	100	808	150	97	1080	238	98	198	358	98	1074	436	98	405	530
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60	98	218	159	97	847	254	98	965	369	99	409	443	100	858	553
63	97	1084	162	97	1083	272	97	849	372	99	436	446	98	906	555
68	98	1070	165	98	156	277	97	1060	374	98	869	448	99	135	557
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7	104	901	105	105	1119	208	108	130	314	108	1168	402	107	353	467	107	1181	548	107	96												
8	104	897	118	106	801	212	106	371	316	108	355	403	107	550	474	107	817	551	107	54												
11	105	189	122	105	804	218	108	132	318	108	1158	407	107	823	475	107	885	554	107	84												
13	105	197	131	105	508	220	108	337	321	108	365	409	107	350	477	107	842	555	107	125												
17	105	178	133	105	785	226	106	336	323	108	361	410	108	661	480	108	693	558	108	24												
20	105	194	137	105	498	228	105	1126	324	108	1157	412	107	814	485	107	836	561	108	53												
21	105	179	188	105	507	231	106	135	326	108	357	417	107	354	486	107	1115	563	108	39												
23	105	181	140	106	138	232	105	1127	327	108	384	418	107	821	488	107	829	567	108	11												
24	105	200	149	106	144	235	108	134	331	108	359	420	107	547	491	108	676	572	108	36												
27	105	182	151	105	792	238	108	352	332	107	855	422	107	837	493	108	689	575	108	117												
33	105	180	153	105	820	241	108	145	336	107	540	424	107	348	499	107	837	581	108	35												
35	105	192	154	106	143	247	108	378	342	107	55	428	108	698	500	107	1127	587	108	34												
37	106	124	156	105	803	250	108	379	344	108	1161	429	108	666	505	108	685	588	108	63												
41	105	185	158	105	798	255	108	389	352	108	1160	430	107	825	507	107	819	601	108	61												
42	105	201	160	105	812	262	108	374	353	108	1160	432	107	346	508	107	824	603	108	61												
44	105	205	162	105	793	265	108	365	355	107	59	438	107	350	510	107	845	604	108	53												
48	105	202	164	105	796	267	108	368	357	107	353	439	107	352	513	107	819	606	108	38												
53	105	190	166	108	136	271	106	363	359	107	832	440	108	660	514	107	820	607	108	38												
55	105	185	167	105	821	273	108	685	360	107	838	441	107	819	516	108	667	608	108	35												
58	105	199	169	105	817	286	108	387	361	107	831	442	108	666	519	107	849	611	108	63												
59	108	128	173	106	1026	288	108	383	362	107	548	444	108	680	522	108	678	613	108	64												
65	105	513	177	105	813	289	108	386	364	107	355	447	108	662	524	107	848	618	108	57												
72	105	502	182	106	342	293	108	376	368	108	695	449	108	675	527	107	844	619	108	67												
80	105	501	185	107	55	296	108	374	369	107	546	451	107	857	528	107	840	621	108	39												
82	105	499	190	107	58	297	108	357	371	107	1121	452	108	687	532	109	133	634	108	68												
84	105	791	193	106	1167	299	108	387	381	107	826	455	107	852	541	107	889	626	108	38												
85	105	509	195	108	149	303	108	345	383	107	549	458	107	857	542	107	822	628	108	39												
91	106	347	198	107	851	307	108	358	387	107	1116	460	107	859	544	109	193	629	108	67												
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